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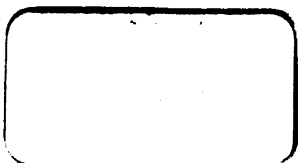




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(75 Cal. 225)

**TOMASINI *et al.* v. SUPERIOR COURT DEL NORTE Co.** (No. 12,511.)

(*Supreme Court of California.* March 6, 1888.)

**CERTIORARI—WHEN LIES—INSOLVENCY—ELECTION OF ASSIGNEE.**

An order of a superior court of a county in California appointing an attorney to vote for an absent creditor at the election of an assignee in an insolvent proceeding, and appointing the person chosen at such election assignee, cannot be reviewed on a writ of *certiorari*, the court having jurisdiction of the proceedings.

Department 2. *Certiorari* to superior court, Del Norte county; JAMES E. MURPHY, Judge.

Louis Tomasini *et al.*, petitioners, against superior court, county of Del Norte, respondent.

*L. F. Cooper, Sawyer & Burnett, and R. W. Miller, for petitioners.*

PER CURIAM. Writ of *certiorari* to review orders of respondent appointing an attorney to vote for an absent creditor at the election of an assignee in an insolvent proceeding, and appointing as assignee the person chosen at such election.

If the petitioners were aggrieved at all by the action of the respondent it was by the order confirming the election and appointing the person selected assignee. But the court had jurisdiction of the proceeding, and the orders complained of, even if erroneous, cannot be reviewed on this writ. The prayer of the petitioners is denied and the writ dismissed.

(75 Cal. 245)

**WINTERHALTER v. WORKMEN'S GUARANTEE FUND ASS'N OF SAN FRANCISCO.** (No. 9,913.)

(*Supreme Court of California.* March 1, 1888.)

**INSURANCE—ACTIONS ON POLICY—EXECUTORS AND ADMINISTRATORS—RIGHT TO SUE.**

The executor of a testator, who, by his will, gave all of his estate after payment of his debts to his mother, is the proper party to sue for and receive the money due on a policy of insurance on testator's life, payable subject to the will of the insured.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

*Marcus Rosenthal*, for respondent. *J. G. Severance* and *Wm. Loewy*, for appellants.

v.17p.no.1—1

SEARLS, C. J. Defendant is a corporation, and on the 16th day of March, 1880, plaintiff's testator, Fritz Hoffmeister, became a member of such corporation, and for a valuable consideration received therefrom its certain promise, agreement, and certificate in writing, in the words and figures following, viz.: "WORKMEN'S GUARANTEE FUND ASSOCIATION OF SAN FRANCISCO, CAL., No. 69.

"This is to certify that Fritz Hoffmeister is a member of the Workmen's Guarantee Fund Association of San Francisco, Cal., and as such is entitled to participate in the guarantee fund, to the extent of \$1 to each member of said association in good standing at the death of said Fritz Hoffmeister, provided the number of members at that time shall not exceed 1,000. Said sum of \$1,000 or less, at his death, shall be paid to ———, subject to his will. This certificate is issued upon the expressed condition that said Fritz Hoffmeister shall comply with all the laws, rules, and requirements which are now or may be hereafter enacted by the Workmen's Guarantee Fund Association. In witness whereof, the Workmen's Guarantee Fund Association has caused this certificate to be signed by its president and secretary, and the seal to be attested this 16th day of March, one thousand eight hundred and eighty.

"WORKMEN'S GUARANTEE FUND ASSOCIATION OF SAN FRANCISCO, CAL.  
[Seal Corporation.] "P. VEASEY, Vice-President.

"E. M. READING, Secretary."

Hoffmeister never filled the blank in the certificate by inserting the name of a beneficiary, but died on the 4th day of October, 1882, leaving a last will whereby he gave, devised, and bequeathed to his mother, Louisa Hoffmeister, after payment of all his debts and liabilities, all his estate and effects. Plaintiff was named as executor of the will, which has been regularly admitted to probate, etc. Defendant answered, admitting its liability to the extent of \$1,000, but claimed that testator had, by his last will, designated his mother, Louisa Hoffmeister, as his beneficiary, and the person to whom said sum should be paid in the event of his death, and asked that said Louisa be made a party to the action, which was done. Plaintiff had judgment, from which, and from an order denying a new trial, defendants appeal. The articles of association of the defendant provide: "(2) That the purposes for which it is formed are to provide for the payment to the widow, heirs, and legatees of each deceased member thereof, a stipulated sum of money, by contributions from surviving members upon assessments duly made therefor." The constitution of defendant, article 2, provides as follows: "Art. 2. The object of this association is to provide for the payment to the husband, widow, heirs, or legatees of a deceased member, a stipulated sum of money, by contributions from its surviving members upon assessments duly made therefor." The defense also introduced the following in evidence: "The application of intestate for membership in the association contained the following clause: 'I hereby authorize and direct that the amount of said guarantee fund to which I may be entitled shall, at my death, be paid subject to my will.'"

The question presented for determination upon the facts is this: Is the executor entitled to recover the sum due decedent, or does it go directly to his mother, Louisa Hoffmeister? It may be stated that, where a policy of life insurance expressly designates a person as entitled to receive the insurance money, such designation is conclusive, in the absence of some question as to the rights of creditors. The receipt of the person designated will discharge the insurer, and he may sue for and recover the amount due at the maturity of the policy. In such cases the legal representative of the insured has no claim upon the money, and cannot maintain an action therefor. It forms no part of the assets of the estate of the insured. The exceptions to this rule, involving the rights of creditors, are not involved in this case, and need not be commented upon. Bliss, Ins. §§ 316, 317. The policy in the present instance, as will be seen, did not specifically name the beneficiary; it was to be



paid "*subject to my will*," that is to say, subject to the will of the insured. Whether the term quoted should be interpreted as meaning subject to the last will and testament of the insured, or in the broader sense of subject to his will as expressed by inserting the name of the beneficiary in the blank space left in the policy, apparently for that purpose, need not concern us here, as such blank was never filled. Nor was there any special designation of the mother of deceased as the beneficiary of the amount to be realized on this policy in the will of the deceased, except that all of his property was bequeathed to her after the payment of his debts and liabilities. He left no widow, and we may suppose that, had he left no last will, the sum for which he was insured would, under the articles of association and the constitution of defendant, quoted above, have gone to his heirs. Either this result must follow in such a case, or the policy be held to have lapsed for want of a beneficiary. Such a contingency cannot arise in any event here, for defendant admits its liability, has paid the money into court, and only asks that the question as to the right of the two claimants may be determined, so as to absolve it from liability. Had the testator in his last will specifically nominated his mother as the recipient of the sum to fall due upon his death, it might be contended, alike upon reason and authority, that, under his contract with defendant, she alone was entitled to recover. The undertaking of the corporation defendant was to pay not exceeding \$1,000, subject to the will of deceased. That will, as expressed, is that this sum, in common with all his property, "after payment of all his debts and liabilities," shall go to his mother, Louisa Hoffmeister. It is true that by subdivision 10 of section 690 of our Code of Civil Procedure, this money is not subject to execution and forced sale. So, too, in case of the death of a husband, the probate court may set aside for the use of his family the property exempt from execution, but these provisions cut no figure here, as there is not, so far as appears, any family. The simple fact is that testator has bequeathed the fund in question to his mother, subject to the payment of his debts, and as these debts can only be paid through the interposition of his executor, the court below was correct in its conclusion that the executor was a proper party to have and recover the fund out of which such debts, if any, were to be paid. The executor is the trustee of an express trust, and, as such, under our Code, may sue without uniting with him those beneficially interested. Code Civil Proc. § 369.

We have examined the several decisions quoted from various states in appellant's brief. Most of them depend upon the peculiar statutes of the states in which they were rendered, which are different from our own, and, while we are in accord with most of the reasoning of those cases, we are still of opinion the peculiar facts of this case are sufficient to differentiate it from those referred to. The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

(75 Cal. 234)

ELLIS v. BRADBURY. (No. 9,725.)

(Supreme Court of California. March 14, 1888.)

1. LANDLORD AND TENANT—LEASES—COVENANT TO PAY TAXES—ACTION ON—PLEADING.  
In a suit brought by a lessor for the recovery of taxes paid by him on demised premises which, by the terms of the lease were to be paid by the lessee, it is not necessary to specifically set forth in the complaint the steps necessary to constitute a valid assessment.
2. SAME—ACTION AGAINST SUBLESSEE—AMOUNT OF RECOVERY.  
In a suit by a lessor against a sublessee of a portion of the demised premises, where the lease bound the lessee to pay taxes, for taxes paid by the lessor, it is er-

ror to render judgment in favor of the plaintiff for an amount in the same proportion to the tax on the whole tract that the sublet portion bears to said tract, without reference to the proportionate value of the tracts.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Complaint by Moses Ellis against W. B. Bradbury. Ellis leased certain real estate to Tyler, who agreed in the lease to pay, as the same became due, all taxes levied on the demised premises or any tract thereof levied by any lawful authority during the demised term, and, if paid by the lessor, should be repaid to him by the lessee. Tyler assigned his interest under said lease in a part of said demised premises to Bradbury, who failed to pay the taxes, and the same were paid by the lessor, who brings this suit to recover a proportionate part of the total tax on said premises. The demised tract was assessed as a whole at the same amount per front foot, and the improvements thereon were assessed separately. The portion sublet to Bradbury had a less depth than the remaining portion. Judgment was rendered in favor of plaintiff for an amount in the same proportion to the total tax as the assignee's portion bears to the whole tract. Defendant appeals.

*Joseph R. Brandon*, for appellant. *T. C. Van Ness*, for respondent.

TEMPLE, J. Plaintiff, by indenture in writing, leased to Samuel Tyler certain lots of land in San Francisco for a term of 15 years. The lessee covenanted to pay all taxes levied or imposed upon said premises or any part thereof, or upon the owner on account thereof. The lessee assigned all his right, title, and interest in said indenture as to a portion of one of said lots leased, to the defendant, Bradbury. This action is to recover a proportion of the taxes on the whole lot, levied after such assignment, and alleged to have been paid by plaintiff under authority given in the lease. In addition to the covenant on the part of the tenant to pay the taxes when they became due, the lease provides that, "if any of said taxes, charges, assessments, or impositions should become due and payable and remain unpaid, and the said demised property should be offered for sale, then the party of the first part may pay the same; or, if said premises, or any part thereof, should be sold, then the party of the first part may redeem the property so sold therefrom; and all sums of money by said party of the first part paid as aforesaid shall be repaid by the party of the second part within ten days, with interest at the rate of 2 per cent. per month." To this complaint a general demurrer was interposed, and the point is made that the steps necessary to constitute a valid assessment are not specifically set forth. It is alleged in general terms that the whole of the lot in question was assessed for state and county taxes, and that the proportionate amount of taxes due upon the portion sublet to defendant is a certain sum.

This suit is upon a covenant in the lease, and the assessment is a collateral matter. Under such circumstances we think the complaint not obnoxious to a general demurrer. We think the covenant was one running with the land, and was divisible, but we think the method adopted to ascertain the proportionate tax upon the portion sublet was clearly erroneous. Property is assessed in proportion to its value, and the division should be made on that basis. The court cannot assume that each portion of the lot had the same value per front foot; especially where, as in this case, the portion sublet had less depth than the remaining portion. Upon this question the method followed by the assessor was an entirely immaterial circumstance. That might or might not be a correct mode of ascertaining the value of the whole lot; but it would not follow that it would be a proper criterion of the relative value of the portion sublet to defendant. Defendant is not sued upon the covenant for allowing the tax to become delinquent, or a sale of the property to be made. The action is for money laid out and expended for his use; and, since it was

his duty to pay when it became due and payable, and the lessor had an interest in its payment, we think he could recover it with interest, after demand. The case will have to be reversed, however, for the error above specified.

Judgment and order reversed, and new trial ordered.

We concur: MCKINSTRY, J.; PATERSON, J.

(2 Cal. Uurep. 851)

DUNPHY v. HEINMANN. (No. 11,189.)

(*Supreme Court of California*. March 15, 1888.)

**APPEAL—FRIVOLOUS.**

Where the finding in ejectment is that defendant did not "wrongfully or unlawfully enter upon or oust plaintiff" from the possession of the premises, an appeal on the ground that there was no finding upon the issue as to ouster is frivolous.

Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Ejectment by William Dunphy, plaintiff, against Fritz Heinmann, defendant. Judgment for defendant, and plaintiff appeals.

*Wm. H. Webb*, for appellant. *Geil & Morehouse*, for respondent.

PER CURIAM. Appeal from the judgment. The only point made is that there was no finding upon the issue as to ouster. It is found that plaintiff was not at any time the owner of the premises, or entitled to the possession thereof or any part of the same, "nor did defendant, during any of said time, wrongfully or unlawfully enter upon or oust the plaintiff therefrom, nor then nor now wrongfully withhold the same or any part thereof from plaintiff." This appeal was evidently not taken in good faith, and is frivolous.

Judgment affirmed, with \$50 damages for taking a frivolous appeal.

(17 Or. 5)

DURBIN v. OREGON RY. & NAV. CO.

(*Supreme Court of Oregon*. February 15, 1888.)

**RAILROAD COMPANIES—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.**

Plaintiff attempted to pass a railroad crossing with a team and wagon. She had just observed the passenger train pass, and was not expecting any other train at that time, although she had seen a freight train standing on the track, headed that way, in the town which she had just left. The railroad at that point cuts through a hill, so as to obstruct the view from the wagon road. She was familiar with the crossing, having crossed there many times before, and had always used great care in looking for trains. On this occasion she did not stop to look or listen; her team came into collision with a passing engine, and one horse was killed and wagon was overturned. *Held*, that plaintiff was guilty of contributory negligence.<sup>1</sup>

Appeal from circuit court, Baker county.

*Olmstead & Anderson*, *Dolph Bellinger*, and *Mallory & Simon*, for appellant. *Hyds & Hyde* and *A. J. Lawrence*, for respondent.

LORD, C. J. This was an action to recover damages for the alleged negligence of the defendant in running a train of cars against the horses hitched to the wagon in which the plaintiff was crossing the defendant's track. At the trial, when the plaintiff rested her case, the defendant moved for a nonsuit, which the court overruled, and the defendant excepted. It is enough to say that a verdict was returned for the plaintiff, and that the present appeal brings up the judgment rendered thereon and the record of the proceedings upon the trial. The main contention is confined to error assigned in not granting the motion for a nonsuit. This is claimed upon the ground that from the evidence submitted by the plaintiff it clearly appeared that it was

<sup>1</sup> See note at end of case.

the negligence of the plaintiff which occasioned the collision and caused her injury. The evidence of the plaintiff shows that she and Mrs. Huntington, and a child of the latter, left the town of Huntington with a team and express wagon to visit some friends in the country, and that after they had traveled west a couple of miles or so the west-bound passenger train came along and passed them; that as she left Huntington she saw standing on the track a freight train, headed west, to which engines were attached with steam up, but that after the passenger train had passed she thought nothing more of any trains coming; that, in driving around the point of the hill or mountain through which the railroad is cut, and across which the county road runs diagonally, just as she was crossing the railroad track, and the front feet of the horses had reached the rail, she saw the engine approaching not more than the length of a rail distant; that she tried to back the horses, but that before she could make them back the train struck the horses, killing one, and overturning the wagon. Her testimony also shows that she had traveled over the crossing many times a year, for several years, was familiar with the place and its surroundings, knew the view was obstructed on account of the intervening hill, and regarded the crossing, under the circumstances of its situation, as so dangerous that she had always before stopped and listened, and if she did not hear the train, she, or some companion for her, went forward and looked up the track before venturing to cross it. She says, in reply to the inquiry whether "she had ever taken any pains to find out whether trains were passing," that "I have got down when I was passing along, and tied my horses, and went and looked; and at other times, if any one was with me, I got them to hold the team, and went and looked, or got them to go and look for me," and that she "always regarded it as a dangerous place." "The reason I did not get down and examine the track this time, as I had done before, was that the passenger train had gone by, and I was not expecting any train from Huntington, and I knew it was not time for the helper to go down until the passenger train had got to Weatherby."

It is clear and undisputed that neither the plaintiff or Mrs. Huntington listened on approaching the crossing to find out whether a train was coming, notwithstanding they knew the view of the track was obstructed, and that the crossing, by reason of the nature of the cut, and the location of the county road across it, was more than ordinarily dangerous, but drove directly on the track without thinking anything about it, or observing the usual precautions required for safety, because the passenger train had passed them, and the plaintiff did not think any other train was coming. There is no doubt if she had listened she could have heard the approaching train, and avoided the accident. But it is sought to discriminate this case from the general rule applied to travelers in approaching railroad crossings, and to excuse the failure or neglect of the plaintiff to listen, on the ground that the evidence showed that she knew the time of the running of the trains, and, as the passenger train had passed them, she knew no other train would be due for some time; and consequently the fact whether her failure to listen, under the circumstances, was such contributory negligence as should defeat her recovery, was for the jury to decide. The law assumes that there is danger at railroad crossings, which to avoid requires the exercise of care and prudence commensurate with the nature of the place or risk involved. It is laid down by the courts and text-writers, when one approaches a point upon the highway, crossed by a railway track, it is his duty, whether on foot or in a wagon, to exercise a care for his own safety, and especially to look and listen before attempting to cross it. "The rule is well established," said MILLER, J., "that it is the bounden duty of a traveler approaching a railroad crossing, before he passes the same, to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears, for the purpose of ascertaining whether a train is approaching; and if, by a proper use of his faculties he could have discov-

ered the train and escaped injury, and fails to do so, he is chargeable with contributory negligence, and no recovery can be had." *Salter v. Railroad Co.*, 75 N. Y. 273. "He must assume," says Mr. Beach, "that there is danger, and act with ordinary prudence and circumspection upon the assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care, under the circumstances,' shall mean in these cases. In the progress of the law in this behalf the question of care at railway crossings as affecting the traveler is no longer a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all courts enforce this reasonable rule." Beach, *Contrib. Neg.* § 63, and authorities cited in note, and also section 9. Now, will the fact that a train is behind time relieve the traveler of the duty of care and caution? Railroad companies have the right to run trains at all times, and those having occasion to cross their tracks are entitled to no exemption from care and vigilance because trains are irregular or extra trains are put on. "Assume in this case," said HARRIS, J., "that it was negligence in the railroad company to be behind time, and will this, in law, excuse the defendant from observing care on his part? In my opinion it will not. Such a rule would be extremely dangerous, and there would be much difficulty in its application. It may be that those who live in the immediate vicinity of railroads, and who frequently cross them, may, when they suppose a train has just passed, be less careful, and this may grow into a habit; or they may consult time-tables, and from them reason that there can be no locomotive near, and act without regard to care; but if they do so, in my opinion they act at their peril. They will be charged with negligence in case they rush on the track without looking, or trying in a proper way to ascertain the fact whether danger is near; and they will not be permitted to recover damages for any injury they sustain." *Dascomb v. Railroad Co.*, 27 Barb. 226. So that it seems that though a person or traveler may know the usual time of the running of different trains, or the fact that they may know that a train has passed, and that another train will not be along for some time, according to their information or the time-table, it does not relieve him of the duty of observing care and prudence, or of using his faculties when he approaches and attempts to cross a railroad track. The law requires of him to make a reasonable use of his senses, and if the view of the track is obstructed, he must use his sense of hearing, and if he neglects to do so, and a collision results, he suffers by consequence of his own negligent act, and is not entitled to recover. He who fails to exercise this precaution when there are no circumstances to disturb his judgment, or impede his action at the time, is not using ordinary care. It has been said: "The track itself is a warning of danger, and I think it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and if either cannot be rendered available, the obligation to use the other is the stronger, to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly upon the track, without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence, and should be so pronounced by the courts as matters of law." CHRISTIANOY, J., in *Railroad Co. v. Miller*, 25 Mich. 290. "As the plaintiff could not use his eyes with effect," said CROCKETT, J., "it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion. Upon the plaintiff's statement of the facts, we hold that he was guilty of contributory negligence, in failing to stop his team to listen for an approaching train."

*Flemming v. Railroad Co.*, 49 Cal. 256. "But aside from this fact," said FIELD, J., "the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's servants in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." *Railroad Co. v. Huston*, 95 U. S. 697. "A railroad crossing is a place of danger, and common prudence requires that a traveler on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. If he fails to do so, the general knowledge and experience of men at once condemn his conduct as careless." *Allyn v. Railroad Co.*, 105 Mass. 79. Again, it is said that "a traveler should always approach a railway crossing under the apprehension that a train is liable to come at any moment, and while he may presume that those in charge of it will obey the law by giving the signals, the law will nevertheless require that he obey the instincts of self-preservation, and not thrust himself into a situation of danger, which, notwithstanding the failure of the railroad, he might have avoided by the careful use of his senses." *Railroad Co. v. Butler*, 2 N. E. Rep. 138. See, also, *Railroad Co. v. Richter*, 42 N. J. Law, 180, note, and cases cited on page 226, 2 Amer. & Eng. R. Cas.; *Payne v. Railway Co.*, 13 Lea, 522; *Schaefert v. Railway Co.*, 62 Iowa, 624, 17 N. W. Rep. 893; *Henze v. Railway Co.*, 71 Mo. 636; *Railway Co. v. Beale*, 73 Pa. St. 504; *Railroad Co. v. Clark*, 73 Ind. 168; *Haas v. Railroad Co.*, 47 Mich. 401, 11 N. W. Rep. 216; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Railroad Co. v. Adams*, 33 Kan. 427, 6 Pac. Rep. 529; *Railroad Co. v. Ritchie*, 102 Pa. St. 425; *Railroad Co. v. Neuborn*, 19 Amer. & Eng. R. Cas. 261; 1 Thomp. Neg. 424, 426. and cases cited; and also Beach, Contrib. Neg. § 63; Ry. Accident Law, 168. It thus appears to be a duty imposed by the law upon a person about to cross a railroad to use his eyes and ears; to look out for sign-boards and signals; to listen for bell or whistle; and if the view of the road is obstructed it does not relieve him of the obligation to listen and ascertain, if he can, whether there is an approaching train. Nor will the fact that the train is behind time, (*Salter v. Railroad Co.*, 75 N. Y. 273; *State v. Railroad Co.*, 47 Md. 76,) or that it was a special train, (*Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125;) or the failure of the railway to give the signal of its approach at the crossing, (see cases *supra*,) excuse the non-performance of this duty. In many of the cases the measure of duty goes to the extent of requiring the traveler to stop in order to look or listen; but he is not required to get out of his wagon and go forward, on foot, for the purpose of looking, (*Stackus v. Railroad Co.*, 79 N. Y. 467; *Davis v. Railroad Co.*, 47 N. Y. 400; *Railroad Co. v. Wright*, 80 Ind. 182,) unless there are some peculiar circumstances requiring it, (*Railroad Co. v. Beale*, 73 Pa. St. 509.)

Now, the plaintiff was a competent person to take care of herself, was familiar with the road and its intersection with the railroad, and fully understood from the obstructed view the danger and risk incurred in attempting to cross it without listening. There is no pretense that her team was or became unmanageable or unduly excited; or that there were any circumstances embarrassing or perturbing her judgment; or that she was in the presence of any entangling influences or conditions to perplex and confuse her mind. She was in the full possession of all her faculties, and if she had listened could have heard the train; yet, relying on the fact that the passenger train had passed, and that no other train was due for some time, she relaxed her

vigilance, and drove on the track, and in collision with the train. "If the obstruction had been such," said JOHNSON, J., "as to prevent her from seeing the track or train, then, in the exercise of ordinary care, she should have listened for the train." *Railroad Co. v. Adams*, 33 Kan. 431, 6 Pac. Rep. 529. Upon this state of facts, what doubtful or qualifying circumstances does the conduct of the plaintiff present which excuses her from the plain consequences of her negligent acts? The duty which the law imposed for her own safety as well as the lives of passengers on trains, she neglected and disregarded, under circumstances which demanded the exercise of prudence and caution. It is true that negligence is ordinarily a question of fact for the jury to determine from all the circumstances of the case, and that the cases where a nonsuit is allowed are exceptional and confined to those as here, where the uncontradicted facts show the omission of acts which the law adjudges negligent. In such cases, where the measure of duty is defined by law, "then," says Mr. Beach, "a failure to attain that standard is negligence in law, and a matter with which a jury can properly have nothing to do." Beach, Contrib. Neg. § 163. This is the principle upon which *Cogswell v. Railroad Co.*, 6 Or. 417, was decided by BOISE, J.

We think, upon the undisputed facts of this case as made by the plaintiff, her own negligent act contributed to produce the injury which she sustained by the collision, and that the motion for nonsuit ought to have been allowed. It follows that the judgment must be reversed, with directions that a judgment for nonsuit be entered.

## NOTE.

**RAILROAD CROSSINGS—DUTY OF TRAVELER TO LOOK AND LISTEN.** It is the duty of a person about to cross a railroad track to make a vigilant use of his senses, as far as there is an opportunity, in order to ascertain if there is a present danger in crossing. *Railway Co. v. Adams*, (Kan.) 6 Pac. Rep. 529; *Starry v. Railroad Co.*, (Iowa,) 1 N. W. Rep. 605; *Abbott v. Railway Co.*, (Minn.) 16 N. W. Rep. 266; *Clark v. Railway Co.*, (Kan.) 11 Pac. Rep. 134; *Railroad Co. v. Davis*, (Kan.) 16 Pac. Rep. 78; *Donohue v. Railway Co.*, (Mo.) 2 S. W. Rep. 424; *Mynning v. Railroad Co.*, (Mich.) 31 N. W. Rep. 147; *Harris v. Railway Co.*, (Minn.) 33 N. W. Rep. 12; *Pennsylvania Co. v. Marshall*, (Ill.) 10 N. E. Rep. 220; *Glascok v. Railroad Co.*, (Cal.) 14 Pac. Rep. 518; *Young v. Railway Co.*, (N. Y.) 14 N. E. Rep. 454. A failure to listen or look, when by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signal, contributed to the injury. *Railway Co. v. Adams*, (Kan.) *supra*; *Schofield v. Railway Co.*, 8 Fed. Rep. 488; *Holland v. Railroad Co.*, 18 Fed. Rep. 243; *Mynning v. Railroad Co.*, *supra*. The diligence required of the traveler in ascertaining the approach of a train to a highway crossing must be greater accordingly as the peculiar locality and the circumstances of the case seem to require greater caution. *Morris v. Railroad Co.*, 26 Fed. Rep. 22. The fact that the approach of a railroad to a highway is obstructed from view imposes upon travelers by the highway special care to avoid collisions. *Haas v. Railroad Co.*, (Mich.) 11 N. W. Rep. 216; *Schaefer v. Railway Co.*, (Iowa,) 17 N. W. Rep. 898; *Burns v. Rolling-Mill Co.*, (Wis.) 19 N. W. Rep. 880; *Pence v. Railroad Co.*, (Iowa,) 19 N. W. Rep. 785. Where a crossing is particularly dangerous, and requires extraordinary effort to ascertain whether it is safe to attempt to cross, one familiar with the locality and the danger surrounding it must use care proportioned to the probable danger. *Railroad Co. v. Butler*, (Ind.) 2 N. E. Rep. 188; *Merkle v. Railroad Co.*, (N. J.) 9 Atl. Rep. 680; *Seefeld v. Railway Co.*, (Wis.) 35 N. W. Rep. 278. Where the driver of a team brought his horses to a walk, but did not stop and leave his wagon, and go forward where he could see a train obstructed by cars standing on a side track, held not to be contributory negligence. *Kelly v. Railway Co.*, (Minn.) 11 N. W. Rep. 67; *Guggenheim v. Railway Co.*, (Mich.) 33 N. W. Rep. 161. Where the approach to a crossing was obstructed, and the plaintiff's attention was required in one direction, held, under the circumstances, he was not negligent for failing to look in the opposite direction, from which a train was rapidly approaching, without signal, bell, or whistle. *Loucks v. Railway Co.*, (Minn.) 18 N. W. Rep. 651. Where one knows the dangerous condition of a crossing, that the approach of a train would be obstructed to both sight and sound, and also knew, or had reason to know, that a train is due, it is his duty to both look and listen, and, if need be, to stop for that purpose. *Tucker v. Duncan*, 9 Fed. Rep. 867. But there may be circumstances which will excuse the traveler from taking the usually necessary precaution of looking and listening. *Railroad Co. v. Hedges*, (Ind.) 7 N. E. Rep. 801; *Abbot v. Railway Co.*, *supra*.

(2 Ariz. 383)

**TERRITORY v. COOK et al.***(Supreme Court of Arizona. March 18, 1888.)***1. BONDS—ACTIONS ON—ESTOPPEL OF SURETIES.**

The sureties as well as the principal on a treasurer's bond are estopped to deny that the treasurer had in his hands moneys that he reported he had.

**2. SAME.**

Where a county treasurer is his own successor, and he reports from time to time during his terms the amount of money he has in his hands, in a suit on the last bond given, sureties cannot set up that his reports during last term are untrue, and so prove that deficit occurred in former term.

*(Syllabus by the Court.)*

Appeal from district court, Yavapai county; before Justice WRIGHT.

Action by the territory of Arizona on the official bond of Ed. J. Cook as treasurer of Yavapai county. Judgment for plaintiff, and defendants appeal.

*Briggs Goodrich*, Atty. Gen., for plaintiff. *Rush, Wells & Howard* and *E. M. Sanford*, for defendants.

BARNES, J. This was a suit by plaintiff upon the official bond of defendant Cook as treasurer of the county of Yavapai. It appears that he has been such treasurer for five successive terms of two years each. That at the expiration of the term ending December 31, 1884, he, as such treasurer, as required by law, (chapter 6, and amendment of October 4, 1867, Comp. Laws,) had and filed with the board of supervisors of Yavapai county, his regular quarterly and annual settlements. That in such settlements he charged himself with the sum of \$46,026.23, as being the balance in his hands as such treasurer. That such settlements were duly examined and approved by the said board of supervisors. That thereafter, during his last term of office, and at his first quarterly settlement as such treasurer, he charged himself with said balance as having actually come to his hands from himself as his predecessor, and continued afterwards from time to time, at each annual and quarterly settlement, to report the same in his hands, or using said balance in his first quarterly settlement, and then the balance from each settlement as made and shown therein. That each settlement commenced with the statement of the balance in treasury or on hand at last settlement, and ended with a statement of balance in treasury. That each and every of said settlements were duly approved by the said board of supervisors, except the last statement of account, which was also approved after some corrections, and changes were made in the same by said Cook and said board of supervisors. That the books of said E. J. Cook as such treasurer show the same balances and amounts as the settlements made by him. It was made to appear that at the time of his final settlement the amount of money which his last approved statement showed to be in his hands as such treasurer was not there; in fact that the treasury was short the amount of money sued for. The bond sued on is the official bond for the term 1885 and 1886, and the suit is for money which his statements and settlements represented as being in the treasury at the end of that term. Defendants asked to be allowed to introduce evidence as to what had occurred before the board of supervisors at the times of the successive settlements of his accounts; to ask whether the money in the treasury was actually counted; to ask whether, at the time of the settlement in December, 1884, and before this bond was given, he actually had in the treasury the money his statements showed, and so as to the succeeding statements; to ask whether he did not produce certificates of deposits upon various banks as cash in the treasury. This evidence the court refused to allow. These rulings present the question asked by the appellants: "Are the sureties permitted to go behind the settlements made by the board of supervisors with the treasurer, and show that the default charged occurred before the commencement of their liabilities?" They



urge with great force and ability that they should be allowed to show that the statements by the treasurer of the amount of money on hand were false, and that the defalcation occurred before this bond was executed, and that the shortage in the cash was continued down to the end of this last term.

The obligation of this bond, among other things, was that the treasurer should faithfully discharge the duties of his office. One of his duties was to correctly report to the board of supervisors the amount of money in the treasury. To falsely report was a breach of his duty, for which his sureties were liable on this bond. It is conceded that the sureties on this bond are not liable for breaches of duty during the former term of office. The cases cited upon this point will not be questioned. The question here is this: May he and his sureties dispute that he had in the treasury the money that he reported from time to time that he had, and on the faith of which reports his settlements were made and approved? It is admitted by appellants that the treasurer is estopped, but they insist that the sureties are not, and that they may show that the statement of money on hand December, 1884, just before the term covered by their bond began, was false, and that the treasurer did not then have the money. They permitted him, from time to time thereafter, to report the amount of money on hand. They could, before they executed the bond, and at any time thereafter, have ascertained the amount of cash in the treasury, and so verify his reports. His sureties had notice, or are charged with notice, of the amount of money he reported as in his hands at the beginning of his last term. They obligated themselves that he should "pay over all money then in his hands." They, as well as he, are estopped to deny that that money was in his hands. The same point was urged in *Morley v. Town of Metamora*, 78 Ill. 394, 20 Amer. Rep. 266, and the sureties were held liable. "The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. That report was approved, and we must presume it was true." "Conceding that fact, (that default occurred in former term,) we do not think it relieves the sureties on the bond upon which this action is brought from liability." To the same effect is *Pinkstaff v. People*, 59 Ill. 148. In *Roper v. Lodge*, 91 Ill. 518, it was urged "that the court should have admitted evidence that the defalcation occurred the term before appellants became sureties on this bond." Upon the authority of the foregoing cases, judgment was affirmed. In *Chicago v. Gage*, 95 Ill. 593, 35 Amer. Rep. 182, the court say: "Gage was his own successor in office. It was his duty, as incoming treasurer, to receive the treasury balance from his predecessor. If he entered it in his treasury books after the beginning of his second term as having actually come to his hands from his predecessor, and continued afterwards, from time to time, to return and report the same as in his hands, both he and his sureties, we think, should now be concluded from denying that this balance did actually come into Gage's hands as treasurer." It was his duty to keep such accounts, and make such reports; and to "falsify them, and show that these balances, etc., were not at the time actually in the treasury, would be inadmissible, as we conceive, upon sound legal principle." "And we are of opinion that the sureties should be equally concluded here with Gage himself." The court cites *Commissioners v. Mayrant*, 2 Brev. 228; *McCabe v. Raney*, 32 Ind. 309; *Stovall v. Banks*, 10 Wall. 583; *Baker v. Preston*, 1 Gilmer, 235; *U. S. v. Girault*, 11 How. 27; *Evans v. Keeland*, 9 Ala. 42. In *Insurance Co. v. Simmons*, 131 Mass. 85, 41 Amer. Rep. 196, the court held the sureties were not discharged by laches of creditor in not compelling payment after knowledge of default. "It is the business of the surety to see that his principal performs the duty which he has guarantied, and not that of the creditor." *Wright v. Simpson*, 6 Ves. 714; *Bank v. Anthony*, 18 Pick. 238; *Telegraph Co. v. Barnes*, 64 N. Y. 385; *McKecknie v. Ward*, 58 N. Y. 541. In *Boone v. Jones*, 54 Iowa, 699, 2 N. W. Rep. 987, 7 N. W.

Rep. 155, it was held that, "in an action on a county treasurer's bond, the principal's accountings and settlements made in pursuance of law are conclusive against him and his sureties." The court cites, with approval, *McCabe v. Raney*, *Baker v. Preston*, *Morley v. Metamora*, and *Chicago v. Gage*, *supra*. On a rehearing the decision was adhered to. The authority of *Baker v. Preston* has been questioned and the decision criticised. *State v. Rhoades*, 6 Nev. 352, and *State v. Newton*, 33 Ark. 276; and see note to *Boone v. Jones*, 37 Amer. Rep. 234. In *State v. Grammer*, 29 Ind. 530, the court, of *Baker v. Preston*, say: "We regard the reasoning in that case as entirely satisfactory, and we know of no case holding a contrary doctrine." We are satisfied that the weight of authority and the better reason sustains that case and *Chicago v. Gage*, and that the law is that both the principal and sureties are concluded by the report of the principal, made according to law, as to the amount of money in his hands. We therefore see no error in the record.

The judgment is affirmed.

(20 Nev. 89)

JERRETT D. MAHAN. (No. 1,266.)

(Supreme Court of Nevada. March 8, 1888.)

1. JUDGMENT—RENDITION AND ENTRY—DELAY—INCAPACITY OF JUDGE TO ENTER.

The verdict of the jury and the findings of the trial judge, all in favor of the plaintiff, were filed in the district court in 1881. The plaintiff and defendant each moved for a judgment at once, which motions were taken under advisement by the judge, who shortly afterwards died without disposing of such motions. The plaintiff's attorney succeeded said judge in office, and it was not until 1887 that a judge competent to act was provided. Neither party in the mean time took any steps in the case. *Held*, the condition of both parties in reference to the controversy remaining the same, that the plaintiff was not barred by his own negligence from taking judgment in 1887.

2. IRRIGATION—RIPARIAN RIGHTS—APPROPRIATION—PRESCRIPTION.

In a suit brought to recover damages for diverting water claimed for irrigating purposes, and for an injunction, defendant made no claim to be the riparian proprietor of the streams, but claimed the waters by prior appropriation and prescription. *Held*, that to support the claim for damages, the material allegations in the complaint were prior appropriation of the water by the plaintiff, and the diversion thereof by the defendant, and that it was unnecessary to aver riparian ownership in the plaintiff.

3. SAME—DIVERSION OF WATER—INJUNCTION—PLEADING.

*Held, further*, that to enable plaintiff to obtain the injunction, it was only necessary, in addition to the facts averred in the complaint which were relied upon for a judgment for damages, to aver facts sufficient to obtain equitable relief, without repeating the averments already made.

4. SAME—FINDINGS OF JURY.

*Held, further*, that the answer of the jury of "We do not know" to the question, "How much of the waters of that stream was required for the proper irrigating of crops growing on that land in 1875?" was immaterial, and their finding that all the waters of said stream were used by plaintiff in irrigating said land, and, if properly used, all was necessary for that purpose, controlled and sustained the verdict for plaintiff.

5. SAME.

*Held, further*, on the answer of "Yes" by the jury to the question, "Has the defendant since the year 1872 used the waters of Snow creek for the purpose of irrigating, peaceably, openly, notoriously, under claim of right, and adversely to plaintiff and all other persons?" that the trial judge correctly applied this finding to all waters of Snow creek except those naturally flowing in the two south branches (which were claimed by plaintiff), in view of the facts that defendant, from 1873 to 1876, used the waters of said two south branches to irrigate plaintiff's land which he occupied as tenant, and that plaintiff made no claim to the other branches of the same creek which ran through defendant's land.

Appeal from district court, Elko county; A. L. FITZGERALD, Judge.

J. W. Dorsey and C. Thornton, for appellant. R. M. Clarke and Talbot & Farrington, for respondent.

LEONARD, C. J. This is an action to recover damages for the alleged wrongful diversion and use of the waters of Niagara creek, and the three

southernmost branches of Snow creek, described in the complaint, and for equitable relief against further diversion. In his answer defendant prays for a decree adjudging to him the right to use the waters of Snow creek, or a sufficient quantity thereof to irrigate so much of his land as may be irrigated by said waters; that his right to so much of the waters of Niagara creek as he had diverted through "Mahan's Ditch" be adjudicated superior to that of plaintiff; and that plaintiff be perpetually enjoined from interfering with his said rights. The action was commenced April 13, 1881, and on July 26, 1881, a trial was had which terminated in a verdict by the jury on 83 special issues of fact, and a general verdict in favor of plaintiff, for five dollars damages. On the same day the court made and filed certain findings, and plaintiff and defendant, each by his counsel, made a motion for judgment in his favor, upon the pleadings, general verdict of the jury, special verdict of the jury, and the findings of the court, which motions were taken under advisement by the court, but never decided. No further action was taken in the case, so far as the record shows, by the court or either party, until March 26, 1887, when plaintiff, by his present counsel, gave notice of a motion for judgment on the pleadings, general and special verdicts of the jury, and findings of the court before mentioned. When the last-named motion came on to be heard, counsel for defendant objected to the hearing of the same, and the granting thereof, upon the ground that plaintiff had been guilty of laches, negligence and inexcusable delay in making the same. The objection was overruled, and an exception taken. Thereupon counsel for defendant proved that Hon. J. H. FLACK, the judge before whom the cause was tried, died in October, 1881, and, after argument, judgment was rendered and entered against defendant in the sum of five dollars damages; and it was ordered, adjudged, and decreed that, at the time this suit was brought, plaintiff was and is the owner of the usufruct, and entitled to use and enjoy, for the irrigation of the land described in complaint, all the waters of said Niagara creek, and all the waters naturally flowing in the two southernmost branches of said Snow creek at all times and whenever he requires the same for the proper irrigation of the land described in complaint; that defendant was and is the owner, and entitled to use, for irrigation of the land described in his answer, and for stock and domestic purposes, all the waters of Snow creek naturally flowing therein, except that part naturally flowing in the two southernmost branches of said Snow creek; and each party was perpetually enjoined from depriving the other of any rights to him belonging, as set forth in the decree. Plaintiff recovered his costs.

1. It is urged that the court erred in granting the plaintiff's motion for judgment, on account of his laches, negligence, and inexcusable delay in making the same. From the facts above stated, it appears that each party claimed to be the owner, and entitled to the use, of the waters in dispute, and asked affirmative relief against the other in relation to the same; that on the date of the verdicts, each submitted a motion for judgment in his favor; that the motions were taken under advisement by Judge FLACK, who died October 1881, before rendering judgment in the cause; that plaintiff made another and similar motion for judgment before Judge FITZGERALD in March, 1887, which was granted. It is also stated by counsel for defendant in their printed briefs, and is the truth, that Judge BIGELOW, who was plaintiff's attorney when the suit was brought and tried, succeeded Judge FLACK by appointment and election, and was the presiding district judge in Elko county, wherein the cause was tried, until January, 1887, when, for the first time after Judge FLACK's death, a judge competent to render judgment was provided. Although it is not claimed that there is any statute of limitations within which this case falls, it is undoubtedly true, as claimed by the learned counsel for defendant, that all rights of action may be lost by lack of diligence in asserting them; and, in proper cases, actions may be dismissed for want of prosecution, and

oftentimes equity refuses to aid a party who has slept upon his rights. "To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly." *Sullivan v. Railroad Co.*, 94 U. S. 811. "The reason of the rule is apparent, and consists in the difficulty, and, in many cases, the impossibility, of ascertaining, after a great lapse of time, the facts necessary to enable the court to exercise its power with safety. He who delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so indeterminate and obscure that it is impossible for the court to see whether what seems to be justice to him is not injustice to his adversary, should be denied all relief; for, by his laches, he has deprived the court of the power of ascertaining, with reasonable certainty, what the truth is, and thus of doing justice." *McCartin v. Traphagen*, 11 Atl. Rep. 164. And in *Adams' Adm'r v. Taylor*, 14 Ark. 67, it is said that \* \* \* "while courts of chancery may have a discretion to determine the rights of parties seeking an adjudication, notwithstanding the lapse of time, where the facts are not disputed, or are susceptible of being clearly ascertained, the reason why they refuse relief in accordance with a statute by which they are not expressly bound is the fear of doing injustice, and the inability to afford relief where the sources of testimony have become obscured or lost by lapse of time." In *Daggers v. Van Dyck*, 37 N. J. Eq. 137, the court said: \* \* \* "The delay of the complainant in seeking redress constitutes no defense. It is only when the complainant has slept over his wrongs so long that, if relief be given to him, great and serious wrong will be done to the defendant, that laches constitute a complete defense. Here the parties are in almost the same position now that they were at the time the wrong for which redress is sought was done, and relief may be given to the complainant without doing any harm whatever to the defendant." And see *Spurlock v. Sproule*, 72 Mo. 510; *Lawrence v. Rokes*, 61 Me. 42; *Spaulding v. Farwell*, 70 Me. 21; *Wissler v. Craig*, 80 Va. 22; *Cranmer v. McSwords*, 24 W. Va. 601; *Neel's Appeal*, 88 Pa. St. 49; *Smith v. Thompson*, 7 Grat. 112; *Getchell v. Jewett*, 4 Greenl. 367; *Platt v. Platt*, 58 N. Y. 646; *Burden v. Stein*, 27 Ala. 114; *In re Lord*, 78 N. Y. 111; *People v. Common Council*, Id. 63. In the light of the above decisions let us now examine the claim of error under consideration. Conceding for the present that, aside from the question of laches, plaintiff was entitled to the relief granted, the granting or refusing of the motion was within the legal discretion of the court, and its action will not be disturbed unless such discretion was abused. Hayne, New Trials & App. § 289. Lapse of time is the only evidence of laches or abandonment of the cause shown by the record. Judge BIGELOW was disqualified except to call another judge or transfer the case to another judicial district for decision. We shall not stop to inquire whether he had power, or it was his duty, to dispose of it by either method upon his own motion. It cannot be said there was laches on the part of either party, during the time Judge FLACK held the cause under advisement, that is to say, until October, 1881. It seems strange if no effort was made by either party to expedite a decision. But, under the circumstances, conceding there were five years and five months of inaction on the part of both parties after Judge FLACK's death, we cannot say the court abused its discretion in overruling defendant's objection on the ground of laches. The facts on which the

court acted, and upon which only it could, at any previous time, have predicated its decision, were among the files and records of the court, unaffected by time. There were no new facts to be ascertained. The result of the original transactions was embodied in the verdicts and findings. There was no showing or pretense that, by reason of delay, defendant had been deceived as to plaintiff's intentions or claims, or that by reason thereof he had been induced to do anything he would not otherwise have done. It was not shown or intimated that defendant had suffered the slightest injury on account of the delayed judgment, and no reasons existed why the court could not do complete justice to both parties on the 8th day of April, 1887, as well as it could have done so the daysucceeding Judge FLACK's death. We are satisfied with the conclusion reached for the reasons above expressed, and will not extend the volume of this opinion by discussing a question suggested at the oral argument, that is to say, whether or not defendant can complain of the delay, inasmuch as he did not himself move the court to call another judge, or transfer the cause to another district for decision, although after Judge FLACK's death, as well as before, his motion for judgment was pending. But see *Canal Co. v. Kidd*, 28 Cal. 684; *Baird v. Moses*, 21 Ga. 250.

2. It is claimed that, under the law as declared in *Jones v. Adams*, 19 Nev. —, 6 Pac. Rep. 442, the complaint states no cause of action, because it bases plaintiff's right to recover upon riparian ownership, and not upon appropriation. This case does not call for a discussion of the rights of riparian proprietors, nor does it require a restatement of the points decided in *Jones v. Adams*, which speaks for itself. In his complaint plaintiff alleges that "Niagara creek is a natural surface stream of running water which, until the commission of the grievances hereinafter stated, has from time immemorial constantly flowed over, upon, and through the lands of the plaintiff, \* \* \* and of right ought still to flow over, through, and upon the same, and that said lands embrace the natural banks, beds, and channel of said stream." The same allegations are made in relation to the two southernmost branches of Snow creek. But following the allegations just stated in each cause of action is a full and explicit statement of facts showing an appropriation of all the waters of Niagara creek in 1875, and of the two southernmost branches of Snow creek in 1874. In his answer, defendant did not, as to Niagara creek, claim to be riparian proprietor, but alleged prior appropriation and title by prescription. As to Snow creek, two of its natural channels pass over and through defendant's lands, but the two southernmost ones do not. Defendant claimed the waters adjudged to plaintiff by prior appropriation only, and set up title by prescription to the same. From the pleadings and findings it seems plain that the case was tried mainly upon the two issues just stated, raised by the answer,—prior appropriation and prescription,—and it is certain that by the judgment plaintiff was awarded no relief except such as he was entitled to receive upon findings in his favor on those two issues. It is also claimed that the complaint fails to state facts constituting a cause of action because there is no proper averment that plaintiff is the owner, or entitled to the use or flow or enjoyment, of the waters of Niagara creek, or to the two southernmost branches of Snow creek. As to Niagara creek, the criticism of counsel is entirely without merit. As to Snow creek there is no allegation in terms that plaintiff is the owner or entitled to the use of the waters naturally flowing in the two southernmost branches; but plaintiff's appropriation in 1874, by means of dams and ditches constructed by him for irrigating purposes upon his land, his continued use thereof since that time, except when prevented by defendant, and the necessity of such use, together with ample facts justifying equitable relief, are fully averred, and they are sufficient to sustain the judgment. The facts material to be alleged were plaintiff's prior appropriation and defendant's diversion. If plaintiff first appropriated the waters in question for irrigating purposes upon his land, the

law gave him the right to continue their exclusive use regardless of the pleader's opinion in the premises. When those facts were alleged and admitted or proven, the law determined plaintiff's rights to be that he was entitled to use and enjoy the waters up to the amount of his appropriation; and an allegation of the conclusion of law following the facts alleged would add nothing to the pleading. Mr. Pomeroy says: "In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in the abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded will, therefore, always be the facts from which the plaintiff's primary right, and the defendant's corresponding primary duty, have arisen, together with facts which constitute the defendant's delict or act of wrong." Pom. Rem. & Rem. Rights, § 453. Again it is urged that "the matters alleged as grounds for equitable relief in both courts are not sufficient to sustain the judgment as to the equitable relief therein granted." To sustain this assertion counsel for defendant say: "In neither of the counts is there any allegation of the plaintiff's ownership or appropriation of the use or enjoyment of the water, or any trespass of the defendant. All that is alleged is matter tending to show the irreparable nature of the defendant's trespasses. It is well settled that, in a complaint for both legal and equitable relief, the statement of each cause of action must be separate and complete in itself. Nor can the allegations of any count be eked out by those of another, unless by express reference." We presume counsel's argument is predicated upon the theory that there are four causes of action stated in the complaint instead of two,—two for judgments at law and two for equitable relief,—and that the latter must contain all the allegations necessary to sustain the injunction granted, including those of plaintiff's ownership or right of use, or prior appropriation, and defendant's diversion, although the same facts are previously alleged in stating facts looking to legal relief; because it cannot be denied that plaintiff's appropriation and defendant's diversion are plainly and separately alleged in the parts of the complaint preceding the allegations justifying equitable relief. It may be admitted that, when a complaint contains more than one *cause of action*, "each count must contain all the facts necessary to constitute a cause of action; and that its defects cannot be supplied from statements outside of it, and not then if the matters omitted relate to the *gravamen* of the action." *Haskell v. Haskell*, 54 Cal. 265; Pom. Rem. & Rem. Rights, § 575. This complaint fills every requirement stated and follows approved precedents. Plaintiff declares separately upon two causes of action only, although, in each he seeks two kinds of relief, as he is permitted to do. Pom. Rem. & Rem. Rights, §§ 78, 437, 452, 454, 575; Bliss, Code Pl. § 114. In each cause of action the grounds of equitable interposition are stated subsequently to and distinct from those upon which the judgment at law is sought, and, in each, the portion which seeks equitable relief is separated from the preceding part by apt words. *Mining Co. v. Clarkin*, 14 Cal. 548. As to each stream, all the facts stated as grounds for legal and equitable relief constitute but one cause of action, and in seeking the equitable interposition of the court, it was only necessary or proper to allege other facts which, in addition to those previously stated as grounds for a judgment at law, would justify the injunction sought.

3. It is asserted that "the judgment rendered by the court is unsupported by the findings, and the same are insufficient to sustain the judgment." As to Niagara creek it is said they are insufficient because the amount of water necessary for the proper irrigation of plaintiff's land is not found. This assertion is based upon the answer to the seventh issue submitted to the jury on behalf of plaintiff, as follows: "How much of the waters of that stream was required for the proper irrigating of the crops growing on that land during

1875? *Answer.* "We do not know." In view of other findings we are by no means convinced that a finding of the amount of water required by plaintiff in 1875 was material but that question we need not decide. The findings of the jury must be construed together; and so treating them they show without substantial contradiction that all the waters of Niagara creek, if properly used, were necessary to irrigate the quantity of land plaintiff had under cultivation in the years 1875, 1876, 1879, and 1881. The jury found that plaintiff's ditches constructed prior to and during the year 1875 were sufficient to carry all the water of Niagara creek during the irrigating season, that the entire waters flowed through said ditches, and were used by plaintiff and his tenants during that season for irrigating the land described in complaint; that all the waters of said creek, if properly used, were necessary to irrigate the *quantity of land* plaintiff had under cultivation in 1875, 1879, and 1881. It is true that, in answer to the question under consideration, the jury said they did not know how much of the waters of this creek was necessary for the proper irrigation of the *crops growing on plaintiff's land* in 1875, but they did know and find that the entire waters of the creek were required to properly irrigate the *quantity of land* plaintiff had under cultivation that year. Since the last question was fully answered, there must have been some reason, real or imaginary, why they were unable to reply to the first. It may have been because the testimony did not show that crops were grown upon the entire amount of land cultivated that year. Crops do not always grow, although the seeds are planted and the ground is watered. It was found that in 1875 plaintiff and his tenants irrigated 74½ acres of land with water from Niagara creek, and, as before stated, that all the waters of said creek were necessary, in that year, to irrigate that amount of land in a proper manner. The jury may have said: "All the water was required to irrigate the land plaintiff cultivated in 1875, but we do not know there were growing crops on all the land, or half of it, and consequently we do not know how much water was required to irrigate the growing crops properly." There is no necessary contradiction between the findings on this subject, and there is no failure to find that plaintiff required all the waters of Niagara creek for the proper irrigation of the land cultivated by him in 1875, 1879, and 1881. Finally, it is claimed that, as to *all* the waters of Snow creek, the findings contain every element of an adverse use known to the law for a period of more than eight years, that is to say, from 1872 to 1881, and consequently that the court erred in granting an injunction as to the waters of the two southernmost branches thereof. Again the findings must be construed together. At folio 100 *et seq.* of the transcript, the jury was asked: "Has the defendant, since the year 1872, used the waters of Snow creek for the purposes of irrigating continuously, peaceably, openly, notoriously, under claim of right, and adversely to plaintiff and all other persons? *Answer.* Yes." The court below applied these findings to all the waters of Snow creek, except those naturally flowing in the two southernmost branches thereof; and the question is whether they embrace, or were intended by the jury to embrace, the entire waters of all the branches of Snow creek, or only those included by the court. From the pleadings and findings construed together, it is plain to us that the jury did not intend to find that since 1872 defendant had used all the waters of Snow creek in the manner stated at folio 100, or had so used any of the waters naturally flowing in the two southernmost branches thereof. Some of the reasons for this conclusion will be stated. It was found that in 1873 defendant moved on to plaintiff's land, described in complaint, and erected a dwelling-house thereon, as lessee of plaintiff; that defendant *commenced* using the waters of the two southernmost branches *on the lands now claimed by him* in 1876; that his use thereof prior to that time was on plaintiff's land described in the complaint, and that in 1876 defendant changed the point of diversion of the waters of Snow creek from a point on plaintiff's land, described in complaint,

to a point on the lands now claimed by defendant. It seems to us that, in the last finding, the two southernmost branches only were referred to, although the words, "the waters of Snow creek," were used; because plaintiff did not claim to have diverted, at any time, the waters of any of the other branches, and defendant "commenced using the waters of the two southernmost branches on lands now claimed by him in 1876."

Until 1876 defendant's use of the waters of the two southernmost branches was upon lands occupied by him as tenant of plaintiff. But, say counsel for appellant: "This fact does not imply that defendant was tenant of plaintiff's water right also. A man may rent another's land and trespass upon his water right, or *vice versa*." But let us consider the fact of defendant's tenancy in connection with others. It is admitted by the pleadings that the two southernmost branches of Snow creek flow naturally through and over plaintiff's land, and the jury found that the two other branches pass over defendant's land, described in the answer, in two natural channels. Defendant rented plaintiff's land in 1873, but it is not found that he used any of the waters of Snow creek for its irrigation in 1873, and in 1874 plaintiff, by means of dams and ditches, appropriated the waters of the two southernmost branches running through his land. Now, to say the least, it would have been an anomalous proceeding on the part of plaintiff to lease land to defendant that was valuable with irrigation, but practically valueless without it, and allow him to continue an adverse use of water diverted from the natural channels by plaintiff, for the sole purpose of irrigating the leased lands. There is no finding that plaintiff appropriated all the waters of the two southernmost branches in 1874, but the answer substantially admits it. The complaint contains an averment of such appropriation and use by means of dams and ditches, and defendant only denies that plaintiff constructed dams and ditches \* \* \* whereby he diverted *all* the waters from the two southernmost channels, or that it was necessary to use *all* the waters of said channels, or that defendant had diverted or used *all* the waters of said channels, thus admitting plaintiff's appropriation and necessary use and his own diversion, except as to the smallest quantity flowing in said channels or branches. After making the admission just stated, defendant then alleges that in 1871, by means of dams and ditches leading from the channels of Snow creek, he diverted therefrom all the waters thereof *when necessary to irrigate his said land*, and that he diverted said waters for the purposes of irrigation every year thereafter. He does not allege that, at any time prior to plaintiff's admitted appropriation and use, he appropriated any of the waters of the two southernmost branches, which were the only ones in dispute on the question of prior appropriation and use, but contents himself with the allegation that he diverted all the waters of Snow creek *when necessary to irrigate his own land*, without alleging that all of said waters were necessary, or that he used any portion thereof, except upon his own land described in the answer. In fact, he limits all adverse use since 1871 to his own lands; that is to say, in his answer, his claim of right and title by prescription rests upon a use of the waters of Snow creek,—not of the two southernmost branches thereof,—upon his own lands described in the answer,—not plaintiff's. But the jury found that he did not commence using the waters of the two southernmost branches on his own lands until 1876, and that his prior use was upon plaintiff's land, undoubtedly as plaintiff's tenant. Again, as to Niagara creek, it appears in both complaint and answer that defendant diverted only a portion of its waters. He claimed only so much thereof as ran through the "Mahan Ditch," which was but a part of the creek. But, in many instances, the form of questions put to the jury is the same as that of those under consideration in relation to defendant's adverse use of the waters of Snow creek. For instance, at folio 72 is this question: "When did Mahan commence running the waters of Niagara creek through the ditch above Jerrett's lands? Answer. Between April 25, 1876,



and May 1, 1876." Now the jury did not intend to say that *all* the waters of that creek ran through defendant's ditch, nor did the court mean to submit such a question to them, because that was not claimed by either party, and was not the fact. And at folio 94 it is asked: "Upon what quantity of land did the defendant use *the waters* of Niagara creek in 1872, if any? *Answer.* About one acre." It would hardly be claimed that the jury intended to find that *all* the waters of that creek were used in one acre; because, as to that stream, it is alleged in the answer that "at all seasons of the year it affords a supply of water far beyond the necessities of the plaintiff for the proper irrigation of the lands described in the complaint, and that all of said waters cannot be used profitably or reasonably in the irrigation of said lands."

The court did not err in excluding the two southernmost branches of Snow creek from the findings under consideration; and there is no finding that defendant used any of the waters of said branches continuously, openly, notoriously, under claim of right, and adversely to plaintiff, for the period of five years before the commencement of this action. The plaintiff was entitled to his costs. Judgment affirmed.

(5 Utah, 423)

*BURLOCK et al. v. SHUPE et al.*

(*Supreme Court of Utah.* February 2, 1888.)

1. NEW TRIAL—NOTICE OF DECISION—WAIVER.

Where, after a decision rendered by the court, the party against whom decision is made applies for time in which to file a motion and statement for new trial, such application is not a waiver of the notice of decision required to be given under the provisions of Laws Utah, 1884, § 536, relating to new trials.

2. SAME—DILIGENCE IN PROSECUTING MOTION—REVIEW ON APPEAL.

The question of lack of diligence in prosecuting a motion for new trial is wholly within the discretion of the trial court, and will not be reviewed on appeal.

3. FRAUD—PLEADING AND PROOF.

In an action for the recovery of land defendant filed a cross-complaint alleging that as administratrix she had negotiated a sale of the land, but, the purchaser having become insolvent before the sale was confirmed, she had declined to give a deed; that plaintiff had levied upon the purchaser's interest in the land, and by false and fraudulent representations to the probate court had induced the court to confirm the sale to plaintiff. *Held*, that fraud was alleged sufficiently to warrant the admission of testimony showing the character of the transaction.

Appeal from district court, First district; before Justice HENDERSON.

On motion for new trial. This action was brought by William E. Burlock and others against Elizabeth Shupe and others, to recover certain lands. Judgment was rendered for plaintiffs, whereupon defendant moved for new trial, which was granted, and plaintiffs appeal.

*J. N. Kimball* and *A. R. Heywood*, for appellants. *Thos. Maloney*, for respondents.

**BOREMAN, J.** The plaintiffs (appellants) brought their action against the defendants for the possession of certain real estate, claiming ownership. The defendants filed their answer, cross-complaint, and amended cross-complaint, claiming to hold the property as the sole heirs of Brigham Shupe, deceased. Upon the case being heard, judgment was rendered for the plaintiffs. Thereafter the defendants made their motion for a new trial, which motion the plaintiffs moved the court to dismiss. The motion to dismiss was overruled, and the motion for a new trial was granted, and thereupon the plaintiffs appealed to this court from such orders.

The plaintiffs maintain that the court below had no authority to consider the defendants' motion for a new trial, alleging that it was not filed in time, and no notice or statement was filed in time. The statute says that "the party intending to move for a new trial, must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of

the court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention, designating," etc. Laws Utah 1884, p. 246, § 536. The case was tried by the court without a jury, and the findings and decision and judgment were made and filed on the same day, the 25th of February, 1886. No notice of the decision was given to the defendants, as contemplated by the section of the statute referred to, but the defendants' attorney, on the same day that the decision was rendered, wrote a note to the judge who tried the case, asking a stay of proceedings for 30 days, to prepare and file the motion and statement for a new trial, and the extension of time was granted. On the 26th of March, 1886, another order, dated 24th of March, 1886, was filed, giving 20 additional days from the date of the order within which to prepare, file, and serve notices, motions, and statements for a new trial and appeal. The plaintiffs contend that these applications and orders for the stay of proceedings were a waiver of the notice of the decision, which the statute requires to be given. We have no doubt that the giving of the notice of intention to move for a new trial was a waiver of the notice of the decision, under the authorities referred to by the plaintiffs, (*Cottle v. Leach*, 43 Cal. 322; *Thorn v. Finn*, 10 Pac. Rep. 414;) and for some purposes the law does no doubt consider mere knowledge as equivalent to notice; but this does not hold good in all cases. It does not seem that the provision of the statute that the time to give the notice of the intention begins to run from the time of the notice of the decision, and that notices must be in writing, could be held to mean that mere knowledge is notice. Where the party has knowledge, and acts in the manner pointed out in the statute as to follow the notice, there would be good reason to treat his action as a waiver of the notice, or as equivalent to the notice. But we are not prepared to say that anything short of doing something which the statute points out as to follow or be preceded by the notice, would be or could be treated as a waiver of the notice. The party must do some affirmative act pointed out in the statute as not necessary to be done until after the notice. The statute says that the notice of intention to move for a new trial need not be made until after notice of the decision, but if the party proceeds to give his notice of intention without waiting for the notice of the decision, the inference would be that he had waived the notice of decision. The asking of a stay of proceedings to prepare the notice of intention, etc., would seem not to be a waiver of the statutory right to have a written notice before he should file or serve the notice of intention. This is the view taken by the supreme court of California, of a like statute, and it seems to be the most reasonable rule to reconcile the conflicting views. *Blagi v. Howes*, 66 Cal. 469, 6 Pac. Rep. 100; *Carpenter v. Hewel*, 67 Cal. 589, 8 Pac. Rep. 314; *People v. Carter*, 64 Cal. 561, 5 Pac. Rep. 260. The plaintiffs (appellants) further contend that the defendants' motion for a new trial should have been dismissed, because it was not prosecuted with diligence. There was a long delay in the disposition of the motion for a new trial, but no injury appears to have resulted. The plaintiffs had not, prior to action by the defendants, made any move to dismiss. Plaintiffs' action was taken subsequent to action by the defendants. The well-known burdened condition of the docket of the court may have had something to do with the delay in the hearing of the motion; but whether this be so or not, the question of the want of diligence is one resting in the sound discretion of the court which passed upon the motion. *Boggs v. Clark*, 37 Cal. 236. In the absence of anything showing that the court did not exercise a sound discretion, this court will not disturb the action of the court below, so far as it concerns the question of diligence.

It was claimed by the defendants in their application for a new trial that the court, on the trial of the case, had rejected evidence tending to show fraud as set up in the cross-complaint. The appellants contend that such rejections were not grounds for granting a new trial, but were correct rulings; that the

cross-complaint made no statement of facts that would constitute fraud. The cross-complaint, as amended, alleges in substance that the property belongs to the defendants as the sole heirs of Brigham Shupe, deceased,—one defendant being the wife, and the other the child, of said Brigham Shupe, deceased; that the defendant Elizabeth Shupe, as administratrix, obtained an order for the sale of the real estate in question, and at the sale S. H. Higginbotham became the purchaser at \$950 cash, subject to approval by the probate court; that the probate court delayed confirming the sale; that in the mean time Higginbotham became insolvent, and notified the administratrix and the probate court that he could not pay for the land, and that he repudiated the sale; that after this time the plaintiffs sued and obtained judgment against Higginbotham, and sold on execution such interest as Higginbotham had in the property; that he falsely and fraudulently represented to the probate court that Higginbotham had an equitable interest which they had bought at the sheriff's sale, and were entitled to have the sale made by the administratrix to Higginbotham confirmed to them; that they intended to mislead the probate court by such false and fraudulent representations; that Higginbotham never paid said \$950, or any part of it; that said plaintiffs never paid said sum or any part of it; that plaintiffs well knew that said Higginbotham had never paid any part of said money, and the probate court likewise knew these facts; that the probate court, at the solicitation of the plaintiffs, with these facts before it and before them, made a pretended order confirming said sale to the plaintiffs, in fraud of the rights of the heirs; that because the administratrix refused to make the deed to the plaintiffs without having received any pay therefor, she was removed from her position as administratrix, and another person appointed thereto, who did make the deed. These facts, if proven, would have shown a most bald fraud. They would have shown that the plaintiffs were endeavoring, through the forms of law, but without a shadow of right, moral or legal, to appropriate the property of others without having paid for it, and knowing that the party through whom they were claiming it had never paid for it. In passing upon the matters, the probate court had to decide that Higginbotham had such an interest in the real estate as was subject to levy and sale under execution, when that was a question for a court of more extended jurisdiction, and not one for the probate court,—a court of but limited jurisdiction. The rejection of the proofs offered by the defendants, of the facts, was therefore error. The evidence should have been admitted. The motion for a new trial was properly granted.

We see no error in the action of the court below in granting the motion. The order granting it is therefore affirmed.

ZANE, C. J., concurring. HENDERSON, J., concurs.

(11 Colo. 15)

ADAMS v. SCHIFFER *et al.*

(*Supreme Court of Colorado. January 27, 1888.*)

1. EQUITY—RESCISSON OF CONTRACT—FRAUDULENT REPRESENTATIONS.

General representations to the vendor of an interest in mining property, that the purchaser could command capital to work the mine, and influence so that a future sale could be advantageously made, which do not definitely appear to have formed part of the consideration, or to have been made with fraudulent intent, or to have been in fact false, followed a considerable time afterwards by the exaction of hard conditions, whereby the vendor was compelled to sell at a less sum than anticipated, are not sufficient evidences of fraud in the inception of the contract to invalidate it.

2. DURESS—OF PROPERTY—WHAT CONSTITUTES.

Complainant agreed to convey to defendant an interest in certain mining property by a deed passing a good and perfect title. In pursuance of such agreement, he gave the defendant a quitclaim deed, which defendant accepted. A third party made an unfounded claim to the property, which defendant voluntarily bought up. At the time of such claim, complainant was a depositor in defendant's bank and de-

defendant compelled him, by refusing to honor his checks, to settle for part of the sum paid to such third party. *Held* that, as by accepting the quitclaim deed defendant had waived all rights to a covenant against incumbrances, he had no right to demand a repayment of such sum even if the claim had been valid, and such settlement was in duress of complainant's property, and void.<sup>1</sup>

8. SAME—TAKING ADVANTAGE OF PARTY'S FINANCIAL EMBARRASSMENT.

The refusal of a purchaser to pay the contract price of mining property on the ground of false representations, and the acceptance by the seller of a less sum on account of financial embarrassment, does not constitute duress, if the purchaser had done nothing unlawful to cause such financial embarrassment.

4. SAME.

Acceptance by a seller of a certain sum for his interest in mining property, because of financial embarrassment, and of his co-owners pressing him to pay his share of improvements made on the land, does not constitute duress, so as to invalidate the sale, or the settlement made by the seller with his co-owner, the latter being willing to take a mortgage on the seller's interest in the mine for his claim, and the sale and receipt of the purchase money by the seller being made with the understanding that such claim was to be paid out of the money received from the sale.

Error to district court, Rio Grande county.

Adams, the plaintiff in error, filed his bill of complaint in the court below against Schiffer, Forsch, and Stern, praying for an account, and a reconveyance to him of the Aztec lode and the Aztec mill-site, and, in case he should not be entitled to this relief, that the defendants be decreed to pay him certain sums of money. The cause was tried to the court, on the bill, answer, and evidence, and the bill dismissed. From this decree Adams appeals to the supreme court. It appears from the evidence that the plaintiff in error, Adams, on the 24th day of January, 1881, entered into a contract to sell to the defendant Schiffer an undivided one-half interest in certain mining and milling property, viz., the Summit lode and the Summit mill-site, situate in Summit mining district, in Rio Grande county, with the engine, stamp-mill, and machinery thereon. The consideration was \$3,500,—\$1,500 cash in hand, the remaining \$2,000 to be paid when, in the language of the contract, "said Adams shall execute and deliver to said Schiffer good and sufficient deed of conveyance, passing to said Schiffer a good and sufficient title to the above-described property." It was further agreed "that at any time when, by mutual consent, the whole of said property shall have been sold for the sum of \$40,000, or the interest of said Schiffer in said property shall have been sold for the sum of \$20,000, the said Schiffer will immediately pay to the said Adams the sum of \$6,000." Schiffer further agreed "to furnish the sum of \$5,000 as working capital for the working and developing of the aforesaid property; said amount to be furnished as needed for the working and developing of said property; \* \* \* and it is agreed that the said \$5,000 shall be repaid to said Schiffer out of any proceeds arising in any way from said property." It was further agreed "that, should it be advisable for said Adams to relocate the lode or mining claim and mill-site heretofore described and known as the 'Summit Lode,' and 'Summit Mill-Site,' and to change the name of said lode from its present name, 'Summit Lode,' to that of 'Aztec Lode,' and to change the name of the said mill-site from its present name, 'Summit Mill-Site,' to that of the 'Aztec Mill-Site,' then all of the aforementioned agreements by each of the parties hereto in relation to the said Summit lode and Summit mill-site shall apply with equal and full force and effect to the Aztec lode and Aztec mill-site, when the same shall have been located." In selling and purchasing, the respective parties had in view placing the property on the New York market, and selling it at an advance. The complainant, Adams, addressed himself at once to the relocation and entry of the lode and mill-site under the name of the "Aztec Lode" and "Aztec Mill-Site." The entry under that name was made by him on or about the 15th of the fol-

<sup>1</sup> As to what constitutes duress, see *Lomerson v. Johnson*, (N. J.) 13 Atl. Rep. 8, and note.

lowing June. In the mean time both Adams and Schiffer went to New York city, and, in the month of March following the sale, Adams sold to one Ferdinand Forsch, a brother-in-law of Schiffer, a one-eighth interest in his remaining interest in the mining and milling property for the sum of \$2,500; \$250 was paid down, and the remaining \$2,250 was to be paid, in the language of the agreement, "on or before the 1st day of June, 1881, or as soon thereafter as a perfect title deed can be given said party of the first part; said party of the first part binds himself, or his heirs, assigns, or administrators to give said party of the second part a good warranty deed, as soon as a duplicate receipt for patent is issued from the United States land-office at Del Norte, for the within described mine and mill-site." Both parties returned from New York to Del Norte; and, on the 15th of June, Adams having theretofore entered the property under the name of the "Aztec Lode and Mill-Site," conveyed to Schiffer by deed of quitclaim the one-half interest in pursuance of his agreement of the 24th of January, at which time Schiffer paid to Adams the remainder of the purchase money, \$2,000. Adams also at the same time tendered to Schiffer, as the representative of Forsch, a deed for the one-eighth interest theretofore sold to Forsch in March. At this point the first difference arose. When Adams tendered the Forsch deed to Schiffer the latter refused to receive it, and to pay Adams on behalf of Forsch the remainder of the purchase money, \$2,250. He claimed that Adams had made certain false and fraudulent representations respecting the amount of ore on the dump at the time Forsch purchased. Adams denied making any such representations. Schiffer offered to receive the deed for Forsch, and to pay \$1,750, saying that this was the best he would do. Adams finally accepted the proposition, took the money, and delivered the deed. In respect to this, as well as the other contentions in this case, the parties are practically the only witnesses. Of this settlement on the 15th of June the plaintiff, Adams, testifies: "Mr. Schiffer had gone up to the mine, and came down and said to me that I had made representations of the mine to him and his brother-in-law. I said I had not done any such thing. He said, 'You made representations, but the condition is not as you represented it to be; you said there was at least 1,500 pounds to a ton somewhere there, but it is not there.' I said, 'What has become of it?' He said he did not know; it was not there. I asked him if he thought I was responsible for that. 'I cannot help it,' he says; 'it is not there, and I do not propose to pay you the other \$2,250.' I said 'I could not stand that. I am ready, whenever I can get my money, to make this deed.' He said, 'I will pay you \$1,750, and no more, and I think I will probably buy this back myself from Mr. Forsch.' Understanding that I had done as I had agreed to do, I trusted to getting the other \$500 from Mr. Forsch, and gave him the deed. This conversation occurred in Mr. Schiffer's store, in the main building. \* \* \* I took the ore that I carried to New York as specimens out of the same place, and Mr. Schiffer and I both went to see Bullback in New York. There was fifty-eight pounds of dry ore. Mr. Bullback's certificate was 1,467 dollars, and, I think, some cents. \* \* \* Mr. John Shaw told me there was 1,500 pounds on the dump. I made the statement through him. I left the mine on the 16th day of January, previous, I think. This ore was taken out afterwards. I informed Mr. Schiffer of the ore taken out, as a fact stated by Mr. Shaw. The ore was sampled before the sale to Mr. Forsch. \* \* \* I wanted the money, and he wouldn't pay more, and I took it rather than lose the sale."

The defendant Schiffer testifies that "Mr. Adams told him (Forsch) it was a good piece of property in his opinion; told him there was some money taken out last year; and, judging from the ores which he had sent to me, it was a valuable piece of property. I received 58 pounds of ore which I assayed at Bullback's, and it ran one thousand four hundred dollars; that is, the ore that he testified about, sent in the spring. Mr. Adams told Mr. Forsch there was

several tons of good ore on the dump. Mr. Forsch said, 'If that is the case, what will you take for an interest,—for one-sixteenth.' Mr. Adams wanted five thousand dollars; Forsch would not give it; \* \* \* but finally an agreement was drawn up that he was to pay Adams \$250 down and \$2,250 when Mr. Adams gave him the deed; that was the sum of the contract. We both considered that there was not much risk, as there were several tons of good ore on the dump. When we went up to the mine I do not believe we found fifty pounds of ore; \* \* \* there was a vein there, but not very valuable ore; that was at the Colconda; but he represented that there was several tons of very rich ore. Mr. Adams came to Del Norte a few days later,—about the 14th or 15th of June. We had the receiver's receipt of the Aztec lode. The deeds were brought over the next day, and we went to Jim Ross' office to acknowledge them, and we had my deed acknowledged. I told Mr. Adams that I would not take the Forsch deed; that, under the circumstances, I could not accept it, as Mr. Forsch had requested me to attend to his business for him. I said, at the recorder's office, 'We will consider that you own one-half and I own one-half, and that the deed to Forsch was not accepted by me.' \* \* \* I told Adams I would not accept the Forsch deed, and would rather let the \$250 go than take the property, as it is entirely different from what you represented it to be in New York. Mr. Adams insisted upon it, but I would not do it. I told him I would telegraph to Mr. Forsch about it, and then I could tell him what I could do. I telegraphed that I thought two thousand dollars should be paid, and no more; and if Mr. Adams would be satisfied with that, I would wire him. Mr. Adams said to wire him, and see what he says. It was accepted. Mr. Adams acknowledged the deed, and I paid him one thousand seven hundred and fifty dollars. He made the draft on Mr. Forsch, and I cashed it. Mr. Adams was perfectly satisfied. I acted for Mr. Forsch because he was my brother-in-law, and he told me to act for him. The receipt given me is the one read in evidence." With respect to this transaction, Adams claims that he is entitled to a decree for \$500, the remainder of the purchase money as agreed upon.

On the 18th day of October following, Adams entered into an agreement with Schiffer to convey to him by good and sufficient deed his remaining interest in the said Aztec lode and mill-site, for the sum of \$25,000, to be deposited to the credit of Adams in the Rio Grande County Bank on or before the 15th day of November, 1881. Schiffer was in New York, and soon thereafter telegraphed to Adams to come on for the purpose of closing a sale of the property. In response to the telegram Adams went east, and on the 17th of November sold and conveyed, by quitclaim deed, his remaining interest in the property to one Stern, for the sum of \$15,500. This sale to Stern was negotiated by Schiffer, who represented to Adams that this was all he could get for the property. Adams was reluctant to sell the property for that price. The purchase money, \$15,500, was paid by Stern to Schiffer, who, before paying it over to Adams, insisted that Adams should repay to Schiffer his share, or seven-sixteenths of the money advanced by Schiffer for the purpose of working and developing the mine, amounting to about \$6,800. Adams expressed his willingness to pay his share of all moneys so advanced by Schiffer for working and developing the mine, over and above the sum of \$5,000, but insisted that, under the written agreement of January 24th, that Schiffer was to advance \$5,000 for the developing and working of the mine, and was to be reimbursed out of the proceeds arising from working the mine. Schiffer, on the other hand, insisted that he was, under the terms of the contract, to be reimbursed his \$5,000 out of the proceeds of the mine, whether arising from working the mine or from its sale. Adams finally yielded to the claim of Schiffer, delivered the deed, and received from Schiffer the purchase money, \$15,500, less the amount claimed by Schiffer as due from Adams to him for money laid out and expended by Schiffer in working and developing the mine. This was

the second matter of difficulty, in respect to which the complainant Adams claims a decree for the sum of \$2,900. Of this settlement the complainant Adams testifies: "He said, 'If you will take the fifteen thousand five hundred dollars,' he would make the negotiations. Well, I had to do that or nothing. I made the conveyance for fifteen thousand five hundred dollars, on this understanding of what I have been telling; I did not know who this man was. I have got up to the point where I finally concluded to tell him to make out the deed. He did so, and wanted the deed made out to another man, and he wanted the consideration in the deed forty-five thousand dollars. I said, 'You can put it in fifty thousand dollars if you want it; and if you have to pay it it will not be so pleasant.' Well, I had not got any money yet; but we had figured up this thing,—what I owed him on the expenses for work. When he came to pay me he said, I am going to take out what you owe me. This deed was signed, and I could not help it. I thought I had better let him have it. I took his check for twelve thousand dollars on his bank, and he paid me the balance. He took out the balance I owed him on the tunnel transaction, and paid me the balance in currency." On cross-examination he says: "He said a friend of his would give fifteen thousand dollars for it. I refused, and then he wanted a settlement, and then it was discovered I owed seven-sixteenths of the amount expended in development, and he used that as a means of coercion. I preferred, if I could, to settle amicably. He would have taken security on what I had if I would have given it to him. If he had given me the fifteen thousand five hundred dollars for that interest, without taking his pay out, I would not have been satisfied to sell; not for that price. I considered that I might be placed in a worse position by Schiffer, if I did not do as I did. I did not know he could not compel me to pay the seven-sixteenths of the development money; he said he could compel me. I knew the contract said he was only to be paid that five thousand dollars from the mine, and that I had received no proceeds from the mine. I offered Mr. Schiffer security on the ore taken out, and him to give me twenty-five per cent. for my share until he was paid; but he wouldn't do it. I wanted him to do that, and go on and ship the ore, but he would not do that; but he would have taken a deed for my interest and held it, and when he got the deed I would have been completely in his control. He didn't tell me he would freeze me out. On the whole of this, rather than chance what I feared, I sold balance for fifteen thousand five hundred dollars. [Witness here shows Exhibit L.] I made, executed, and delivered that instrument." The defendant Schiffer testifies: "My contract with him was that this \$5,000 or more, whatever I advanced towards developing this property, I could only get through the sale of the mine, or from sales of ore. I did not press him at all for the money; made no such demand for his share of the development money. \* \* \* The \$5,000 development was to come out of a sale of the mine, or proceeds of the ore; either a sale of all or only a portion of the mine,—either way; presume that was Dr. Adams' understanding also. Every fraction sold was to pay its proportion of the development money. When Dr. Adams sold seven-sixteenths to Stern, it was my understanding that seven-sixteenths of all development money was to be paid by Adams to me, and deducted from the proceeds of the sale. When he sold the one-sixteenth to Forsch, I didn't deduct the development money, because he didn't have the money to spare at that time, and I didn't ask him for it. We had no expenses then, in June, to speak of. *Question.* Now, I will call your attention to this part of the contract, 'And it is agreed that the said sum of \$5,000 shall be repaid to said Schiffer out of any proceeds arising in any way from said property.' Do you swear that that meant that the proceeds arising in any way from said property meant from the sale of the property. *Answer.* Yes, sir."

In March, 1882, Richard O. Adams, a son of the complainant, set up a claim of title to the property sold by his father, and entered a protest at the proper

office, restraining the officer against issuing of patent to his father for said property. The complainant had, at the time, about \$8,000 deposited at the Rio Grande County Bank, an incorporation owned and controlled by the defendant Schiffer and his brother, one Abraham Schiffer. The defendant Schiffer refused to honor the checks of the complainant, on said deposit, until the claim of his son to the property should be adjudicated and settled. Schiffer professed his willingness to pay \$10,000 to have the matter settled, and the complainant opened up negotiations with his son, who resided a part of the time in Utah, and part of the time in Denver. After extended negotiations, running through several months, the son, Richard O. Adams, executed a deed to Schiffer, conveying all his right, title, and interest in and to the property, and received from Schiffer, through the First National Bank of Denver, the sum of \$10,000. The deed of the son appears to have been delivered to Schiffer. Schiffer then insisted that Adams should reimburse him the \$10,000 paid to the son in order to protect the title. With respect to this there was more or less contention. Schiffer finally, however, offered that if Adams would release his claim to the contract of January 24th for \$6,000, to be paid in case the mine should be sold for \$40,000, or Schiffer's half interest for \$20,000, and allow Schiffer, in addition, \$2,500 cash, that he would settle upon that basis and none other; that if he would not accede to that proposition, Adams would have to enforce his rights in the courts. Adams took time to consider, returned to the bank in the afternoon, and accepted Schiffer's proposition. Thereupon receipts in full, covering all the transactions with respect to the mining property, were signed and interchanged by the parties. The refusal of Schiffer to pay the complainant his money upon his check until the complainant should secure a deed from his son, and the subsequent refusal of Schiffer, after obtaining possession of the deed of the son, to settle with complainant upon any other basis than the one which we have set forth, constitutes the third ground of complaint, in respect to which the complainant claims that he is entitled to a decree for the sum of \$10,000. It was admitted that on or about the 15th day of June, 1881, the proceedings being apparently regular, the proper officials of the land-office at Del Norte issued to Dr. Adams a receiver's receipt, and that some time in the early part of 1882, a protest, or document of some kind having that effect, was filed in the general land-office at Washington against the issuing of a patent to Dr. Adams, and that, in consequence of the filing of such papers, an order was made directing the local land-office at Del Norte to institute a hearing as to the matters set up in the protest, and report the result thereof to the general land-office at Washington. Respecting the relocation of the mining property, and his son's claim of title, the complainant testifies: "We relocated it as abandoned property in February or March, 1881. I think it was subject to relocation for failure to do assessment work in 1879. Did some work that year, but think not enough. Don't recollect whether I made affidavit to that effect. Mr. Schiffer had an abstract. Don't know whether it showed title in my son; some said it did. I know all about conveying the mine to my son in June, 1873. Told Schiffer I had a right to relocate it. Don't believe I told him the work had not been done for more than one year. I told him the mine was abandoned by my son. Perhaps I told him the necessary work had not been done for at least one year, and for that reason it was abandoned and subject to relocation, and that I would relocate it as the Aztec lode and get a clear title. \* \* \* I did not see my son about revoking the power of attorney he gave me. I did not write to him about it in January, 1882, or at any time. I don't know when the deed signed by myself as attorney in fact for my son was written, but I know I signed something like this in New York city; but I knew nothing about the power of attorney being revoked. \* \* \* That deed was made by Schiffer, and sent to me to sign with and under the knowledge that my son had revoked the power of attorney; and he urged me



to sign it, and I suppose I had the right to do it. This deed was sent me by letter. That is the letter, [Exhibit F3,] dated January 22d, 1882. \* \* \*

Defendant Schiffer testifies: "It was about the middle of January, 1881, when I heard that young Adams had a claim. I didn't mention anything about his claim when I sent the deed to New York to be signed by Dr. Adams for himself, and for his son, as his attorney in fact. I didn't know what trouble he would make; didn't know from the abstract made in 1881 that the son had a title. \* \* \* I don't remember how long I had the abstract referred to before the conversation with Dr. Adams. I wanted to see the title I was buying. I got the abstract two or three days before our agreement. Before the execution of the contract in January, 1881, I told Dr. Adams that the deed to his son and wife, and especially to his wife, were ridiculous. I knew all about the title before I signed the contract with Dr. Adams. He agreed to relocate the property, if he found it necessary. *Question.* Was it the understanding, Mr. Schiffer, that the doctor should purchase and perfect a title, and make a relocation of this property, if it were advisable, under a different name, and that such name should be the 'Aztec Mine and Mill-Site;' that when he got a patent in consequence of that application, and had made a deed to you, that that should be a compliance with this contract? *Answer.* I should consider it such; yes, sir."

*Hugh Butler, T. D. W. Yonley, and Frank Naylor, for plaintiff in error. Markham, Patterson & Thomas, for defendant in error.*

ELBERT, J., (*after stating the facts as above.*) The complainant, Adams, prays for an account, and for a reconveyance of the Aztec mine and Aztec mill-site. We consider first the case made on the pleadings and evidence against the defendant Schiffer. The complainant alleges that he was the owner of the mining property in question; that it was of great value; that the defendant Schiffer knew this, and desired to purchase an interest in it; that the complainant was embarrassed financially, and unable to work the mine advantageously; that the "defendant was possessed of considerable money and property, and claimed to have a considerable acquaintance and influence among moneyed men in the city of New York; that if he could acquire an undivided one-half interest in the property, he would assist in opening and developing the property, and in that manner greatly enhance and increase the value of the remaining half of the property retained by the complainant; that by the aid and influence of the defendant among his moneyed friends and acquaintances in New York, after said property had been opened and developed, he could sell the remaining half interest in said property, or some portion thereof, for a very large sum of money, so that the complainant could, in a short time, realize a fortune in ready money by the sale thereof;" that the plaintiff, believing and relying upon said representations, made with the said Schiffer the contract of sale of January 24, 1881. With respect to this contract of sale there is no allegations of fraudulent representations. The only allegation which we find in the bill is in the fourteenth paragraph, and is one of fraudulent intent, namely, that the defendant "*entered into said contract with the intent to deceive and defraud plaintiff.*" The theory upon which plaintiff seeks to recover is thus more fully stated by his counsel: "The primary purpose is made plain by the after-conduct of the defendant Schiffer. That he has oppressed, coerced, and impoverished plaintiff at every turn throughout the whole transaction after his purchase of one-half interest, cannot be denied; and from this conduct the inference appears to us to be irresistible that the defendant Schiffer made the original purchase of the half interest for the purpose of getting a hold upon the property, and enabling himself to practice the wrongs and oppressions which he has practiced upon the plaintiff. From this, and what Schiffer did in the end, the conclusion cannot be escaped that he made the promise to use his influence with his friends to

sell plaintiff's remaining interest, and to pay plaintiff the \$6,000, with the fraudulent intent not to keep the one, or to perform the other; with the purpose, not to carry out the arrangement, but to make use of the situation, which he would gain through the arrangement, to get the title to the property in the end, in exact accordance with what he has shown by the evidence to have accomplished through coercion, intimidation, and duress." The defendant Schiffer's representations as to his influence in New York, and his ability to sell, were general. He did not undertake to sell at any sum; much less for any definite sum. He engaged to expend a certain sum in developing the mine; this he did. His demand for reimbursement will be hereafter considered. It does not appear that his representations respecting his influence were false, or that he failed to make the promised effort to sell. He did effect a sale of the remaining interest of the complainant at figures which the complainant voluntarily accepted, although the price did not meet his expectations. There is no evidence that Schiffer could have sold the property for a larger sum, or that he did not make due effort to that end. Had his representations, however, been false, and had he failed to effect a sale, it would not have necessarily been a ground for the relief asked. "A misrepresentation goes for nothing, unless it is approximately the immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place." *Kerr, Fraud & M. 74; Improvement Co. v. Cowan*, 5 Colo. 324. While Schiffer's representations as to his influence in making the sale may have been a motive influencing the complainant in making the contract of January the 24th, it cannot be said, in view of the conflicting testimony, that it definitely formed a part of the consideration, or that it was the proximate and immediate cause of the transaction. The distinct allegation of the bill, however, is that in entering into this contract of the 24th of January there was, upon the part of the defendant Schiffer, an intention to defraud. Not an intention to defraud in the transaction of that date, but an intention to defraud thereafter, as explained by counsel, in future dealings with the property. It is claimed by the counsel for the complainant that this intention was pursued and consummated by the sale to Forsch in March, the settlement in respect thereto of the 15th of June, the subsequent sale of all the complainant's remaining interest to Stern on the 17th of November, the settlement of that date, with respect to the money advanced by the defendant Schiffer for working and developing the mine, and the subsequent and final settlement of August 1, 1882. With respect to this proposition, we think it is sufficient to say that the mere intent upon the part of the defendant Schiffer to defraud the complainant in some future transaction could not affect their contract of the 24th of January, which was otherwise unimpeachable. These subsequent transactions which we have mentioned must stand, each upon its own merits. If the complainant was defrauded by any one or all of them, it cannot operate to affect or invalidate a prior, independent contract made, entered into, and executed for a good and valuable consideration. A fraud must relate to facts then existing, or which had previously existed, hence non-performance of a promise made in the course of negotiations is not of itself either a fraud or the evidence of a fraud. *Cooley, Torts*, 474-486. It is true, this rule does not obtain in a class of cases where the promise is the device resorted to to accomplish the fraud, as where one buys property, real or personal, with the existing intention not to pay for it. *Cooley, Torts*, 487; *Dowd v. Tucker*, 41 Conn. 203; *Dow v. Sandborn*, 3 Allen, 182; *Richardson v. Adams*, 10 Yerg. 273; *Gross v. McKee*, 53 Miss. 538. It is difficult to bring the case at bar within this class of cases. The deferred payment of \$2,000 was paid by Schiffer when due. The subsequent wrongful demand to be released from the contingent payment of the \$6,000, like a failure to pay, is not of itself evidence of an

original fraudulent intent. Taken in connection with his entire conduct in his dealings with the plaintiff, it is perhaps cumulative evidence that the defendant was a hard and exacting dealer, but to treat it, even when thus supported, as evidence of an original fraudulent intent sufficient to invalidate the several contracts between the plaintiff and defendant of a year and 18 months before, would be to place the validity of contracts and conveyances upon very uncertain grounds. We are of the opinion, therefore, that the complainant is not entitled, as against the defendant Schiffer, to reconveyance of the one-half interest sold to him. Still less is the complainant entitled to this relief as against the defendants Forsch and Stern. There is no evidence to support the allegation of conspiracy between them and the defendant Schiffer, or to show that they were other than innocent and *bona fide* purchasers.

We now proceed to the consideration of the three several settlements made by the complainant and defendant, of the 15th of June and of the 17th of November, 1881, and of the 1st of August, 1882, with respect to which the complainant demands relief upon the ground that they were made under duress of goods. Contracts made and money paid under duress of goods have been held, the former void and the latter recoverable, in many well-considered cases both in England and America. The decisions are not uniform in their expression of the law, but they all rest upon the proposition that the duress of property was such as to render the contract or payment involuntary. It seems to be well settled that where a party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made or money paid by the owner under such circumstances to emancipate the property is to be regarded as made under compulsion. The case of *Astley v. Reynolds*, 2 Strange, 915, is regarded as the leading English case. There a pawnbroker refused to deliver goods pawned, except upon payment of excessive interest. The owner having paid this to obtain possession of his property, he was allowed to recover back the excess. See, also, *Smith v. Bromley*, 2 Doug. 696. The refusal of common carriers to deliver goods without payment of excessive charges has given rise to numerous cases in which the principle has been applied. *Ashmole v. Wainwright*, 2 Q. B. 837; *Harmony v. Bingham*, 12 N. Y. 99; *Tutt v. Ide*, 3 Blatchf. 249; *Beckwith v. Frisbie*, 32 Vt. 559. The exaction of illegal taxes and tolls constitute another class of cases in which recovery has been allowed upon the same principle. *Briggs v. Lewiston*, 29 Me. 472; *Grim v. School-Dist.*, 57 Pa. St. 433; *Preston v. Boston*, 12 Pick. 14; *Elliott v. Swartwout*, 10 Pet. 138; *Ripley v. Gelston*, 9 Johns. 201; *Chase v. Dwinal*, 7 Me. 134; *Manufacturing Co. v. Amesbury*, 17 Mass. 461. So, too, where the duress has been by means of legal process, money paid to release property so held is recoverable. *Spaids v. Barrett*, 57 Ill. 289; *Craunford v. Cato*, 22 Ga. 594; *Collins v. Westbury*, 2 Bay, 211; *Chandler v. Sanger*, 114 Mass. 364; *Bank v. Watkins*, 21 Mich. 483. Money wrongfully exacted by a corporation as a condition precedent to a transfer of stock was held recoverable in the case of *Bates v. Insurance Co.*, 3 Johns. Cas. 238. Illegal commissions demanded and paid to secure the surrender of bonds were held recoverable in the case of *Scholey v. Mumford*, 60 N. Y. 498. Money paid in order to obtain a transfer of patents wrongfully withheld was held recoverable in the case of *White v. Heylman*, 34 Pa. St. 142. In the case of *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. Rep. 997, the duress consisted in an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due him from such other debtors. Mr. Greenleaf states the general doctrine thus: "Under this count [*in debitatus assumpsit*] the plaintiff may recover back money found to have been obtained from him by duress, extortion, imposition, or taking an undue advantage of his situation, or otherwise involuntarily and wrongfully paid, as by demand of illegal fees, or

claims, tolls, duties, taxes, usury, and the like, where goods or the person were detained until the money has been paid." 2 Greenl. Ev. § 121. Mr. Cooley says: "Duress of goods consists in seizing by force, or withholding from the party entitled to it, the possession of personal property, and extorting something as the condition for its release, or in demanding and taking personal property under color of legal authority, which, in fact, is either void, or for some other reason does not justify the demand." Cooley, Torts, 507. What shall constitute duress of goods, as a question of fact, is often difficult to determine, and in its determination we are constantly confronted with the maxim, *volenti non fit injuria*,—"an injury cannot be done to a willing person." Or, as more pointedly put, "if a person consent to a wrong, he cannot complain."

Counsel for complainant insist upon the application of the principle of duress of goods to the three several and separate transactions between the complainant and defendant, which we have mentioned under their respective dates. As to the settlement of June 15th, respecting the Forsch sale, the principle involved has no applicability. Schiffer, as the agent of Forsch, charging Adams with certain false representations, refused to pay him the contract price for the interest sold by Adams to Forsch, whether justly or not we need not inquire. Adams was entirely free to accept or reject the smaller sum offered by Schiffer by way of compromise. He says: "I wanted the money, and he would not pay more, and I took it rather than lose the sale." "Refusal on demand to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress, if the debtor has done nothing unlawful to cause the financial embarrassment which compelled him to submit to the extortion." *Hackley v. Headley*, 45 Mich. 576, 8 N. W. Rep. 511. The evidence discloses no ground for saying that Adams, at the time, was financially embarrassed in any special or extraordinary manner, or, if he was, that Schiffer was in any way the cause of his financial embarrassment.

Nor can the settlement of the 17th of November be regarded as made under duress of goods. It is true that Schiffer claimed that Adams should reimburse him, or secure to him what he claimed as Adams' share of the money expended in the development of the mine, and this doubtless with a view of inducing Adams to accept the \$15,500 offered by Stern for Adams' remaining interest in the mine. Schiffer was doubtless pushing him, but it was Adams' duty to resist, if the demand made by Schiffer was unjust. He was entirely free to refuse, either to make the sale to Stern, or to secure Schiffer's claim upon the mine. Schiffer had no control or possession of Adams' property. The claim for reimbursement was made, according to Adams' testimony, pending negotiations for the sale to Stern, and with a view, as he says, of coercing a sale. Upon Adams refusing to make the sale to Stern for the sum offered, he says: "We figured up this thing that I owed him upon the expenses for work." Adams says he offered him security on the ores to be taken out of the mine, but Schiffer refused, and wanted security on Adams' remaining interest in the mine, in case he refused to sell to Stern. Rather than thus place himself in Schiffer's power, he says he sold for \$15,500. It is true that Adams, in his testimony, says, "When he [Schiffer] came to pay me, he said, 'I am going to take out what you owe me.' The deed was signed, and I could not help it." He does not say, however, that the deed had passed from his control or possession to that of Schiffer, or that he demanded its return from Schiffer, or that Schiffer refused to return it. Moreover, even on this state of facts, did they exist, the question would still remain as to the lawfulness or the unlawfulness of Schiffer's demand. But the gist of Adams' testimony is to the effect that he made the sale with the full understanding that Schiffer would demand reimbursement out of the proceeds of the sale of an amount "figured up" and ascertained before the sale. That he yielded to

the pressure brought to bear by Schiffer because he needed the money, is no ground for holding either the sale or the settlement void. Sales and compromises and contracts under stress of pecuniary needs are of daily occurrence, and if such stress is to affect their validity, "no one," in the language of Justice COOLEY, "could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need." *Hackley v. Headley*, 45 Mich. 577, 8 N. W. Rep. 511.

The evidence touching the settlement of the 1st of August following, presents a much closer question. In the month of April preceding, Adams had been notified by Schiffer that his checks against his deposit at the Rio Grande County Bank would not thereafter be honored, until the matter of his son's claim of title to the mining property was settled. The bank appears to have been under the control of the defendant and his brother, Abraham Schiffer, under the firm name of H. Schiffer & Bro. Adams had, at the time, about \$8,000 on deposit at the bank, subject to his check. After receiving this notice from defendant, upon application by Adams to the bank for his money, Abraham Schiffer told him he didn't dare to let him have it without the consent of his brother. The refusal to let Adams draw on his money at the bank was peremptory and absolute, except for "enough to live on." Thus the matter stood until the settlement of the 1st of August. In the mean time Adams had addressed himself to the matter of his son's claim of title to the mine, and had obtained a deed from his son to Schiffer, the consideration being \$10,000, which was paid by the defendant. He had also obtained a deed from the administrator of the estate of his deceased wife, at Schiffer's request. With respect to this claim of title of the son of Adams, there does not appear to be any foundation for the charge that father and son were acting in concert, for the purpose of compelling defendant Schiffer to pay a further sum of money for the mine. The son seems to have been undutiful, and beyond the control or influence of the father. Some time prior to 1874 the complainant had given the son what is called a bill of sale of the mine, and had taken back a power of attorney to himself, dated February 19, 1874, and recorded May 6, 1874. This power of attorney was afterwards revoked by the son, at what date the record does not disclose. The bill of sale to the son was without consideration, and made for the purpose of putting the property beyond the reach of certain divorce proceedings instituted by the wife of Adams, but afterwards discontinued. There is nothing to show that it was a conveyance, either in form or effect. Schiffer had obtained an abstract of title from the county clerk's office prior to his purchase from Adams, in January, 1881, and had full knowledge of its condition at the time of his purchase. His contract with Adams of the 24th of January, for the one-half interest, calls for a good and sufficient deed of conveyance, "passing to the said Schiffer a good and perfect title to the said above-described property." On the 15th of June following, after Adams had made his relocation and entry of the mine and mill-site, under the name of the "Aztec," Adams, in pursuance of this contract, conveyed to Schiffer the one-half interest by a deed of quitclaim, without covenants. Schiffer must be taken to have accepted this deed as a full compliance with and discharge of the contract of January 24th. Forsch's contract with Adams, of the 21st of March, for one-sixteenth interest in the mining property called for a "good warranty deed as soon as a duplicate receipt for patent is issued from the United States land-office." On the 15th of June, Adams, in pursuance of his contract, conveyed to Forsch this one-sixteenth interest by deed of quitclaim, without covenants, and delivered it to Schiffer as Forsch's agent. This also must be taken as having been accepted in full discharge of his agreement of the 21st of March. The conveyance by Adams to Stern, under the date of November 17th, is by ordinary deed of quitclaim, but with the covenant added: "And the said party of the first part, for the consideration above stated, does hereby covenant and agree with the said party of

the second part that he has full right and power to sell and convey the said premises, and that said premises are now free and clear from all incumbrances, sale, or mortgage made or suffered by the said party of the first part." These covenants were broken at the time of the conveyance, if broken at all. Will. Real Est. 413. The covenant of right to convey amounts to a covenant of seizin; they are synonymous. The principles and practice applicable to the one apply to the other. 3 Washb. Real Prop. 448; Will. Real Est. 415; *Rickert v. Snyder*, 9 Wend. 421. There was no breach of this covenant, as, at the time of the conveyance, Adams was in possession of the property conveyed, and had a right to convey, within the meaning of the covenant. 3 Washb. Real Prop. 449. Nor can we say that there was breach of the covenant against incumbrance and sale. An existing, outstanding, paramount title is held to constitute a breach of the covenant against incumbrances. 3 Washb. Real Prop. 461; *Cornell v. Jackson*, 3 Cush. 506. But the claim of title made by R. O. Adams does not appear to have been of any such substantial character. What is called a bill of sale to him from his father is not set forth in the record. So far as we can see, his claim was without any foundation in law. He does not appear to have ever been in possession of the mining property, nor to have taken any of the steps necessary under the law to perfect or preserve title. What little evidence we have on the subject goes to show that the property was subject to relocation by the complainant, and that the title he gave was good. Afterwards, Adams, on his own behalf, and as attorney in fact for his son, R. O. Adams, executed and delivered to Schiffer a quitclaim deed for the entire property. This deed is dated November 17, 1881, but is acknowledged February 14, 1882, and was made in compliance with a request of Schiffer, contained in his letter of January 22, 1882. He writes: "\* \* \* I had abstracts sent east, but since I am here a party wishes also a quitclaim deed signed by you, as attorney for R. O. Adams, as it cleans up all interest or pretended interest in the former location. I therefore inclose you quitclaim deed for you to sign. There is no value attached; only matter of form. \* \* ." This deed likewise is without covenants, and Adams testifies that Schiffer at the time knew that R. O. Adams had theretofore revoked his power of attorney to his father. Schiffer does not contradict this statement.

In view of the facts, we do not see that Schiffer had any legal ground for his claim that Adams was bound to protect him and his associates, Forsch and Stern, against the claim of title made by the younger Adams. But whatever the rights of Schiffer under the several contracts and conveyances, he must be held to have waived them, if they existed. After much dispute in respect to the matter, Schiffer distinctly announced to Adams that he himself was willing to pay \$10,000 for a quitclaim deed from his son. It was upon this reiterated proposition that Adams addressed himself to the work of securing his son's deed. He says in his testimony: "Mr. Schiffer said, 'If you accomplish a settlement, and he [the son] will give me a quitclaim deed, I will give him \$10,000.' I said, 'I don't know anything more about that boy than you do. He has been nothing to me for four years; but I will do what I can.' \* \* \* After he said he would help, I went to work with a determination to accomplish it. I never admitted the title of my son to Mr. Schiffer. I went to work negotiating with my son by letter and telegraph, and at last he agreed to relinquish all claims to Mr. Schiffer by giving a quitclaim deed for \$10,000." There can be no doubt upon this point, accepting the testimony of the defendant Schiffer himself. In the postscript to his letter under date of June 16, 1882, he writes: "You certainly can't expect me to pay \$10,000 without seeing the deeds and getting everything satisfactorily arranged, after agreeing to pay this sum without owing a cent for it; but I will not fail upon my word, and will pay for deeds satisfactory all around, so there will be no more hereafter. I want you plainly to understand, if I agree

to do anything I never fail, except by accident or death. \* \* \* "Question. What do you mean when you state in your letter—I have forgotten the date of it—that you would pay \$10,000? Did you mean, when you said that, that Dr. Adams was to pay any part of that \$10,000? Answer. I agreed to pay \$10,000. Q. Did you tell Dr. Adams at that time that he was to pay his proportion of that \$10,000? A. I did not say so at that time. \* \* \* When I made the \$10,000 proposition to Dr. Adams, I authorized him to make the proposition to his son, and I said in case he brought it about I would pay \$10,000. Q. When you made that proposition did you tell him in any way, shape, or manner that he would be required to pay any part of that \$10,000? A. I didn't. Q. Did you not give him to understand that you would pay that \$10,000 yourself for the sake of having the matter settled? A. Yes, I told him I would pay it to have the matter settled." Again he says: "I told Mr. Adams then, in order to have this thing settled, the best I would do, and all I would do, was, I would give him \$10,000, although I don't know your son, and I consider it your business to defend it." After having obtained this deed from his son, and also a deed from the administrator of his deceased wife, Adams went to the bank of defendant on the 1st day of August, 1882, for the purpose of settlement. Whether the defendant snatched the administrator's deed from the hand of the complainant or not is immaterial; he admits that he refused to return it to Adams, and took it and put it on record. He then, for the first time, tells Adams that he was to reimburse him the \$10,000 paid to the son. He says: "I had it recorded, and then I went back to the bank and found Mr. Adams there, and Mr. Keyser [cashier] was there also. I asked Mr. Keyser how much was due Mr. Adams. Mr. Keyser looked up the books, and found between sixty-three and sixty-four hundred dollars, —\$6,437.34. I told Mr. Adams I had an offset; 'I have an offset against you of \$10,000 that I paid your son, which I had no business in the world to pay. It was for you to settle; it was a suit brought by your son against you, but you did not do anything towards it. I had to bear it, and I want you to stand it.' \* \* \* He wouldn't submit to it. I says, 'I will tell you what I will do, and that is all I will do; if you stand \$2,500 out of this ten thousand, and release me from the payment of the six thousand I was to pay you according to our contract at any time I should sell the property for \$40,000, or my half for \$20,000, we will settle right here.' I says, 'If you ain't satisfied with that you can sue, but that is the best I will do.' He asked me to put it down on a piece of paper what I was willing to pay. I says, 'All right, it is in black and white; we have some \$6,400 due you; you take off \$2,500, which will leave a balance of thirty-nine hundred and some odd dollars, and you discharge me from paying that six thousand.' It was all on a piece of paper, and I think he took that paper. He says, 'Is that the best you will do?' and I said, 'Yes.' He said, 'I will see you later,' and left the bank. \* \* \* Some time about two o'clock Mr. Adams came back to the office and says, 'Now, Herman, let us settle this matter; I have had enough of this trouble, I want my money.' I told him that his money was ready. He looked at the paper he had and said, 'Now, can't you make this an even sum of \$4,000.' I says, 'No, I can't; but if you want to accept this you can do so.' He studied awhile, and said, 'I suppose I am satisfied with it.' \* \* \* I went out and called Mr. Wilson, and told him that we had settled. \* \* \* Mr. Wilson went out, and in an hour or so came back and brought the papers to the office, and read us the settlement papers. \* \* \* Mr. Wilson read both of them to Adams. Adams made no objection; he signed them. I gave him a receipt in full, and he accepted it. That finished everything, except some small accounts, which were not settled in that."

The refusal of Schiffer to allow Adams to draw on his money in bank, his agreement to pay \$10,000 for the son's deed, his subsequent refusal to pay it after getting the deed in his possession, and the demand that Adams should

pay it, was a clear attempt to perpetrate an unmitigated fraud. Adams did not admit any title in his son, or, if it existed, that he was called upon to defend it; nor is it to be presumed that he ever would have submitted to the final demand made by Schiffer but for the control which Schiffer had over his money on deposit with the firm of H. Schiffer & Brother. Money deposited with a banker by a customer in the ordinary way is money lent to the bank, with the superadded obligation that it is to be paid when demanded by check. Ball, Banks, 83. The money deposited by Adams, and withheld from him, was due him, not from the defendant Herman Schiffer, but from the banking firm of H. Schiffer & Brother. The defendant's control and influence in the business matters of the firm were such as to control the firm in its action in this matter. It was, therefore, not a mere withholding of a debt due from himself, but an unlawful interference between the plaintiff and other debtors, by means of which he stopped the payment to plaintiff of sums due him; and presents a case analogous to that of *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. Rep. 997, reviewed by Mr. Justice COOLEY in the case of *Hackley v. Headley*, 45 Mich. 577, 8 N. W. Rep. 511. We are of the opinion that the settlement of the 1st of August was clearly made under duress of property, and must be held null and void.

The court erred in dismissing the bill. The views expressed preclude a recovery in respect to the matters embraced in the settlements of the 15th of June and the 17th of November. Upon some, if not all, of the remaining issues made by the pleadings, we are of the opinion that both complainant and defendant should have an opportunity to introduce further evidence, if they should be so advised. We do not, therefore, direct a decree, but remand the cause for further proceedings. The decree of the court below is reversed.

(7 Mont. 373)

#### WHITESIDE v. LOGAN.

(*Supreme Court of Montana. January 17, 1888.*)

##### 1. JUDGMENT—BY DEFAULT—SETTING ASIDE—DISCRETION OF COURT.

Under Comp. St. Mont. § 116, providing that a party aggrieved, desiring to set aside a judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, may make application within a reasonable time, not exceeding five months, after the close of the term at which the judgment was rendered, on showing cause satisfactory to the court that he was unable to apply during the term, the question as to what is satisfactory cause for entertaining the application is purely within the discretion of the trial court.

##### 2. SAME—APPLICATION IN VACATION—MISUNDERSTANDING BETWEEN COUNSEL.

Where defendant applied in vacation for relief from a judgment against him, and showed by proper affidavits that he had a meritorious defense, and had employed counsel to represent him, but, through a misunderstanding between counsel, a personal judgment was taken against him by default, of which he had no knowledge until after the adjournment of the court for the term, *held*, that the order of the trial court, in vacating the judgment, would not be disturbed on appeal.

Appeal from district court, Custer county; before Justice BOCK.

Application by Thomas H. Logan to set aside a judgment rendered against him in favor of Fred Whiteside. From the order vacating the judgment Whiteside appeals.

*Burleigh & Middleton*, for respondent. *O'Connor & Milburn*, for appellant.

MCLEARY, J. In this case a judgment by default was rendered in the district court on the 14th day of May, 1887, against Isaac Silverman and Thomas H. Logan for a certain sum of money and the foreclosure of a mechanic's lien on a certain building in Miles City. Afterwards, on motion of the defendant Logan, the default was opened, and the judgment suspended and vacated, and Logan allowed to file an answer. From this last order this appeal was taken by the plaintiff, Whiteside. The appellant contends—*First*, that the motion



to open the default and vacate the judgment was not made in time; and, *second*, that the motion papers filed in the case show no ground for relief. In order to a proper understanding of the case it may be well to make a brief review, in chronological order, of the proceedings had in the court below: The defendant Logan was summoned on the 9th day of March, 1887. A demurrer was filed in his behalf on the 17th day of March, which was afterwards overruled, and time for answering fixed on the 30th of April, which was afterwards extended to the 3d, 5th, and 7th days of May, respectively, on which latter day default was taken. On the 14th day of May judgment was rendered against defendants Silverman and Logan for \$717, interest and costs, and a decree entered foreclosing the lien claimed by the plaintiff on the property described in the complaint. On the 31st day of May an order of sale was issued, upon which the property was sold on the 16th of July, 1887, and the proceeds applied on said judgment, leaving a balance due thereon of \$442.60. On the 23d of August execution was ordered and issued against Thomas H. Logan for the unpaid balance. On the 12th of September notice was given of a motion to vacate the judgment as to the defendant Logan, which motion was set for hearing on the 17th day of October, and the hearing afterwards continued to the 7th day of November, when the default was opened and the judgment suspended and vacated. Logan's affidavit in support of the motion was filed on the 7th of September, together with an answer duly verified, setting forth a meritorious defense. On the 29th of October affidavits were filed by Burleigh, Strevell, and O'Connor, who had been counsel in the case for the plaintiff and defendant respectively. Thomas H. Logan deposes "that he is one of the defendants above named in said action; that on or about the 10th day of March, 1887, the summons in said cause was duly served upon him in the town of Miles City; that thereafter, and on the same day, deponent placed the copy of summons so served upon him in the hands of Jason W. Strevell, an attorney and counselor at law in the said town of Miles City, and stated to the said Strevell the facts constituting his defense, and was then and there advised by the said Strevell that he had a good and substantial defense in said cause upon the merits, and then and there instructed the said Strevell, as such attorney, to attend to the matter until the return of Andrew F. Burleigh, who was defendant's regular attorney, and at that time absent from Miles City; that thereafter, and in a few days, said Strevell informed deponent that he had turned the papers in the cause over to said Andrew F. Burleigh, as such attorney, and deponent supposed that his interests and defense to said cause of action would be attended to, and paid no more attention to the matter, as he had been informed by his said attorneys that no civil actions would be tried at the April, A. D. 1887, term of said court; that the defendant knew no more about said cause until after judgment had been taken by default in said cause, and execution thereon issued and levied upon the property of this deponent; that defendant was greatly surprised upon hearing that judgment had been entered against him by default, and without the cause being tried or defended, for the reason that he had been informed by his said attorneys that he had a good defense upon the merits to said action, and desired an opportunity to offer his proofs in said action touching the matter of his said defense; that the deponent makes this affidavit for the purpose of having the default in said cause opened and the judgment vacated and set aside; and that he may have an opportunity to put in an answer to said complaint, a copy of which answer is hereto attached and made a part hereof, and defend said cause upon its merits; and that a stay of all proceedings be granted until said cause is finally tried and disposed of." Andrew F. Burleigh deposes as follows: "That he was one of the attorneys of the defendant Logan in the above-entitled action at the spring term, 1887, of said court; that in said action plaintiff was seeking to foreclose a lien on certain property in the complaint described; that the defendant Logan was defending on the ground that he had

no interest in the said property, notwithstanding a half interest therein had been deeded to him, that having been done without his consent, and the said deed having been recorded without ever being delivered to him; that plaintiff was pushing for a trial on a judgment at so late a day in the term that it was apparent that nothing could be done in said cause at said term if said defendant resisted; that affiant stated substantially these facts to A. H. O'Connor, Esq., one of the attorneys of the plaintiff, whereupon said O'Connor told affiant that all he wanted was a judgment against the property and Silverman, and that they did not care for a judgment against Logan personally. Affiant thereupon agreed to let said O'Connor take judgment without further defense on that understanding. And thereupon, with such understanding, affiant believes said judgment was taken. Affiant has heard said Logan state his defense to said action, and advised him that it was a good and substantial defense thereto; and that but for the understanding had as aforesaid affiant knows of no reason why the same would not have been successfully maintained." Jason W. Strevell deposes as follows: "At some time about the commencement of the action one of the defendants, T. H. Logan, came into my office with the summons in the action, which I think had just been served upon him, saying he desired me to look after the case. I procured the papers, as I now remember, but before I had done anything in the matter, or before anything was required to be done, I met Major Logan again, when he stated to me that Mr. Burleigh (Andrew) was attending to his business, and would attend to this case, and that I need have nothing further to do with the matter. The papers were taken from my office to the office of Mr. Burleigh, but I do not remember by whom. It was Major Logan's directions that he should have them. This ended my connection with the matter, and no charge was made to Major Logan for services, as he removed the case from my hands before anything had been done. I probably did say to Major Logan that, upon his statement of the facts, he had a defense; but if the major, on his affidavit, intends to convey the impression that I told him no civil cases would be tried that term, I think he is mistaken. I have no recollection of making any such statement to him." Arthur H. O'Connor deposes as follows: "That, from the commencement of the above-entitled action until the present time, he has been associated with George R. Milburn as an attorney for the plaintiff in said action; that he has read the certified copy of entries made on the judge's docket, which copy is filed herewith; that he was personally present when each of the actions noted by said entries was had in the above-entitled case; that upon April 23, 1887, when affiant asked for a hearing of the demurrer in said case, the hearing of the same having been set for that day, W. A. Burleigh, Esq., appearing for the defense, stated to the court that, although he himself was an attorney in the case, he had expected Judge Strevell, who was also an attorney for the defense, to attend to the demurrer in said case; that upon the next day, April 24th, Judge Strevell, when the matter was called up by affiant, stated to the court that he had not examined the complaint, and did not know whether or not there was any ground for demurrer; that upon the 25th day of April, the next day, the said Strevell announced to the court that he found no cause for demurrer, whereupon, with the consent of the affiant, one of the attorneys for plaintiff, and at the request of one or more of the attorneys for the defense, the defendants were given until April 30th to file their answer; that each and every extension of time granted to the defendants, as noted by the entries of the judge, shown in the certified copy aforesaid, were at the request of the defendants, without any good or sufficient cause therefor having been shown, but by consent of affiant; that, when time for defendants to answer as last extended, viz., until May 7, 1887, had expired, it being apparent to affiant that all previous delays asked for and obtained by defendants were for the purpose of preventing a trial of said cause at that same term of court, he refused to consent to further delay

in the matter, and caused the default of the defendants to be entered; that one week thereafter, to-wit, on the 14th day of May, A. D. 1887, plaintiff made proof to the court of the matter set forth in the complaint, and in the presence of at least three of the attorneys for defendants, to-wit, W. A. Burleigh, Jason W. Strevell, and Andrew F. Burleigh, affiant presented to the judge for signature a final judgment and decree in said case, which was then and there signed by the judge in the presence of said attorneys, they knowing of the same, and the same is now on file in said case; that Andrew F. Burleigh, one of the attorneys for Thos. H. Logan, the defendant, who, in this proceeding, moves to set aside the said judgment, was in attendance, according to the best of affiant's recollection, information, and belief, during the entire term of said court in which the above-mentioned proceedings were had, and, as affiant verily believes, was personally cognizant of all that had transpired in said case, and had, prior to the entry of judgment therein, spoken to affiant of the case several times; that when affiant had prepared the said judgment and decree, and before the same was presented to the judge for his signature, the said Andrew F. Burleigh asked affiant if a judgment against the defendant Thomas H. Logan was included in said judgment; and that affiant then and there informed him that it did include a judgment against the said Logan as well as against the said defendant Silverman." Defendant Logan's answer specifically denies all the allegations in the plaintiff's complaint, and alleges as follows: "That the said plaintiff did erect a store building for the said defendant Isaac Silverman and one Fannie Silverman, his wife, but denies that he ever had any interest in or to said building, or that he was in any way, either directly or indirectly, connected with said Isaac Silverman as a partner or otherwise, or ever authorized his name to be used in such firm; and denies that he is indebted to said plaintiff in any sum or amount whatever." The court, in acting upon this motion, proceeded under section 116 of the first division of the Compiled Statutes of Montana, which reads as follows: "The court may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court or judge at chambers, in vacation, may grant the relief, upon application made within a reasonable time not exceeding five months after the adjournment of the term." Comp. St. Mont. § 116, p. 88.

We will first consider whether or not this motion was made in time. It will be observed that the statute provides that such a motion may be made in vacation, when, for any cause satisfactory to the court or judge at chambers, the party aggrieved has been unable to apply for the relief sought, during the term at which said judgment was taken. The defendant Logan, in his affidavit, alleges that he was not cognizant of the judgment rendered against him until after the term at which it was entered had expired. This, undoubtedly, was satisfactory to the judge, and that is all the statute requires. It was a matter entirely within his discretion to hear the motion within any reasonable time not exceeding five months after the adjournment of the term. Then we should next inquire whether or not the motion papers filed in the case show any ground for relief. By inspection of those portions of the record quoted it will be seen that the defendant Logan undoubtedly has a meritorious defense, which he sets up in his answer, duly verified. It will also be observed that, immediately upon being summoned, he employed able counsel to represent him in the case: and that a demurrer was filed in his behalf. From this point the affidavits on file are more or less contradictory. It appears that Mr. Burleigh evidently understood that no personal judgment was to be rendered

against Logan, and for that reason filed no answer, and made no defense. It may be, as appears from the affidavit, that Mr. O'Connor understood the matter differently; but it was for the trial judge to reconcile these contradictions, and to exercise his discretion in the matter. He has acted, and the court is of the opinion that he has acted, wisely, for the reasons stated by him in the order, "that the defendant's default is satisfactorily excused, and that manifest injustice has been done to the defendant Logan."

We are referred by appellant's counsel, in order to sustain his propositions, to several cases in the Montana Reports, which we propose briefly to review. The first is the case of *Vantilburg v. Black*, 3 Mont. 469. It is held that "after the adjournment of a term the court loses control over the judgments rendered at such term, unless its jurisdiction is saved by some proceedings instituted within the time allowed by law;" referring to several cases from California and Nevada. Among such proceedings are mentioned an appeal within one year after the entry of the judgment, which Mrs. Vantilburg did not take. Another proceeding which might have been mentioned would have been a motion to vacate the judgment made within a reasonable time, not to exceed five months after adjournment, which was done in the case at bar. Instead of appealing or moving to vacate the judgment, Mrs. Vantilburg brought a suit to set aside the judgment and enjoin the execution thereof, on the ground that no summons or other process in the original case was ever served upon her, and that she never appeared in court, or authorized any attorney to act on her behalf, and that she had no notice or knowledge of this judgment until about five months after its entry. The plaintiff denied these averments, and stated affirmatively facts to the contrary. The court struck these denials and allegations from the answer, and judgment was rendered in favor of Mrs. Vantilburg on the pleadings, and the personal judgment against her annulled. The case was reversed on the ground that the court erred in striking out the answer of the defendant. So we find that this case is not an authority against the decision of the court below. In the case of *Lowell v. Ames*, 6 Mont. 188, 9 Pac. Rep. 826, the counsel for the defendant, residing at Virginia City, wrote a letter to the counsel for the plaintiff, residing at Dillon, asking him to agree to a continuance of the case; but, before he received an answer thereto, he left Virginia City, and went to the Yellowstone Valley, and his whereabouts were unknown to plaintiff's counsel, who, for that reason, did not answer his letter, but tried the case, and proceeded to judgment against the defendant. The learned chief justice, delivering the opinion of the supreme court, says: "It does not appear where the defendants themselves were during the time of and prior to the said term of court. Parties having cases in court are bound to be present to attend to them, or present some valid excuse, such as a written agreement or stipulation, signed by the parties, for a continuance, or a physician's certificate of sickness accounting for their absence. The defendants knew that they had an important case in court, and they knew that it had not been continued by the consent of the plaintiffs. Under such a state of facts there does not seem to be any excuse for their absence from court, or any room for surprise that a judgment was rendered against them. We see no abuse of the legal discretion of the court in overruling the motion to set aside and vacate the judgment herein." 6 Mont. 190, 9 Pac. Rep. 826. This case is not parallel to the one at bar. The defendants knew that they were not represented by counsel, and still made no effort to be present at court. Logan employed counsel to represent him, who were present and appeared to have looked after his interests with ordinary zeal and vigilance, and, taking his affidavit and answer to be true, he was not to blame for the result. The case of *Donnelly v. Clark*, 6 Mont. 136, 9 Pac. Rep. 887, is also quoted. That case holds that the judgment against the defendant will not be set aside on the ground of surprise, unless the facts constituting the defense to the action are stated in a moving affidavit. In the case at bar, Logan files,

together with his affidavit, an answer under oath, which sets out a meritorious defense, and one sufficient to defeat the plaintiff's case if it should be supported by the proof. For this reason it does not fall within the purview of the authority quoted. *Donnelly v. Clark, supra.* Appellant also refers to the cases of *Elliott v. Shaw*, 16 Cal. 377; *Mulholland v. Heyneman*, 19 Cal. 605; *Haight v. Green*, Id. 113; and *Seale v. McLaughlin*, 28 Cal. 668,—in all of which cases the trial court below refused to vacate the judgment which had previously been entered, and the appellate court sustained that action on the ground that the matter was within the discretion of the court below, which discretion did not appear to have been abused.

It is unnecessary to pursue this subject further, believing the whole matter to have been placed by the statute fully within the discretion of the trial court, and that that discretion has been exercised prudently and in furtherance of justice. The judgment is affirmed.

McCONNELL, C. J., and GALBRAITH, J., concur.

(2 Idaho [Hasb.] 432)

TERRITORY v. GUTHRIE.

(*Supreme Court of Idaho. February 27, 1888.*)

1. CRIMINAL LAW—PRINCIPAL AND ACCESSORY.

By our statute, all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, are treated as principals, and should be prosecuted and punished as such; yet, if one who is in fact an accessory before the fact is indicted as such, this is not a defect of which the accused will be heard to complain.

2. SAME—INDICTMENT—JOINDER OF COUNTS.

Under our practice, the indictment must charge but one offense, but the same offense may be set forth in different forms, and under different counts. *Held*, that the indictment charging one defendant as principal, and the other as accessory before the fact, charges but one offense.

3. SAME—NEW TRIAL—ABSENCE OF WITNESSES—ADMITTING AFFIDAVIT AS TO TESTIMONY.

Where, in a criminal action, the defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that the witness, if present, would testify to the facts as stated in the affidavit, and that such evidence, if proper, be considered as actually given, the affidavit thereby becomes evidence, but not conclusive of its contents; and it is not error for the court, after such admission, to deny the continuance.

4. SAME—UNCERTAINTY OF SENTENCE—REVIEW ON APPEAL.

When the indictment is good, and no error appearing in the trial, but the sentence is void for uncertainty, the appellate court may remand the case to the court below, with direction to enter a proper judgment upon the verdict.

(*Syllabus by the Court.*)

Appeal from district court, Nez Perces county; before Justice BUCK.

Indictment for assault with intent to commit murder. Terrence B. Guthrie was convicted, and appeals.

*Albert Hogan, Frank Ganahl, and James H. Hawley*, for appellant. *Richard Z. Johnson, Atty. Gen.*, for appellee.

BRODERICK, J. At the October, 1887, term of the district court for Shoshone county, Mathew Guthrie and Terrence B. Guthrie were jointly indicted for an assault upon Thomas F. Handly, with intent to commit murder. Separate motions were interposed to set aside the indictment on account of some alleged irregularity in summoning and impaneling the grand jury. These motions were overruled, and the defendants pleaded not guilty. Separate trials were ordered. The defendants then applied for a change of venue, which motion was granted, and the cases were transferred to Nez Perces county for trial. At the December, 1887, term for Nez Perces county, a trial was had, and Terrence B. Guthrie was found guilty "of an assault with a deadly weapon likely to produce great bodily injury." Motions were made

for a new trial, and for an arrest of judgment, and were by the court overruled, and the following judgment was rendered: "It is therefore considered, and the judgment of the court is declared to be, that you, Terrence B. Guthrie, pay a fine of one thousand dollars, and that you be taken into custody by the sheriff of Nez Perces county, and taken from this court to the county jail of Nez Perces county, Idaho territory, and thence, unless said fine be sooner paid, within thirty days, to the territorial prison in Ada county, territory of Idaho; and that you be confined in said prison, at hard labor, until said fine be paid, not exceeding two years from the date of this sentence, and upon the payment of said fine you be released from said custody and confinement." From this judgment, and the order denying a new trial, the defendant Terrence B. Guthrie appealed to this court. The record is voluminous, and counsel for appellant have specified 30 alleged errors in the transcript. From an examination of the record, we are satisfied many of these assignments are not of sufficient interest to justify any further consideration of them.

It is claimed, first, that the indictment is not sufficient to sustain a conviction against the appellant, that the facts stated therein do not constitute a public offense, and that the motion in arrest of judgment should have been sustained. The defendants were indicted jointly; Mathew being charged with an assault with a pistol, etc., with intent to murder, and Terrence B., the appellant, being charged as accessory. Section 7697, Rev. St., abolishes all distinction between an accessory before the fact and a principal, and provides that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." The contention is that, by reason of this statute, one cannot be indicted as an accessory. We cannot agree with this view. The last clause of the statute quoted says: "No other facts *need* be alleged in any indictment against such an accessory than are required in an indictment against his principal." It is true the statute makes an accessory before the fact a principal, and it is wholly unnecessary to charge the accused in any other form than as principal; but, if the grand jury does charge one who is in fact an accessory before the fact as such, the effect is simply to inform him more clearly of what he must defend against, and therefore it is not a defect of which he can be heard to complain. The supreme court must give judgment without regard to technical errors or defects which do not affect substantial rights. Section 8070, Rev. St. We do not mean to assert that this is the better course, but only that the defendant was not prejudiced by this form of charging the offense. Indeed, we think, when the statute clearly provides what shall be a sufficient pleading, that it is always better that the statute should be closely followed.

It was said, on the argument, that the indictment charges two offenses. We do not think it is open to this objection. It is true, the statute provides that the indictment must charge but one offense, but the same offense may be set forth in different forms, and under different counts. Section 7681, Rev. St. The rule established by this statute is not violated by setting forth the same offense in different forms; and this is all that is herein done.

The case was set for trial on the 15th of December, and, when called, the defendants, by their counsel, moved for a postponement of the trial, on the ground of absent witnesses, and supported the motion by their joint affidavit. The motion was overruled, and an exception taken. The record shows, however, that an attachment for the absent witnesses was at once issued, and that the appellant was not put upon his trial until December 21st. The motion for postponement was then renewed, upon the affidavit theretofore presented, but no further showing was made or offered. The prosecution admitted that one of the absent witnesses would, if present, testify to the matters and facts

as stated in the affidavit, and thereupon the court overruled the motion. It is conceded that the testimony of this witness was material to the defense. An application for a continuance is addressed to the sound judicial discretion of the court, and appellate courts have uniformly refused to disturb a ruling on such questions, unless it appears that there was an abuse of discretion. In this case, after looking into the whole record, we are satisfied there was not a sufficient showing of diligence on the part of the defendant, and hence there was no abuse of discretion in overruling his motion. *People v. Walter*, 1 Idaho, 386. But it is urged, on behalf of appellant, that, pending an application for a continuance, the admission by the prosecution in a criminal case that an absent witness would testify to certain facts if he were present, is an admission that the facts set forth in the affidavit used in support of the motion are true; and we are referred to *People v. Diaz*, 6 Cal. 249, as supporting this rule. Our statute makes the rule of evidence in civil actions applicable to criminal actions, except as otherwise provided in the Code. Section 7864, Rev. St. Section 4372, Rev. St., establishes the rule for a continuance upon the ground of the absence of evidence, and, among other things, says: "The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given, on the trial, or offered and overruled as improper, the trial must not be postponed." We think it would be a strained construction of this statute to hold that when, under it, a party makes the admission, to avoid the expense and delay incident to a continuance, he thereby admits the absolute truth of the evidence set out in the affidavit. Such a construction was certainly not in the contemplation of the legislature, nor do we think it supported by any well-considered authority. We think the correct rule is that, when the admission is made, the affidavit becomes evidence, but not conclusive of its contents. *Whart. Crim. Pl.* § 645; *State v. Mooney*, 10 Iowa, 506; *King v. Com.*, 3 S. W. Rep. 430; *State v. Jewell*, Id. 77, 79; *Boggs v. Merced Co.*, 14 Cal. 358.

It is contended that the court erred in giving to the jury, of its own motion, certain instructions, and also in refusing certain others asked by the defendant. The record shows a number of instructions refused, but the charge given was full and comprehensive, and was warranted by the evidence in the case. We have failed to find anything in the charge that was prejudicial to the substantial rights of the defendant, or that will warrant a reversal of the judgment. Objection is here taken to some remarks of the judge addressed to counsel while refusing instructions presented on behalf of the defendant; but the record does not show that the words were spoken in the presence or hearing of the jury, nor were the remarks excepted to at the time they were made.

It is further contended that the judgment as pronounced is void. The conviction was had under the following statute: "Sec. 6732. Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the territorial prison not exceeding two years, or by fine not exceeding five thousand dollars, or by both." Several objections are urged against the judgment, but the one most strongly insisted upon is that, when the court imposes the fine, the offense must thereafter be deemed a misdemeanor, and that the defendant could not be imprisoned in the territorial prison by reason of the non-payment of the fine. The following statute is cited: "Sec. 6311. A felony is a crime which is punishable with death, or by imprisonment in the territorial prison. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the territorial prison is also punishable by fine or imprisonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor, for all purposes, after a judgment

imposing a punishment other than imprisonment in the territorial prison." It seems to us that the real objection to this judgment is its uncertainty. The language is: "That you, Terrence B. Guthrie, pay a fine of one thousand dollars, and that you be taken into custody by the sheriff of Nez Perces county, and taken from this court-room to the county jail of Nez Perces county, Idaho territory, and thence, unless said fine be sooner paid, within thirty days, to the territorial prison in Ada county, territory of Idaho; and that you be confined in said prison, at hard labor, until said fine be paid, not exceeding two years from the date of this sentence, and that upon the payment of said fine you be released from said custody and confinement." Section 7994 provides that, "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine." See, also, section 7238, Rev. St. We are not satisfied that in a case where the defendant is tried and found guilty of a felony, and wherein he may be fined or imprisoned, in the discretion of the court, he may not be imprisoned in the territorial prison in default of payment of the fine. We find nothing in the statute that forbids it in such case. *People v. War*, 20 Cal. 117.

We find no error in the record except that the judgment pronounced is not sufficiently definite, and for this reason the judgment is vacated, and the case is hereby remanded to the court below, not for a new trial, but with direction to pronounce such judgment upon the verdict as may seem proper. *Reynolds v. U. S.*, 98 U. S. 168; *People v. Cozad*, 1 Idaho, 167; *People v. O'Callaghan*, 9 Pac. Rep. 414. It is so ordered.

HAYS, C. J., and BUCK, J., concurring.

(38 Kan. 459)

#### HENTIG v. SPERRY *et al.*

(*Supreme Court of Kansas*. February 11, 1888.)

##### MECHANIC'S LIEN—PROCEEDINGS TO PERFECT—STATEMENT—AFFIDAVIT.

A statement for a mechanic's lien should be verified by affidavit; and if neither the statement nor the affidavit is signed by the claimant, nor any one for him, and it cannot be inferred from the statement, or any papers attached thereto, that it was verified by the claimant, or any one for him, such statement is insufficient to establish a lien upon the premises described therein.

(*Syllabus by the Court.*)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

Action by F. G. Hentig to foreclose a mortgage executed to him by the defendants, C. A. Sperry and wife. One I. H. Whaley had obtained a judgment against Sperry, which judgment was adjudged to be a mechanic's lien against the mortgaged premises. Whaley was joined as a defendant in the foreclosure suit, but, having died before the trial, the action was revived as against the administrator of his estate. Judgment was rendered in favor of Hentig, and in favor of the administrator; but the latter was adjudged to be the prior lien. Hentig brings error to review this decision.

*F. G. Hentig*, for plaintiff in error. *J. P. Greer* and *R. A. Frederick*, for defendant in error.

HORTON, C. J. In the fall of 1880, C. A. Sperry, one of the defendants, was the owner of a lease-hold interest in lots 166 and 168, on Tyler street, Topeka, and, being desirous of building a dwelling-house thereon, applied to one McVean, "trustee," for a loan of money for that purpose. The lease-hold interest being considered insufficient security for the amount of money required, Hentig and wife, at the earnest solicitation of Sperry, executed a mortgage on real estate belonging to them to McVean, to secure the note of Sperry for the sum of \$750. To indemnify and secure Hentig from having to pay the



\$750 so loaned by McVean to Sperry, and to save Hentig harmless in every respect from the mortgage to McVean, Sperry and wife, on the 13th day of October, 1880, executed a mortgage on their lease-hold interest, or estate in said lots 166 and 168 on Tyler street, to Hentig. This mortgage was dated October 1, 1880, and recorded October 14, 1880, at 11:21 A. M. At this time Sperry was a law partner with Hentig, and doing business in Topeka. This sum of \$750 proved to be insufficient to pay for the construction of the house, and there was left a balance due to the contractor, I. H. Whaley, of \$127.21, for which sum Sperry gave Whaley his note. And within the time allowed by law, Whaley filed what is claimed to be a "mechanic's lien" against the property; and on August 9, 1881, suit was commenced by Whaley in the district court of Shawnee county to foreclose this lien. This action was tried on May 29, 1883, and judgment was rendered in favor of Whaley against Sperry for \$140.10, and the amount thereof adjudged to be a mechanic's lien upon the property in controversy. The judgment has not been satisfied, and no sale of the property has been had thereon. After Sperry had defaulted in the payment of interest on the McVean loan, McVean brought his suit against Sperry, and Hentig and wife, in the circuit court of the United States for this district, to foreclose his mortgage. On October 9, 1883, he recovered judgment for the sum of \$813.60, and also obtained a decree for the sale of the mortgaged property. Subsequently Hentig paid the McVean judgment, and on November 18, 1883, commenced this action to foreclose the mortgage executed to him by Sperry and wife on lots 166 and 168 on Tyler street. I. H. Whaley, the contractor and judgment creditor, was also made a party defendant. Before the trial he departed this life, but the action was revived as against the administrator of his estate. The court rendered judgment in favor of Hentig for \$1,035.55, and also his costs, taxed at \$120. It also rendered judgment in favor of the administrator of the estate of I. H. Whaley, deceased, for \$173.14, and his costs, taxed at \$48.85. The judgment in favor of the administrator was adjudged a prior lien upon the property to that rendered in favor of Hentig. Of this complaint is made.

The question, therefore, is whether the mortgage lien of Hentig is prior to the mechanic's lien of I. H. Whaley, lately deceased. In the action of *Whaley v. Sperry*, to foreclose the alleged mechanic's lien, neither Hentig nor his wife were parties. Section 634, of the Code, (Comp. St. 1885,) provides: "In such actions, all persons whose liens are filed as herein provided, and other incumbrancers, shall be made parties, and issues shall be made and trials had as in other cases." This provision of the statute was not complied with, and Hentig, being the owner of the mortgage upon the premises, and therefore having an interest therein, had the right, in the foreclosure of his mortgage, to contest the validity as well as the priority of Whaley's alleged lien. Section 636, Civil Code. The statement filed by Whaley was not signed, nor was the affidavit signed. It does not appear from the statement or the papers with it connected that the claimant ever verified the same. The notary certified that the statement was subscribed and sworn to on the 23d day of March, 1881, but he does not state who subscribed the same, or swore to the same; and in fact, as before stated, the affidavit was not subscribed by the claimant or any other person. If it had been shown upon the trial that the claimant had signed his name to the affidavit, the objection to the alleged lien would be insufficient. In *Deatherage v. Wood*, 37 Kan. 59, 14 Pac. Rep. 474, the statement was not signed. This was held unimportant; but in that case the affidavit was signed, and this rendered the statement and lien sufficient. The statute reads: "Any person, claiming a lien as aforesaid, shall file in the office of the clerk of the district court of the county in which the land is situated a statement setting forth the amount claimed, and the items thereof, as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property subject to the lien, *verified by affidavit*." Sec-

tion 632, Civil Code, (Comp. Laws 1885.) As the statute was not complied with in making and filing the alleged mechanic's lien, it cannot be said that the lien is prior to the mortgage lien of Hentig. As to Hentig, it had no validity whatever. The judgment of the district court will be reversed, and cause remanded for a new trial.

VALENTINE, J., concurring.

JOHNSTON, J., having been of counsel, did not participate in the decision.

(40 Kan. 676)

*MAWHINNEY et al. v. DOANE et al.*

(Supreme Court of Kansas. February 11, 1888.)

1. JUDGMENTS—ACTIONS ON—DORMANT JUDGMENTS—DEATH OF CREDITOR—LIMITATIONS.  
An action cannot be maintained on a dormant domestic judgment, or a revivor of the same had, when more than three years have elapsed from the death of the judgment creditor and the appointment of an administrator of the estate of the judgment creditor.
2. SAME—LIMITATION OF ACTIONS.  
An action on a domestic judgment is barred in five years from and after the rendition thereof, when no execution has been issued thereon, or no order for the revivor or no action in the nature of revivor has been made or had.
3. SAME—REVIVED JUDGMENTS—LIMITATION OF ACTION.  
Actions on domestic judgments on which executions have been issued, property sold, and proceeds applied in part payment of such judgments, and on which orders of revivor have been made, can be maintained within the statutory periods prescribed for the issuance of executions and for orders of revivor, and so long as said judgments are not dormant.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

PETITION.

"The plaintiffs, Frank Mawhinney, who sues in his own right, and Nettie M. Bragunier and Nina F. Bragunier, minors, who sue by Frank Mawhinney, their guardian, complains of Abner H. Doane and Harvey D. Rice, defendants, for that, whereas, heretofore, to-wit, at the January term, A. D. 1879, of the district court of the county of Shawnee, and state of Kansas, to-wit, on the thirtieth day (30) of January A. D. 1879, one David Shellabarger did by the consideration of said court recover against the said Abner H. Doane and Harvey D. Rice and one Jeremiah Bragunier, the then defendants, a judgment for the sum of two thousand and twenty-four dollars and sixty-seven cents (\$2,024.67,) and to draw interest at the rate of 10 per cent. per annum until paid; and also for the further sum of one hundred and fifty dollars (\$150.00) for his reasonable attorney's fees in his said suit; and also for the further sum of twelve dollars and thirty cents (\$12.30) for his costs in and about his said suit laid out and expended. And the plaintiffs aver that on, to-wit, the third (3) day of September, A. D. 1879, an execution delivered to the sheriff of Shawnee county, state of Kansas, and which said execution was by said sheriff on, to-wit, the thirteenth (13) day of October, A. D. 1879, duly returned with a credit thereon of five hundred and two dollars (\$502.00) made by sale of real estate and otherwise wholly unsatisfied. And the plaintiffs further aver that on, to-wit, the sixth (6) day of November, A. D. 1879, an *alias* execution was duly issued from said court on said judgment directed and delivered to the sheriff of Shawnee county, state of Kansas, and which said *alias* execution was by said sheriff duly returned on, to-wit, the eleventh (11) day of December, A. D. 1879, wholly unsatisfied. And the plaintiffs further aver that on, to-wit, the ninth day of November, A. D. 1879, the said Jeremiah Bragunier departed this life. And the plaintiffs further aver that on, to-wit, the twenty-sixth (26) day of November, A. D. 1879, the said David

Shellabarger, the owner of said judgment, for a valuable consideration, to-wit, for the full amount then due on said judgment, sold, assigned, and transferred said judgment to one Sarah R. Bragunier, of all of which the defendants herein then and there had lawful notice. And the plaintiffs further aver that on, to-wit, the tenth (10) day of March, A. D. 1881, the said Sarah R. Bragunier was married to Frank Mawhinney, one of the plaintiffs herein. And the plaintiffs further aver that on, to-wit, the thirty-first (31) day of January, A. D. 1882, a second *alias* execution was duly issued out of said court on said judgment, directed and delivered to the sheriff of Shawnee county, state of Kansas, and which said second *alias* execution was by said sheriff duly returned on, to-wit, the twenty-second (22) day of February, A. D. 1882, wholly unsatisfied. And the plaintiffs further aver that on, to-wit, the twenty-third (23) day of February, A. D. 1882, a third (3) *alias* execution was duly issued out of said court on said judgment, directed and delivered to the sheriff of Shawnee county, state of Kansas; and which said third (3) *alias* execution was by said sheriff duly returned on, to-wit, the twenty-fourth (24) day of April, A. D. 1882, wholly unsatisfied. And the plaintiffs further aver that on, to-wit, the thirteenth (13) day of April, A. D. 1882, the said Sarah R. Mawhinney, formerly the said Sarah R. Bragunier, departed this life intestate, leaving her surviving the plaintiffs Frank Mawhinney, Nettie M. Bragunier, Nina F. Bragunier, and Frank F. Mawhinney, her only heir at law. And the plaintiffs further aver that on, to-wit, the seventeenth (17) day of April, A. D. 1882, the plaintiff, Frank Mawhinney, was by the probate court of Shawnee county, state of Kansas, duly appointed administrator of the estate of the said Sarah R. Mawhinney, deceased, and that he duly qualified and entered upon the duties of said administration, and that as such administrator he has fully paid all the claims allowed against said estate by said probate court; and that on, to-wit, the twentieth day of April, A. D. 1885, said probate court duly found and declared said real estate fully settled, and thereupon duly discharged said administrator therefrom. And the plaintiffs further aver that on, to-wit, the seventeenth (17) day of April, A. D. 1882, said Frank Mawhinney, plaintiff herein, was by the probate court of Shawnee county, state of Kansas, duly appointed guardian of the person and estate of the said Nettie M. Bragunier and Nina F. Bragunier, minors as aforesaid, and that he qualified and entered upon the office and duties of said guardianship, and that he is still acting as such guardian. And the plaintiffs further aver that on, to-wit, the twenty-eighth (28) day of July, A. D. 1882, the said Frank T. Mawhinney departed this life intestate, leaving no debts whatever, and leaving the said Frank Mawhinney, plaintiff herein, his only heir at law. And the plaintiffs further aver that said judgment still remains in said court in full force, unreserved and unsatisfied, and that there is now due and unpaid on said judgment, attorney's fee, cost of suit, accruing costs, and lawful interest thereon, the sum of three thousand one hundred and eighty-seven dollars (\$3,187) after allowing and deducting all just payments and credits thereon, and that said defendants, though often requested so to do, have not, nor has either of them, paid said sum of money, nor any part thereof, to the said David Shellabarger or to the said Sarah R. Mawhinney in her life-time, or to the said Frank Mawhinney, as the administrator of the estate of the said Sarah R. Mawhinney, deceased, or to the said plaintiffs or either of them, or to said Frank T. Mawhinney, deceased, in his life-time, to the damage of the plaintiffs the said sum of three thousand one hundred and eighty-seven dollars, (\$3,187.00) and for which sum they ask judgment," etc.

## ANSWER.

"The defendants, for answer to the petition of plaintiffs, jointly and severally say: *First Defense.* For a first defense to the petition of the plaintiffs, the defendants deny each allegation in the petition contained, except only those allegations hereinafter expressly admitted. *Second Defense.* The de-

fendants, for a second defense to the petition of plaintiffs, say that more than three years have elapsed since any cause of action accrued to the plaintiffs, or any of them, and prior to the commencement of this action or any other action for the relief herein asked for, or upon the subject matter of the controversy contained in the petition. *Third Defense.* For a third defense to the petition of plaintiffs, these defendants say that more than five years have elapsed since any cause of action accrued to the plaintiffs, and prior to the commencement of this or any other suit for the recovery of the same. *Fourth Defense.* For a fourth defense to the petition of the plaintiffs, these defendants say that more than five years have intervened and elapsed without the issuance of any execution on the judgment declared on in the petition, and that said judgment is dormant, and has never been revived. *Fifth Defense.* For a fifth defense to the petition of the plaintiffs, these defendants say that prior to the institution of this or any other suit that more than five years have elapsed without the issuance of any execution on the judgment declared on in the petition, and that said judgment became dormant; and that after said judgment became dormant, more than one year had elapsed without any step or proceeding being taken to recover the same, and that said judgment was at the commencement of this action wholly barred as a cause of action in favor of said plaintiffs, or as against these defendants, or any of them. *Sixth Defense.* And for a sixth defense to the petition of the plaintiffs, these defendants say that heretofore in the court the plaintiff, Frank Mawhinney, applied to the court for the purpose of having the judgment declared on in the petition revived, and that upon the hearing of said motion it was found that said judgment was dormant and barred; and the order and judgment of this court then was that the said judgment should not be revived as against these defendants, or either of them, and which judgment is now in full force and effect, and at all the times prior hereto has been in full force and effect. *Seventh Defense.* For a seventh defense, these defendants say that by judgment of this court heretofore rendered in a proper proceeding before the same parties the judgment of the court was then had and obtained; that said judgment was dormant; that no execution has issued on the same for five years; that no step had been taken within six years to revive the same; that said judgment could not be revived, and that the same was barred; and which judgment and decision is now, and at all times has been, in full force. *Eighth Defense.* For an eighth defense to the petition of the plaintiffs, these defendants say that said judgment has been fully paid. *Ninth.* For a ninth defense, the defendants say that David Shellabarger, the plaintiff mentioned to the judgment recited in the petition died, and that more than one year elapsed without the same being revived in the name of his administrator, and that it never was revived in the name of his administrator, and that no defense of these defendants was ever given at any time; that the same should be so revived; and that the said judgment by reason thereof is barred. *Tenth.* For a tenth defense to the petition of the plaintiffs, these defendants say that while the said judgment was owned by David Shellabarger he was in debt to these defendants at the time he was living and when he was the owner of said judgment in a sum of money equal to the amount then due on said judgment, and that they paid to him during his life-time a sum of money equal in amount to the said judgment, and the interest and costs thereon. *Eleventh.* For an eleventh defense to the petition of the plaintiffs, these defendants say that after the death of David Shellabarger one Sarah R. Bragunier claimed to own and be the assignee of said judgment; that said Sarah R. Bragunier died; and that more than a year elapsed without the same being revived in the name of her representatives; and that the same has never been revived in the name of any person whatever; and that no consent has ever been given by these defendants, or either of them, at any time that the same should be revived; and that said judgment by reason thereof is barred. *Twelfth.* For a twelfth de-

fense to the petition of the plaintiffs, these defendants say that Sarah R. Bragunier, during the time she purported to own said judgment, became and was indebted to these defendants in a sum of money equal in amount to all of said judgment, and that these defendants and each of them paid the said Sarah R. Bragunier, while she so purported to own said judgment, a sum of money and goods and valuables equal in amount to all of said judgment. *Thirteenth.* For a thirteenth defense to the petition of the plaintiffs, these defendants say that Jeramiah Bragunier was one of the defendants to the original judgment declared on in the petition of the plaintiffs; that the said Jeramiah Bragunier died November 9, 1879; and that no step or proceedings at any time since then has at any time been taken to revive the same against his real estate or his representatives; and that the same is barred for that reason. *Fourteenth.* For a fourteenth defense to the petition of the plaintiffs, these defendants say that the said Sarah R. Bragunier was never the owner of said judgment; that the same was purchased by Harvey D. Rice for the purpose of wiping it out as an indebtedness, and never again to be insisted upon as a cause of indebtedness against himself; that he advanced a part of the money to pay the same; that at the time they were mutual acts between him and Sarah R. Bragunier, and it was the understanding, contract, and agreement that the same should be purchased and no longer held as an indebtedness against the said Harvey D. Rice; that the same should be adjusted in a full settlement of accounts, the said Sarah R. Bragunier and her husband each owing him a large amount of money and in excess of said judgment. Wherefore, the defendants pray judgment for costs."

## REPLY.

"The plaintiffs in reply to the fifth, (5,) seventh, (7,) eighth, (8,) tenth, (10,) twelfth, (12,) and fourteenth (14) defenses of defendants, answers herein filed, deny each and every material allegation in each and all of said defenses contained."

## DEMURRER.

"The plaintiffs demur to the second (2) defense in the defendant's answer contained, because the facts stated therein are not sufficient to constitute a defense to said action. Plaintiffs demur to the third (3) defense in said answer, because the facts stated therein are not sufficient to constitute a defense to said action. Plaintiffs demur to the fourth (4) defense in said answer, because the facts stated therein are not sufficient to constitute a defense to said action. Plaintiffs demur to the sixth (6) defense in said answer, because the facts stated therein are not sufficient to constitute a defense to said action. Plaintiffs demur to the ninth (9) defense in said answer, because the facts therein stated are not sufficient to constitute a defense to the said action. Plaintiffs demur to the eleventh (11) defense in said answer, because the facts therein stated are not sufficient to constitute a defense to said action. And plaintiffs demur to the thirteenth (13) defense in said answer, because the facts therein stated are not sufficient to constitute a defense to said action. Wherefore, plaintiff prays judgment," etc.

The demurrer overruled, and the case brought here, the error assigned is the overruling of the demurrer.

*W. A. S. Bird*, for plaintiffs in error. *Waters & Chase* and *E. F. Hilton*, for defendants in error.

SIMPSON, C., (*after stating the facts as above.*) It must be held that this is an action on the judgment, for the reason that the petition so states. The prayer is for a recovery of the amount of the judgment with interest; and a summons as on a money demand was issued and served. *Gruble v. Wood*, 27 Kan. 535. There was no notice of revivor as required by the statute served in the case. All these things determine the character or nature of the suit as an action on a judgment. Can it be maintained or is it barred

by the statutes of limitation? The case of *Burnes v. Simpson*, 9 Kan. 658, declares that in this state suits can be maintained on domestic judgments, it was claimed in that case that if an action could be maintained on the domestic judgment, that it was barred by the statutes of limitation. The statutes relied on in that case to create the bar have long since been repealed, and other limitations substituted; but the logic of that case remains, and must be applied to our present statutes governing the limitations of such actions. The limitation to be applied to suits on a judgment on which no execution has been issued, or where the judgment has not been revived, is to be found in the sixth subdivision of section 18 of the Code of Civil Procedure, (page 607, Comp. Laws 1885, Dassler.) This ruling follows the case of *Burnes v. Simpson*, so far as the same is applicable to the facts of the one we are considering; but there are other questions here not raised or discussed in that case, and the principal one is, what limitation applies to an action on a judgment on which successive executions have been issued, property sold, and the proceeds of the sale applied to the part payment of the judgment? Section 15 of the Code provides: "Civil actions can only be commenced within the periods described in this article, after the cause of action shall have accrued; but where in special cases a different limitation is prescribed by statute, the action shall be governed by such limitation."

There are other provisions of the Code upon the subject of judgments, their life, lien, and operation that must be considered, so that all statutes upon the subject may be construed together, and all given the effect and operation intended by the law-making power. Judgments are declared liens upon the real estate of the debtor within the county in which they are rendered from the first day of the term of their rendition. This lien is preserved as against all subsequent ones, if an execution is taken out and levied before the expiration of one year next after the rendition of the judgment. This lien can be preserved by the suing out of another execution within five years from the date of the first, and prolonged indefinitely by successive issues of executions within five years of each other. If execution shall not be sued out within five years from the date of any judgment, or if five years shall intervene between the dates of issuing execution, the judgment becomes dormant, and ceases to operate as a lien on the estate of the judgment debtor. If either or both parties die after judgment, and before satisfaction thereof, their representatives, real or personal or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment. An order to revive an action upon the death of either the plaintiff or defendant cannot be made after the expiration of one year without the consent of the opposite party. These various provisions of the Code bearing upon the life and effect of judgments must be given force and expression in the consideration of the various questions arising on the limitation of an action on a judgment. A harmonious construction requires us to hold that so long as the judgment is kept alive by the process of revivor or by the issuance of an execution within five years from the date of the rendition of the judgment or from the last preceding execution, an action may be brought and maintained upon it.

We have been thus particular in stating the most liberal interpretation that can be given these various provisions of the Code, respecting the limitations therein provided, upon the life, force, and effect of domestic judgments, to enable us, if possible, to bring the plaintiffs in error within their scope and bearing. But there is to us this insuperable difficulty in the way, the judgment sued on is dormant, and the time has expired within which it can be revived. This dormancy was created by the death of Sarah F. Mawhinney on the 13th day of April, 1882, to whom Shellabarger, the original judgment creditor, had assigned the judgment. Shellabarger died, and there was no revivor in the name of his administrator, or in the name of the administrator

of Sarah F. Mawhinney, within one year after an order of revivor could have first been made. So long a time elapsed between the date of the death of Sarah F. Mawhinney, the appointment of her administrator, and the commencement of this action, (and during all this time the judgment is dormant,) that no revivor could be had without the consent of the judgment debtors. No such consent is alleged or shown. The judgment being dormant, no action could be maintained upon it, and it cannot be revived without the consent of the judgment debtors. This action was commenced on the 24th day of August, 1885, an administrator of the estate of Sarah F. Mawhinney was appointed on the 17th day of April, 1882, so that more than three years have elapsed, and there has been no attempt at revivor. It is said that the case of *Kothman v. Skaggs*, 29 Kan. 5, is an authority for the maintenance of this suit, but it will be seen by an examination of the pleadings in that case that this claim is not well founded. Kathman recovered a judgment against Myers on the 29th day of May, 1874, and had execution issued thereon on the 1st day of October, 1874. Myers died on the 10th day of December, 1874, and his administrator was appointed on the 7th day of May, 1875. On the 17th day of August, 1875, Skaggs commenced an action against the administrator and heirs at law of Myers, making Kathman a party thereto, and on the 8th day of November, 1875, and within one year from the death of Myers and the appointment of his administrator, Kathman filed his answer, pleading his judgment, praying that it might be revived, and for other relief. Kathman was within the year; these plaintiffs wait for more than three years.

There is no error in the ruling of the district court of Shawnee county on the demurrer, and we recommend its affirmance.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 485)

DURIEN *et al.* v. STATE.

(*Supreme Court of Kansas*. February 11, 1888.)

INTOXICATING LIQUORS—BOND FOR GOOD BEHAVIOR—ALTERATION OF CONDITION.

Where the court before which a person is convicted of a criminal offense requires such person to give security to be of good behavior for a time not exceeding two years, or to stand committed until such security is given, and subsequently such person, not voluntarily, but to prevent himself from being imprisoned, executes, with sureties, a bond containing the condition prescribed by the court, but having superadded therein material and important words of condition beyond what were required by the court, or authorized by the statute, *held*, that the bond is invalid.

*Roberts v. State*, 34 Kan. 151, 8 Pac. Rep. 246, followed.

(*Syllabus by the Court*.)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

On February 19, 1885, the state of Kansas brought its action against Frank Durien, John R. Mulvane, and Conrad Kreipe, to recover \$500 upon a certain written bond executed February 19, 1881. Trial had July 1, 1886, before the court without a jury, upon the following agreed statement of facts: It is stipulated and agreed that the above and foregoing case shall be tried and decided upon the following facts, and none other: "(1) That on the first day of December, 1883, the county attorney of Shawnee county, Kansas, filed an information in the district court of Shawnee county, Kansas, charging the defendant Frank Durien with selling intoxicating liquors at 146 Kansas avenue, in the city of Topeka, county of Shawnee, and state of Kansas, in violation of law. (2) That a warrant was issued upon said information, and the defendant Frank Durien was arrested upon said warrant. (3) That on the 23d day of January, 1884, and during the January term of the district court, the defendant Frank Durien appeared in open court, and, being arraigned upon said information, pleaded guilty to the 1st, 2d, 3d, 4th, 5th, and 6th counts in

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said information. (4) That on the 23d day of February, 1884, Frank Durien appeared in open court, and was sentenced upon said plea of guilty to pay a fine of one hundred dollars upon each of said six counts, together with the costs of suit. (5) That the court, in addition to said fine of six hundred dollars, made and entered the following order in said cause, to-wit: 'It is further ordered and required that Frank Durien give security in the sum of five hundred dollars to be of good behavior for the term of two years from the date of said sentence, and that he, the said Frank Durien, stand committed to the jail of Shawnee county until such security is given; but in no case shall such imprisonment be longer than two years from the date of such sentence; said bond to be approved by the clerk of the district court of Shawnee county, Kansas.' (6) That on the 10th day of June, 1884, the defendant Frank Durien did file a bond in the office of the clerk of the district court of Shawnee county, with John R. Mulvane and Conrad Kreipe as sureties thereon, which was approved by the clerk of the district court. (7) A copy of said bond is filed herewith, marked Exhibit A, and made a part of this agreed statement of facts, being the same bond sued upon in this case. (8) That said bond was not executed voluntarily, but to prevent the said Frank Durien from being imprisoned: that is, said bond was given by order of court mentioned in number five of this agreed statement of facts, and by virtue of said bond the said Durien was not imprisoned. (9) That said defendant was required to execute said bond in the form it was executed, and with all the conditions thereon, as appears in said bond. (10) That defendant Frank Durien paid said sum of six hundred dollars imposed upon him, and also the costs in that suit, before the commencement of this suit. (11) That on the 22d day of November, 1884, and at the October term of the district court of Shawnee county, the grand jury of said county returned an indictment against the said Frank Durien for selling intoxicating liquors at 146 and 148 on Kansas avenue, in the city of Topeka, Shawnee county, Kansas. (12) That on the 15th day of January, 1885, Frank Durien was arrested upon said indictment so returned by said jury. (13) That on the 15th day of January, 1885, the defendant Frank Durien was tried in the district court of Shawnee county, Kansas, upon said indictment returned by the grand jury, upon a plea of not guilty, before a jury. (14) That on the 16th day of January, 1885, the jury so impaneled returned a verdict of guilty against said Frank Durien, as charged in the 1st, 2d, 3d, 4th, 5th, 9th, and 11th counts of the indictment, and the conviction upon the first count was upon a sale of whisky made by said Frank Durien to Ed. Moore during the fair week, in September, A. D. 1884, and on the second count a conviction was had for a sale of beer made by Frank Durien to Howard Stafford, in July or August, A. D. 1884. (15) That the convictions were upon and for sales of intoxicating liquor made after the giving of said bond, and within two years after the giving of said bond. (16) That this action was commenced on the 19th day of February, 1885, and no part of said bond has been paid."

#### BOND.

"Whereas, at the January term, A. D. 1884, of the district court of the county of Shawnee, in the state of Kansas, and on the 24th day of January, 1884, in a criminal action then pending in said court, the above-named defendant Frank Durien duly and legally pleaded guilty to the offense of selling intoxicating liquors at No. 146 Kansas avenue, city of Topeka, Shawnee county, Kansas, in violation of law; and whereas, on the 23d day of February, 1884, said Frank Durien was duly and lawfully adjudged and sentenced by said court to pay a fine of one hundred dollars on the 1st, 2d, 3d, 4th, 5th, and 6th counts in the information filed against him, amounting in all to six hundred dollars, and the costs of said prosecution, and was ordered committed to the jail of Shawnee county until said fine and costs were paid; and, in addition to said sentence, said court did further order and require said Frank



Durien to give security in the sum of five hundred dollars to be of good behavior for the term of two years from the date of said sentence, and that he, the said Frank Durien, stand committed to the jail of said county of Shawnee until such security be given; but in no case should such imprisonment be longer than two years from the date of such sentence:

"Now, therefore, know all men by these presents that we, Frank Durien, as principal, and John R. Mulvane and C. Kreipe, as sureties, do hereby undertake and bind ourselves to the state of Kansas in the sum of five hundred dollars that the said Frank Durien shall and will be of good behavior for the term of two years from the 23d day of February, 1884, and that he, the said Frank Durien, shall not and will not, at any time or place within the state of Kansas during said term of two years, in person, or in connection with, or by means or through the agency of, others, or any one else, either directly or indirectly, in any form or manner, barter or sell intoxicating liquor of any kind, nor shall he, the said Frank Durien, during said term of two years, in any form or manner, violate any of the provisions of an act of the legislature of the state of Kansas, entitled 'An act to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes, approved February 19, 1881.'

"In witness whereof we have hereunto set our hands this 10th day of June, 1884.

FRANK DURIEN.

"JOHN R. MULVANE.

"C. KREIPE.

"*State of Kansas, Shawnee County.* Approved by me this 10th day of June, 1884. B. M. CURTIS, Clerk, by A. B. MCCABE, Deputy."

The court adopted the facts agreed upon as its special findings of fact, and thereupon the defendants moved the court for judgment upon the facts found by the court, which motion was overruled; and thereupon the court found, as a conclusion of law, that the defendants were indebted to the state of Kansas in the sum of \$500. Subsequently the defendants filed their motion for a new trial, which was overruled. On July 3, 1886, judgment was rendered upon the special findings in favor of the state of Kansas against the defendants for the sum of \$500, together with all costs. The defendants excepted, and bring the case here.

*Hazen & Isenhardt*, for plaintiffs in error. *Charles Curtis* and *S. B. Bradford*, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) After Frank Durien had been convicted of a violation of the prohibitory liquor law, the district court required him to give security for his good behavior for the term of two years in the sum of \$500, and to be committed to the jail of Shawnee county until the security was given. Section 242, Crim. Code. To prevent himself from being imprisoned, subsequently, with John R. Mulvane and Conrad Kreipe as sureties, he executed a bond conditioned as follows: "That the said Frank Durein shall and will be of good behavior for the term of two years from the 23d day of February, 1884, and that he, the said Frank Durien, shall not and will not at any time or place within the state of Kansas during said term of two years, in person or in connection with, or by the means or through the agency of, others, or any one else, either directly or indirectly, in any form or manner, barter or sell intoxicating liquor of any kind; nor shall he, the said Frank Durien, during said term of two years, in any form or manner, violate any of the provisions of an act of the legislature of the state of Kansas, entitled 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes.'"

It will be noticed that there are many superadded words of conditions beyond what were authorized by the court or statute. One of the superadded conditions prohibited Durien, for a term of two years, from obtaining any permit to sell intoxicating liquors, even if he fully complied with the statute. The court was not authorized to require such a bond, and the bond taken was a substantial departure from the order of the court. It was not executed voluntarily, and therefore it is invalid. *Roberts v. State*, 34 Kan. 151, 8 Pac. Rep. 246; *State v. Roberts*, 37 Kan. 437, 15 Pac. Rep. 593. We are referred to *State v. Cobb*, 71 Me. 198, as holding that superadded words of condition beyond what are authorized do not invalidate a bond, but may be treated as surplusage only. The decision in that case rests upon *State v. Brown*, 41 Me. 535. In the latter case three of the judges filed a vigorous dissent. We think the law is properly declared in *Roberts v. State*, *supra*, and are therefore unwilling to follow any authorities that conflict therewith. The judgment of the district court will be reversed, and caused remanded, with direction to the court below to enter judgment in favor of plaintiffs in error upon the agreed statement of facts and the special findings of the court.

All the justices concurring.

(38 Kan. 544)

#### SMITH v. LEIGHTON.

(*Supreme Court of Kansas*. February 11, 1883.)

##### 1. EVIDENCE—RECORD COPY OF DEED—GENERAL OBJECTION.

A general objection to the admission in evidence of the record copy of a deed conveying real estate, in an action where the original deed was competent evidence for some purposes, and under certain circumstances, is not available for the purposes of error.

##### 2. CROPS—GROWING GRASSES—PAROL AGREEMENT FOR SALE OF, INVALID.

As a general rule, growing grasses are a part of the land, and require an agreement in writing for their sale and severance from the land.

##### 3. SAME—PASS BY CONVEYANCE OF LAND—PAROL AGREEMENT TO SELL TO TENANT.

A conveyance of land, without any reservations or exceptions, passes to the grantee all growing grass thereon; and where the grantor has agreed by parol to sell the grass growing thereon to a tenant, the purchase price not having been paid, the grantee will be entitled to collect the price thereof, or to collect the unpaid rent upon the land where such grass is growing.

(*Syllabus by the Court*.)

Error to district court, Lyon county; CHARLES B. GRAVES, Judge.

W. A. Randolph, for plaintiff in error. Kellogg & Sedgwick, for defendant in error.

JOHNSTON, J. This proceeding brings up for review a judgment rendered in an action brought by C. A. Leighton against Elias Smith to recover the value of certain grass which Smith cut and carried away from the premises of Leighton. On July 10, 1883, and for some time prior thereto, one V. Lillard owned a quarter section of land in Lyon county, which on that day he sold and conveyed by warranty deed, without reservation, to C. A. Leighton. Before that time he had leased the land to Elias Smith for the year 1883, and Smith had sublet it to A. Hill, who was in possession before the sale of the land, and in May, 1883, Lillard made a verbal sale of some grass growing on a certain meadow of the premises for \$65. About the last of July or the first of August, 1883, Smith cut and took the grass from the premises; and subsequently, when Leighton demanded compensation for the grass, Smith stated that he was ready to pay for the same as soon as he learned to whom payment should be made. Leighton recovered \$75.78, which is the amount Smith agreed to pay for the grass, together with 7 per cent. interest.

The first error assigned here is the admission in evidence of the record copy of the deed from Lillard to Leighton conveying the premises upon which the grass grew. The original deed was admissible in testimony for the purpose

of showing whether there had been any reservation made by Lillard when the land was conveyed. The copy of the deed was not the best evidence, and was not admissible, unless a proper foundation was laid for the introduction of secondary evidence. Only a general objection, however, was made to the introduction of the copy. If the original deed was not in the possession or control of the plaintiff, the record copy could be introduced in evidence, and, being admissible under certain circumstances, a general objection was not available for purposes of error. It has frequently been held "that where evidence is apparently admissible for any purpose, or under any circumstances, the court does not err in admitting the same, unless the reasons for its exclusion are given by the party." *Ferguson v. Graves*, 12 Kan. 43; *Botkin v. Livingston*, 16 Kan. 41; *Cross v. Bank*, 17 Kan. 336; *Railway Co. v. Cutler*, 19 Kan. 83; *Humphrey v. Collins*, 23 Kan. 549.

It is next contended that the court erred in excluding evidence offered by Smith, and also in directing the verdict in favor of Leighton. We think the result reached is substantially just and correct. Smith claimed the right to the grass by virtue of a parol agreement with Lillard, by which he was to pay \$65 for the grass when cut; and also claimed that the purchase price of the grass was for the rent of the meadow land on which it grew. The land upon which the grass stood was conveyed to Leighton subsequent to the parol agreement, and while the grass was yet green and growing. It is stated that the grass was growing on an inclosed and cultivated meadow; but it does not appear whether it was an annual or perennial growth. It is a general rule that growing grasses, whether wild or cultivated, are part of the land, and require an agreement in writing for their sale and severance from the land. Smith contends that this agreement is within some of the exceptions to the general rule, and sought to bring it within the claimed exceptions, by offering to show that Leighton knew of his lease upon the land, and of the sale of the grass prior to his purchase of the land; which offer was refused. However, as the case comes up, we need not examine the sufficiency of this contention, or the competency of the testimony. In the deed of conveyance from Lillard to Leighton there was no reservation of the grass, or exception of any kind. In such a case, and as between grantor and grantee, it is well settled here that the growing crops pass to the grantee. *Garanflo v. Cooley*, 33 Kan. 137, 5 Pac. Rep. 766; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. Rep. 100; *Babcock v. Dieter*, 30 Kan. 172, 2 Pac. Rep. 504; *Smith v. Hague*, 25 Kan. 246. When the conveyance was made and delivered, it carried with it the right to the crops, and to collect all unpaid rents; in other words, Leighton was substituted as owner and landlord in place of Lillard. There being no reservations, Lillard from that time forth had no claim upon the crops, or the rent due from the tenants. Smith had not paid for the grass; and whether the amount agreed to be paid is treated as the purchase price of the grass, or as rent money for the meadow, is immaterial. Smith was owing the price of the grass to some one, and he only refused to pay because he did not know to whom it was due. The amount found by the jury as the value of the grass is the same as that which Smith had agreed to pay for the same, with interest to the time of judgment, and the payment of this judgment will discharge Smith from all liability for the grass. The judgment of the district court will be affirmed.

All the justices concurring.

(38 Kan. 608)

## ATCHISON, T. &amp; S. F. R. Co. v. GANTS.

(Supreme Court of Kansas. February 11, 1888.)

## 1. CARRIERS—OF PASSENGERS—THROUGH TRAINS—REGULATIONS AS TO STOPPING AT CERTAIN STATIONS ONLY.

A railroad company may adopt a regulation that one of its through or fast trains, running regularly on its road, shall only stop at certain designated stations or places.

## 2. SAME—DUTY OF PASSENGER.

It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop, according to the regulations of the railroad company.<sup>1</sup>

## 3. SAME—TRESPASSER.

Where a person purchases a railroad ticket for a designated station upon a railroad, without making any inquiries or ascertaining what train stops at the station to which he desires to go, and subsequently takes his seat upon a car of a train which, according to the regulations of the company, does not stop at the station for which he has the ticket; and such person refuses to pay his fare, on demand of the conductor, to the next station at which the train is to stop, and also refuses to leave the train when requested so to do by the conductor after he has stopped the train at a suitable place for that purpose, such person is a trespasser upon the train.

## 4. SAME—RIGHT TO EJECT PASSENGER.

A trespasser may be ejected from a train after it has stopped at a place other than a depot or station, provided care is taken not to expose his person to serious injury or danger; but, in such an ejection, the railroad company is not required to have consideration for the mere convenience of the wrong-doer.

## 5. SAME—USE OF UNNECESSARY FORCE.

The conductor and train men of a railroad train have the right to eject a trespasser from the train at any suitable place, but in doing so they should not use unnecessary force or excessive violence; if, however, such a person forcibly resists ejection, he cannot recover for the force used in overcoming his resistance, where such force is without intention on the part of the conductor or train men to commit unnecessary injury. In such a case the railroad company is only liable for such unnecessary force or excessive violence as is willful, wanton, or malicious.

## 6. SAME—PASSENGER ON TRAIN BY MISTAKE OF AGENT.

Where a person makes a mistake in taking a seat upon a train which does not stop at the place he desires to go, and fare is demanded of him upon the train by the conductor to the first station at which the train is to stop, and he is able to pay the same, but refuses so to do, and then the conductor stops the train and requests him to leave or pay, he should either pay his fare or get off. If his mistake was induced by the ticket agent of the company, then the extra fare which he pays is an element of damages, in addition to such as are occasioned by his being carried beyond his destination.

## 7. SAME—RESISTANCE OF PASSENGER TO EJECTION.

A person upon a railroad train cannot insist that the conductor shall permit him to ride without a proper ticket for that train, in violation of the regulations of the company. No one has a right to resort to force to compel the performance of a contract, and therefore where a person upon a train by mistake of the local ticket agent has a ticket to a station that the train does not stop at, he must either pay the extra fare demanded or get off when ordered so to do and cannot invite force in his ejection or removal, merely to make a case against the company or to increase his damages.

## 8. SAME—USE OF PROFANE LANGUAGE—EVIDENCE.

Where a plaintiff was ejected from a railroad train, and evidence was offered tending to show that before his ejection he used vile, obscene, and profane language in a car filled with passengers, including many women and children, and, upon his part, he introduced two witnesses, one of whom testified "that he never heard him use half a dozen oaths in his life," and the other that "he never heard him use obscene language in public, but might have heard him make use of an oath some time, but not frequently," *held*, such latter evidence incompetent.

## 9. SAME—REPRESENTATIONS—CONDUCTOR OF BRANCH ROAD.

A conductor upon a branch road, or connecting road of the same railroad company, in collecting fares, taking up tickets, and giving information to the passengers

<sup>1</sup>Passengers should inform themselves as to the train they must take to reach their destination; and if a mistake is made, not induced by the railroad company, against which ordinary diligence as to inquiry would have protected, no redress against the company can be had. *Duling v. Railroad Co.*, (Md.) 6 Atl. Rep. 592. As to the circumstances which will justify a railroad company in ejecting a passenger from a train, see *Arnold v. Railroad Co.*, (Pa.) 8 Atl. Rep. 218, and note.

on his own train, represents the company as to his own route, but does not represent the company in giving information as to the running and operation of the trains upon the main line with which he has no employment.

10. SAME — EJECTION OF PASSENGER — USE OF VIOLENCE BY PASSENGERS ASSISTING CONDUCTOR.

Where a person is removed from a railroad train with the assistance of some of the passengers, and willful, wanton, and malicious force is used in the ejection by the passengers assisting, the railroad company may be liable therefor, although no express directions were given by the conductor or train men to the passengers, as their employment to assist may be inferred. Otherwise, however, if the passengers are mere interlopers and the conductor and train men have no opportunity to interfere with their actions.

*(Syllabus by the Court.)*

Error to district court, Harvey county; L. HOUK, Judge.

On May 29, 1885, A. C. Gants brought his action against the Atchison, Topeka & Santa Fe Railroad Company and in his petition alleged: That at all times hereinafter mentioned the defendant was and now is a corporation duly organized under and pursuant to the laws of the state of Kansas, and was the owner of a certain railroad known as the "Atchison, Topeka & Santa Fe Railroad," with the tracks, cars, and other appurtenances thereunto belonging, and was a common carrier for hire and reward from the city of Newton, in Harvey county, to the city of Peabody, in Marion county, being wholly within the state of Kansas. That on the 19th day of May, 1885, the defendant, in consideration of the sum of 50 cents, then paid to it by the plaintiff therefor, at its ticket office in the city of Newton, issued to him a ticket entitling him to a first-class passage and to be carried from said city of Newton to said city of Peabody, and thereby undertook and agreed, as such common carrier, to transfer and carry the plaintiff from said city of Newton to said city of Peabody, as a passenger; and plaintiff thereupon entered one of the cars of the defendant, to be conveyed from said city of Newton to the city of Peabody aforesaid. That while he was such passenger at said county of Harvey, and when at a distance of about three miles from the said city of Newton, on said line of railroad and on the day aforesaid, the defendant, by the conductor and train men on said train, set upon the plaintiff and, with unnecessary violence, assaulted, beat, bruised, cut, maimed, wounded, and lacerated the plaintiff in the most grievous manner; took from him said ticket; seized and despoiled him of a large amount of money, to-wit, the sum of \$100, and then and there afterwards threw and ejected him forcibly and violently from one of its cars upon a heap of stones, cutting, lacerating, and bruising him, thereby causing lasting and permanent injury to him the said plaintiff. That ever since that time he has suffered from internal injuries received therefrom as aforesaid, so that he cannot retain food in his stomach; but, immediately after eating, is attacked with violent vomitings and retchings, causing him great pain and suffering; that since that time he has been unable to pass urine or fecal matter without the use of artificial means, and then only with great pain; that he has suffered great pain along the region of his spinal column, and was, by the said acts of the defendant, permanently and seriously injured in his spine; that plaintiff, on account of said injuries, has suffered and languished from hence hitherto. That the plaintiff was then in good health, and was then earning, and continuously able to earn, prior to the injuries complained of, \$75 per month; that he was thereby disabled from attending to his business for the space of 10 days thereafter, being wholly, or almost, deprived of the use of his limbs, and has been compelled to pay \$150 for medical attendance. That on account of said injuries so received plaintiff has suffered great mental and bodily anguish, to his damage of \$50,000. Wherefore plaintiff prays judgment against said defendant for \$50,000, his damages sustained by reason of the premises so as aforesaid alleged, and all other proper relief.

On June 29, 1885, the railroad company filed the following answer: (1) Now comes the defendant in the above-entitled cause, and, for answer to plaintiff's petition filed therein, denies each and every material allegation therein contained. (2) The defendant further answering, for a full and complete defense states on the occasion complained of in the petition the plaintiff attempted to ride on the fast passenger train of defendant, bound eastward, which train, according to the rules and regulations of the defendant, which were well known to the plaintiff and the traveling public, generally did not stop at Peabody, and that the conductor of said train, put the said defendant off the said train, using no unnecessary force, because the plaintiff refused, after demand, to pay fare to the station beyond Peabody, namely Florence, at which said train would stop, and further, because said plaintiff, when the conductor informed him that the train would not stop at Peabody, insisted upon riding upon said train, and used violent, profane, and offensive language, and behaved in such an indecent manner as to authorize and justify the defendant's conductor in ejecting him from the train. Wherefore, defendant prays judgment.

On July 1, 1885, Gants filed a reply containing a general denial to the matters and things alleged in the second defense of the answer. Trial had at the February term for 1886, before the court, with a jury. The jury returned a verdict for the plaintiff, and assessed his damages at \$4,000. They also made the following special findings of fact: "(1) Is it not a fact that the train upon which the plaintiff attempted to take passage from Newton to Peabody, Kansas, was a train which, under the rules and regulations of the defendant in force at that time, did not stop at Peabody, Kansas, unless it had passengers upon it from west of Newton? *Answer*, Yes. *Q.* (5) Prior to the time the train started upon which plaintiff attempted to take passage from Newton to Peabody, Kansas, did not plaintiff know, or was he not informed, that such train would not stop until it arrived at Florence, Kansas? *A.* No. (6) Is it not a fact that when the conductor came up to the plaintiff on the train on which plaintiff was attempting to take passage from Newton, Kansas, to Peabody, Kansas, to demand plaintiff's fare, that plaintiff handed to such conductor his ticket, and that such conductor then and there informed him that the train did not stop at Peabody, Kansas, but that its first stop would be at Florence, and that he, the conductor, would accept such ticket for the amount paid for it on the plaintiff paying to him the fare from Peabody to Florence, and that he would carry the plaintiff to Florence? *A.* Yes. (7) Is it not a fact that the plaintiff refused to pay to the conductor of the train on which he was attempting to take passage from Newton to Peabody, Kansas, the amount of fare from Peabody to Florence, the point at which said train first stopped under the rules and regulations of the defendant, after he was informed that such train would not stop at Peabody, and that its first stop would be at Florence? *A.* Yes. (8) Is it not a fact that the conductor, in the last question referred to, informed the plaintiff that if he would not pay, in addition to his ticket, the fare from Peabody to Florence, that he, the conductor, would have to stop the train, and put him, the plaintiff, off? *A.* Yes. (9) Is it not a fact that the conductor of the train upon which the plaintiff was attempting to take passage from Newton to Peabody stopped such train for the purpose of putting plaintiff off after his refusing to pay his fare from Newton to Florence? *A.* Yes. (10) Is it not a fact that, at the time of stopping such train for such purpose as referred to in the last question, the conductor of such train was actuated by a desire to obey the rules of the company by whom he was employed? *A.* Yes. (11) Up to the time the train was stopped for the purpose of putting off plaintiff, had the conductor of such train demeaned himself in any way different from that of a gentleman towards the plaintiff? *A.* No. (12) Prior to the time that plaintiff was actually put off from the train, did plaintiff offer to pay his fare to the first

station at which the train he was upon stopped, under the rules and regulations of the defendant? A. No. (13) Is it not a fact that, after the train was stopped, the conductor of such train requested the plaintiff, in a gentlemanly manner, to leave the train? A. Yes. (15) State if it is not a fact that the plaintiff resisted being put off from the train, after it had come to a full stop, to the utmost of his power and ability? A. Yes. (16) How many people were actually engaged in getting plaintiff from the place where he was seated in the car, after the train stopped, to the platform of such car for the purpose of putting him off? A. Three. (17) Under the resistance offered by the plaintiff to being put off from the train, how much less force would it have taken to put him off than was used? State fully. A. One-half less, or two men should have taken him out of the car. (18) Was it not a fact that, after the train was stopped for the purpose of putting plaintiff off from it, and before any hands were laid upon the plaintiff to put him off from such train, that plaintiff refused to go off, and dared the conductor to put him off? A. Yes. (19) Is it not a fact that the car, in which the plaintiff was seated at the time he was put off from the train, was pretty well filled with passengers, including many ladies? A. Yes. (21) State fully what acts or force or violence were used by the conductor, or any person, in putting plaintiff off from that train, in excess of that force which was required and made necessary to be used by the resistance of the plaintiff. A. The force that produced the wounds on hands, back, and limbs. (23) Could the conductor on that train, under the resistance offered by the plaintiff, remove plaintiff from it without assistance? A. No. (24) Could the train men of that train have removed plaintiff, under the resistance which he offered, without the use of a great deal of force? A. Yes. (25) State for what purpose the plaintiff offered the resistance which he did offer to being removed from that train. A. Because he thought he had a right to be on that train. (27) If the jury find for the plaintiff they may state how much they allowed plaintiff for moneys expended by him for medicine. A. Ten dollars. (28) If the jury find for the plaintiff, they may state what they allowed plaintiff for expenses incurred for medical attendance. A. Twenty-seven dollars. (29) If the jury find for the plaintiff they may state what they allowed plaintiff for loss of time. A. Sixty dollars. (31) If the jury find for the plaintiff they may state what portion of the verdict that they find was given for money which the plaintiff lost at the time of being ejected from the train. A. Four dollars."

Subsequently the railroad company filed its motion for a new trial, which was overruled, and judgment was entered upon the verdict in favor of Gants and against the railroad company. The railroad company excepted and brings the case here.

*Geo. R. Peck, A. A. Hurd, and C. N. Sterry, for plaintiff in error. Ady & Henry, for defendant in error.*

HORTON, C. J., (*after stating the facts as above.*) On May 19, 1885, A. C. Gants, a hotel clerk at Wichita, took passage on a train of the Atchison, Topeka & Santa Fe Railroad Company from Wichita to Newton, intending to go to Peabody. He paid his fare to the conductor on the train from Wichita to Newton. He claims he was told by the conductor of the Wichita train that he could either continue on the train, or go upon one an hour later. While at Newton he purchased a ticket over the Atchison road for Peabody, and paid for it 50 cents. He remained at Newton nearly an hour, to get shaved and look around the town, and about 9 o'clock he took his seat in a car of a train at the depot. This was the eastern fast train, commonly called the "Cannon-Ball." According to the regulations of the railroad company, this train was scheduled not to stop at Peabody except for the purpose of letting off passengers who had taken passage at some point west of Newton. But when it had no such passengers it would not stop at Peabody, going east, and its first stop-

ping place would be Florence. Peabody is a station between Newton and Florence, about four miles west of Florence. The local train, which stopped at Peabody, left Newton before the Cannon-Ball. According to the evidence of the railroad company, a brakeman upon the Cannon-Ball announced, before the train started, that "it would not stop until it got to Florence." Gants testified that just as the train started from Newton a train man came to the car door and said, "This train will not stop until it gets to Florence," but he claims he did not know then where Florence was. He further testified: "*Question.* How long did the train, which you say you boarded, and saw headed towards the east, remain there? *Answer.* I think about twenty minutes. *Q.* You had ample opportunity to get a ticket and had ample opportunity to ask the men who were employed about that train, whether that train stopped at Peabody? *A.* Yes, sir; I expect I did if I wanted to. *Q.* You made no inquiries? *A.* No, sir. *Q.* It is a fact from the time you arrived on the train going from Wichita to Newton, you made no inquiries as to that train,—as to what time the train started, and whether it stopped at Peabody? *A.* No, sir. *Q.* Never made any inquiries, either of the ticket agent or any person who had apparently charge there, although the train was standing there fifteen or twenty minutes after it got there, and while you were there? *A.* I do not think I did. *Q.* How soon did you get aboard of this train before it started? *A.* I cannot say; probably five minutes." Gants, however, testified that, when he bought his ticket for Peabody at Newton, he was told by the agent, who sold him the ticket, "to take the next train." After the Cannon-Ball train had left Newton and gone about three miles, the conductor called upon Gants for his ticket. He presented a ticket for Peabody, and the conductor informed him that the train did not stop at Peabody, and demanded from him 34 cents in addition to his ticket for the fare from Peabody to Florence. Gants refused to pay the additional fare. The conductor then informed him that if he did not pay, in addition to his ticket, the fare from Peabody to Florence, he would have to stop the train and put him off. Gants replied "that he would have to put him off, as he would not pay any further." The conductor then told him he would put him off, and stopped the train for that purpose. After the train had been stopped the conductor requested Gants, in a gentlemanly manner, to leave the train. He refused to get off, and dared the conductor to put him off. He resisted being put off to the utmost of his power and ability. On account of this resistance the conductor was unable himself to remove him; but with the assistance of two or three persons he succeeded in ejecting him from the train. After the train stopped, and while the conductor was attempting to eject Gants from the car, a severe altercation took place between them; the railroad company offered evidence tending to show that Gants during this time used vile and profane language to the conductor, in the car, which contained many passengers, a number of them being ladies. After Gants was ejected from the train, he walked a portion of the way back to Newton, and then got upon a hand-car and rode to Newton, arriving there between 10 and 11 o'clock in the forenoon. In the afternoon or evening of the same day he went to Peabody from Newton upon a local train, and the same day returned to Wichita. Upon his part he claims that he was wrongfully ejected from the train, and was unlawfully kicked, bruised, and injured in being ejected. This action was brought to recover damages therefor. Verdict and judgment for Gants for \$4,000. The railroad company moved for a new trial, which was refused, and it brings the case here.

The important questions presented in the record are—*First*, whether the railroad company had the right to eject Gants from the train; *second*, if the railroad company had that right, and Gants resisted to the utmost of his power and ability, whether he can recover for the injuries inflicted in his removal, unless they were willful, wanton, or malicious.

The law is well settled that, in the absence of statutory provisions to the



contrary, a railroad company may adopt a regulation that a certain train or trains of passenger cars, running regularly on its road, shall not stop at designated stations or places; and it is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop, according to the regulations of the company. *Railway Co. v. Nuzum*, 50 Ind. 141; *Beauchamp v. Railroad Co.*, 9 Amer. & Eng. R. Cas. 307-317; *Railroad Co. v. Pierce*, 3 Amer. & Eng. R. Cas. 340; *Railroad Co. v. Swarthout*, 67 Ind. 567; *Logan v. Railroad Co.*, 77 Mo. 663. In this state there is no statutory provision to the contrary, and as the train upon which Gants took passage was not to stop, under the regulations of the company, until it reached Florence, the conductor had the right, after the train started, to stop the train and require Gants to leave it, if he refused to pay the fare which, in addition to the sum paid for his ticket, would have entitled him to ride to Florence. *Fink v. Railroad Co.*, 4 Lans. 147; *Railroad Co. v. Pierce*, 3 Amer. & Eng. R. Cas. 340; *Railroad Co. v. Hine*, 64 Pa. St. 276. It was the duty of the railroad company to the public to run its trains according to its regulations, and it was also the duty of Gants to have informed himself whether the train stopped at Peabody. It is claimed, however, upon his part, that when he purchased his ticket he was told by the agent to take the next train, and therefore that he was without fault in getting upon the Cannon-Ball. In his direct examination Gants testified: "*Question*. Upon your arrival at Newton, what did you do? *Answer*. I bought a ticket and went up town. *Q*. For what purpose? *A*. I wanted to get shaved and look around the town a little. *Q*. How long did you remain in Newton? *A*. Why, I should say a little over an hour; a little over an hour perhaps." If he purchased his ticket immediately upon his arrival at Newton, the agent at the depot very properly told him "to take the next train," as there was evidence tending to show that a local train, which stopped at Peabody, left Newton for the east soon after Gants reached there. Subsequently, in his examination, Gants testified that he bought his ticket after he got shaved and had looked around the town. If this be true, and he was misinformed by the ticket agent, and thereby induced to take the first train going east, which did not stop at Peabody, this would give him a remedy against the railroad company for its breach of contract, but would not justify him in refusing to leave the train when ordered so to do by the conductor. "The business of railroads can only be carried on safely by having regularity. If trains are arranged in a certain way, and their time fixed with regard to limited stoppages, a conductor would never be safe if he were bound, at his peril, to ascertain from any mere stranger the existence of an agreement by the company to change the arrangement, and stop at an unusual place." *Railroad Co. v. Pierce, supra*.

Under all the evidence in the case, whether Gants was upon the train by mistake or wrongfully, he should have paid the extra fare to Florence, when demanded, or left the train when it stopped, and he was ordered to get off. If his mistake was induced by the company's ticket agent, then the fare from Peabody to Florence would be a proper element of damages, in addition to such as were occasioned by the failure to take him to Peabody on the train which he was told to take. If, however, he was misinformed by the local agent, but subsequently, after entering the train and before it started, was afforded such means of correct information by the announcement of the brakeman or otherwise, as a reasonable and prudent man would not neglect, he could not thereafter rely in good faith upon the incorrect statement of the agent from whom he bought his ticket. Even if Gants made a mistake in taking the train, induced by the ticket agent, it was not necessary for him to invite force to secure his legal demands. In *Townsend v. Railroad Co.*, 56 N. Y. 295, GROVER, J., said: "No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case." In *Bradshaw v. Railroad*

Co., 135 Mass. 407, ALLEN, J., said: "If a railroad company has agreed to furnish a passenger with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract, but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger, who has once paid, to submit to an additional exaction, but, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are, in fact, inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket." In *Railroad Co. v. Connell*, 112 Ill. 295, CRAIG, J., said: "We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expenses necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton." In *Hall v. Railroad Co.*, 15 Fed. Rep. 61, HAMMOND, J., said: "The conductor is somewhat like the master of a ship. He has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. He should be obeyed by the passengers, and the common notion that force must be invited to secure legal demands against his unlawful exactions is, in my judgment, erroneous and vicious. All that a passenger need do is to express his dissent to the demand made upon him, and he need not require force to be exerted to secure his rights; certainly not to increase his damages. \* \* \* I fully recognize the feeling of a 'free American citizen' in the face of threatened wrong or insult, but the safety of the ship forbids that he should fight with the master, and imperil the ship and lives and property she carries. Better that he should suffer the wrong than to danger or discomfort his fellow-passengers. The conductor of a railroad train is not altogether as supreme, perhaps, as the master of a ship; but, on analogous principles, that seem to me obvious, it is, I think, the duty of a passenger to avoid resistance beyond mere dissent, and submit to his authority without more than mere protest, unless resistance is necessary to defend himself against impending personal injuries." See, also, *Railway Co. v. Hinsdale*, 38 Kan. —, 16 Pac. Rep. 937, (just decided.) Clearly, if Gants was a trespasser upon the train, as this case was put to the jury, then the conductor had the right to put him off, and it was his duty to go off without being forced to do so. If the conductor had the right to put him off, Gants, at the same time, could not have a legal right to resist, and necessarily he could not resist the conductor in the discharge of a duty and the exercise of a right, and by that resistance acquire a right to resort to any force to overcome it. Of course, we do not intend to intimate that a trespasser upon a train can be treated in a willful, wanton, and malicious manner. *Railroad Co. v. Kelly*, 36 Kan. 655, 14 Pac. Rep. 172. In the conclusion which we have reached regarding the right of the conductor to eject Gants from the train, even if he made a mistake in taking it, induced by the ticket agent, upon his refusal to pay the fare demanded, we do not overlook the fact that a railroad company is a public carrier, and that some of the authorities are in conflict with the doctrine herein announced. A moving train, filled with passengers,

including ladies and children, is not the place for a wrangle, a quarrel, or a fight with the conductor. The interests of the public are to be considered in such a case, as well as the interests of a private individual. As was said in *Railroad Co. v. Connell, supra*: "It would be unwise and dangerous for the traveling public, to adopt any rule which might encourage resort to violence on a train of cars." This conclusion will prevent breaches of the peace upon railroad trains instead of producing them, and at the same time will fully protect the passenger by making the company responsible for all damages resulting from any breach of its contract. In addition to this, if a passenger has suffered in his business, or been put to expense by the delay or refusal of the railroad company to carry him as promised by its ticket agent, he would be entitled to ample damages therefor. In this connection it is well to state that, where a trespasser is ejected from a train, such ejection may be at a place other than a depot or station, provided care is taken not to expose his person to serious injury or danger; but in such an ejection, the railroad company is not required to have consideration for the mere convenience of the wrong-doer. *Lillis v. Railway Co.*, 64 Mo. 464; *McClure v. Railroad Co.*, 34 Md. 532; *Railway Co. v. Miller*, 19 Mich. 305; *O'Brien v. Railroad Co.*, 15 Gray, 20.

The trial court in its instructions to the jury treated Gants as a trespasser upon the train, after he refused to pay fare from Peabody to Florence, and to leave the train; but further instructed the jury as follows: "(8) If you find from the evidence that an unnecessary degree of force was employed, and that plaintiff was injured thereby, in that case he would be entitled to recover in this action. \* \* \* (11) But in determining what is a reasonable degree of force, under the circumstances of this case, you should consider the amount of resistance opposed by the plaintiff to those who were attempting to eject him. And if you find that the plaintiff suffered injuries which were the direct and necessary result of the application of force rendered necessary by his own resistance, he cannot recover for such injuries; but the use of a degree of force disproportionate to the resistance to be overcome would render the train men wrong-doers in turn, and would render the company liable for any injuries committed by reason thereof. (12) I instruct you that if the plaintiff had exerted himself to the utmost in resisting the efforts of the train men to expel him, and that in overcoming such resistance the train men used more force and violence than was necessary for the purpose, and without any intention to commit unnecessary injury, and that plaintiff was injured thereby, in such a case the resistance offered by the plaintiff may be considered in mitigation of damages. \* \* \* (20) If, under the evidence and instructions of the court, the jury find for the plaintiff, then in estimating the plaintiff's damages, if any are proved, you have a right to take into consideration the personal injury inflicted upon him, the pain and suffering undergone by him in consequence of his injuries, if any are proved, the loss of time occasioned thereby, the reasonable cost of medical attendance, and also the permanent loss or damage, if any is shown, arising from disability resulting to the plaintiff from the injury in question, rendering him less capable of attending to his business than he would have been if the injury had not been received; plaintiff would also be entitled to any sum of money lost by him as a direct consequence of the wrongful acts complained of, if they were wrongful, and any money was so lost; and if you further find from the evidence that the injury complained of was inflicted wantonly or willfully, and that the plaintiff has sustained damages thereby, then the jury are not limited in assessing the damages to mere compensation for damages actually sustained, but you may give him a further sum by way of exemplary or vindictive damages, as a protection to the plaintiff, and as a salutary example." The railroad company requested the following instruction, which was refused: "In determining the question in this case, as to whether the train men on the train from which plaintiff was ejected used more force or violence than was necessary to be

used in ejecting plaintiff from such train, you are to take into consideration the amount of resistance offered by plaintiff to such ejection, and if you find that he resisted the attempt of the conductor to put him off from such train with all the force and power he was capable of using, then, and in such a case, you are instructed that the law will not, with a nicety, weigh the amount of force necessary to be used in overcoming such resistance, and that in such case the defendant would only be liable in a case of palpable and perfectly apparent use of force beyond that which was clearly necessary to be used in overcoming the resistance offered by plaintiff."

If Gants was a trespasser upon the train, the conductor had the right to eject him, and we think the railroad company can only be made responsible for the injuries inflicted which were willful, wanton, or malicious. In refusing to give the instruction prayed for, and in giving to the jury the twelfth instruction, and also the twentieth, the court made the railroad company liable in damages for all excessive force used in overcoming the resistance of Gants, although such force was used "without any intention on the part of the conductor, or those assisting him, to commit injury." The first clauses of the twentieth instruction permitted Gants to recover for "the personal injuries inflicted upon him, and the suffering undergone by him in consequence of his injuries," although a part of the injuries may have been occasioned in overcoming his own unlawful resistance. In *Galbraith v. Fleming*, (Mich.) 27 N. W. Rep. 581, the court said: "The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he come out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him, or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law." In *Taylor v. Clendenning*, 4 Kan. 524, it was held that "where a person, who was the original aggressor in an affray, met with too vigorous a defense, and sued for damages on account of the injuries, he could not recover of his intended victim." It has been decided by this court, time and again, that whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or substantially contributed towards it, he is not entitled to recover; and further, that if a plaintiff is first in fault in infringing upon a defendant's rights, the defendant is absolved from all but slight care, and is liable only for gross or wanton negligence. *Railway Co. v. Rollins*, 5 Kan. 167; *Railway Co. v. Pointer*, 14 Kan. 37. In the latter case it was said by BREWER, J.: "Many considerations, especially the difficulty of correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule, so universally recognized, that where the wrong (the negligence) of both parties contributes to the injury, the law will not afford any relief." In this case, Gants could have remained upon the train and gone to Florence by paying the fare from Peabody to that station; or, when the train stopped, he could have left the train when requested to do so by the conductor, in a gentlemanly manner; and it is clearly evident that if he had done either he would not have suffered any personal injuries at the hands of the conductor or train men. He stubbornly refused to pay the additional fare, and also forcibly resisted when requested to leave the train. He did all of this after the conductor had informed him the train would not stop at Peabody, and that he must pay to Florence or get off. Under the rule established in this state in *Taylor v. Clendenning*, so long ago as 1868, Gants ought not to recover, even if his resistance might have been overcome with something of less force than the conductor and his assistants actually used, unless such excessive force was willful, wanton, or malicious. By resisting to the utmost of his power and ability, Gants invited force; and he ought not to complain of the force used if

there was no intention upon the part of the conductor or his assistants to commit unnecessary injury. On the other hand, if Gants, although a trespasser upon the train, received injuries which were the direct and necessary result of willful, wanton, or malicious acts of the conductor or those assisting him, he is entitled to his damages. *Railroad Co. v. Kelly*, *supra*. Counsel for Gants insist that the decisions are that a trespasser can recover for all injuries arising from the use of unnecessary force, without regard to whether it was willful, wanton, or malicious, and also insist that this court has recognized this rule in *Railway Co. v. Weaver*, 16 Kan. 456, and *Railroad Co. v. Kessler*, 18 Kan. 523. In the *Weaver Case* the railway company was found by the jury to have been the aggressor after the passenger had been ejected and put upon the ground. The expulsion in that case was held to have been wrongful, but as it did not seem to the court to have been wanton or excessively cruel, the damages were deemed excessive and the judgment reversed. In the *Kessler Case* the court held that in the wrongful expulsion of the passenger from the train, the railroad company was guilty of such gross negligence as amounted to wantonness; and yet, even then, with much hesitation it affirmed a judgment of \$820 only. In several of the cases cited by counsel, where damages have been allowed for unnecessary force, the unnecessary force was wanton or malicious. In *McKinley v. Railroad Co.*, 44 Iowa, 314, the acts of the brakeman, for which the company was held liable, were malicious and criminal. In *Bass v. Railway Co.*, 39 Wis. 636, the passenger peaceably and lawfully entered a ladies' car, in which there were many vacant seats, and, when about to occupy one, was rudely and violently seized by a brakeman, aided by a volunteer, and forcibly thrust from the car. The passenger was not first requested to leave the car, or forbidden to enter it. In that case the assault was willful, wanton, and malicious. In *Jackson v. Railroad Co.*, 47 N. Y. 274, the passenger tendered five cents for fare on a street car, and the conductor demanded six. This was refused. The conductor caught the passenger around the waist, and stopped the car to put him out. The passenger refused to leave the car and resisted. The conductor struck him a blow on his nose, but made no further attempt to eject him. The blow struck by the conductor was held by the trial court to have been willful and malicious; and the case was reversed because it was not left to the jury to determine whether the act was done without malice or ill feeling. In *Hanson v. Railway Co.*, 62 Me. 84, after the passenger had ceased all resistance and was returning to his seat with his back to the brakeman, the latter struck him several blows with an iron poker, two feet long and half an inch in diameter, about the head and shoulders and over the eye. Evidently the assault of the brakeman in this case was also willful, wanton, and malicious. In *Coleman v. Railroad Co.*, 106 Mass. 160, the passenger who was ejected was struck two or three heavy blows behind the ear, and thrown bodily upon the platform of the depot. The trial court in that case instructed the jury that the railroad company was responsible for excessive or unreasonable force, but also stated to the jury that the passenger "had no right to resist the process of being put out." In the opinion in that case it was said "that violence on the part of the passenger would increase the violence necessary and proper to be used on the part of the employees; and if it contributed in any degree to the violence of his fall, or to the aggravation of his disease, he cannot recover for the injuries he received. The burden was on him to prove that his own illegal acts did not in any degree contribute to the alleged injury, but that it was wholly caused by the wrongful acts of the railroad company's servants." This language plainly implies that the unnecessary force must be wanton or malicious. We think a critical examination of the decisions will demonstrate the general rule to be that, where parties are permitted to recover solely on account of injuries inflicted by unnecessary force or excessive violence, the facts in the cases disclose that the force or violence used was willful, wanton, or malicious; and that in most of the cases "unneces-

sary force" or "excessive violence" was used as synonymous or tantamount to wanton or malicious force. But counsel insist that the excessive force used in this case was willful and wanton, and therefore the judgment should not be disturbed. We cannot assent to this. Under the instructions the jury were not authorized to separate the force used in overcoming obstinate and forcible resistance with no intention to commit injury, from the force that was used willfully, wantonly, or maliciously, if any such force was used. Even if Gants was upon the train under the direction of the ticket agent, and without fault on his part, as before remarked he should have paid the extra fare to Florence, as he was able to do, or left the train when it stopped. For the mistake of the ticket agent, or the wrong of the railroad company, if any, he had ample remedy: *Manufacturing Co. v. Boyce*, 86 Kan. 350, 13 Pac. Rep. 609.

As a new trial must be ordered we will dispose of the minor alleged errors: There was evidence on the part of the railroad company that, prior to his removal from the train, Gants used vile, obscene, and profane language. Gants introduced two witnesses to show that he was not in the habit of using obscene or profane language. One of the witnesses testified that he had known Gants over a year, and that he never heard him "use half a dozen oaths in his life." Another witness testified that he never heard him "use obscene language in public, but that he might have heard him make use of an oath sometime, but not frequently." We do not think the answers of the witnesses very material, or as tending to prove much. Whether Gants had a great propensity to use obscene language is not important. If such evidence was permitted, it would present a collateral issue, and we do not think, under the authorities, that this evidence in this kind of a case is competent. *Thompson v. Botoie*, 4 Wall. 463; *Com. v. Kennon*, 130 Mass. 39. Also, the question permitted to be asked, upon cross-examination of one of the witnesses, as to the number of saloons in Las Animas and La Junta, Colorado, was wholly improper because it did not tend to rebut, impeach, modify, or explain any of his testimony. Again, we do not think that the evidence of what the conductor of the Wichita train told Gants was admissible. If it were true, it was not sufficient ground for Gants to refuse to pay his fare to Florence, or to resist removal from the train. A conductor in the line of his duty in collecting fare, taking up tickets, and in giving information to the passengers on his train, represents the company as to the running and operation of his own train, but in this case the Wichita train stopped at Newton, and Gants had to change cars at that place in order to go to Peabody. In the case of *Railroad Co. v. Gilbert*, 2 Amer. & Eng. R. Cas. 230, cited, the conductor instructed the passenger to keep her seat upon his train, although she had a ticket for a train that branched off in another direction. The court there very properly held that the answer of the conductor was equivalent to saying she was on the right train, and held the railroad company responsible in damages, but did not intimate that she could have increased her damages by refusing to leave the train when ordered. There was some evidence tending to show that Gants was removed from the train with the assistance of one or two passengers; and it is claimed on the part of the railroad company that the company is not responsible for their acts unless they were requested by the conductor to assist. It was not necessary that the conductor should have given express directions to all concerned in the ejection, but if any passenger aided the conductor or the train men, with his permission and sanction, a jury might infer an employment. If, on the other hand, the passengers were mere interlopers, and the conductor had no opportunity to interfere with their actions, it would not be fair that the railroad company should be held responsible for their acts.

The judgment of the district court will be reversed and the cause remanded for a new trial.

All the justices concurring.

(75 Cal. 256)

*In re RETY'S ESTATE.* (No. 12,331.)

(Supreme Court of California. March 16, 1888.)

**WILL—CONTEST—ATTORNEY'S FEE—DISCRETION OF COURT.**

The appointment of an attorney for absent heirs in the contest of a will, and the allowance to him of a fee, to be paid by the estate, are matters entirely within the discretion of the probate court; and if such allowance be improvident or indiscreet, the court may vacate it at the suggestion of any one, or upon its own motion.

Department 2. Appeal from superior court, Marin county; E. B. MAHON, Judge.

*M. C. Baum, pro se. H. Wilkins and J. M. Chretien, for respondents.*

McFARLAND, J. At the hearing of the petition for the probate of the will of the deceased, the appellant, M. C. Baum, appeared and contested the same for certain absent heirs. So far as we can learn from the very meager record this contest took place in August, 1886. He was not appointed by the court to represent said heirs at the hearing of the petition for the probate of the will, and it seems that he had no authority from said heirs to appear for them. Afterwards, on April 11, 1887, when, for aught that appears, the contest had been determined, the court made an order "*nunc pro tunc* as of the 2d day of August, 1886," appointing appellant attorney for said absent heirs; and on May 3, 1887, the court made another order directing the executors of the estate to pay said appellant \$800, "as such attorney, and under order of court, *nunc pro tunc* as of August 2, 1886." On June 6, 1887, on motion of the residuary legatee, and upon notice to appellant and the executors, the court made an order vacating and setting aside both of said orders above mentioned. From this order appellant appeals, and also from an order overruling certain objections to the appearance of the said legatee.

Waiving the questions whether or not the order appealed from was an appealable order, and whether or not there was power in the court to make the *nunc pro tunc* order at all, and whether or not the residuary legatee could rightfully appear and make the motion to vacate, still we think that the appointment of an attorney for absent heirs, and the allowance to him of a fee, are matters entirely within the discretion of the probate court, and that if such allowance be improvident or indiscreet, the court may vacate it, at the suggestion of any one, or upon its own motion. Orders affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(75 Cal. 117)

*HEILBRON et al. v. LAST CHANCE WATER DITCH CO.* (No. 11,391.)

(Supreme Court of California. February 15, 1888.)

**1. LIMITATION OF ACTIONS—ADVERSE USER—LEASED PREMISES.**

In an action brought by the lessees to restrain defendant from diverting water from a natural water-course which flowed over the leased land, the defense was adverse user of the water diverted for more than five years prior to the commencement of the suit, and the statute of limitations. *Held*, that even if it were the law that the lessor could not bring such suit while the land was in possession of the lessees, yet if, after the adverse user had commenced, the term of the lease had expired, thus giving the lessor the right of possession, he could not continue to make new leases, and thus indefinitely postpone the running of the statute of limitations.

**2. SAME—FAILURE OF LESSOR TO SUE—LESSEE ALSO BARRED.**

The land was all the time in the possession of lessees. *Held* that, under Civil Code Cal. § 826, which provides that "a person having an estate in fee, in remainder, or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years," the lessor could have maintained an action against defendant for the alleged diversion at any time within five years after it commenced, and not having done so, he and the plaintiffs, lessees, were barred, and defendant acquired title by adverse user.

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In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*McAllister & Bergin, D. S. Terry, and Brown & Daggett*, for appellants. *Bronson & Wells, Atwell & Bradley, and Wells, Van Dyke & Lee*, for respondents.

McFARLAND, J. This is an action to restrain defendant (a corporation) from diverting water from a natural water-course called "King's River," and for damages for past diversion. The court below, sitting without a jury, gave judgment for defendant, and from the judgment, and an order denying a new trial, the plaintiffs appeal. The plaintiffs, who are August Heilbron, Adolph Heilbron, S. Clayburgh, and S. C. Lillis, aver in their complaint that they "are now, and they and their predecessors and grantors for more than five years last past have been, the owners and in lawful possession of" a large tract of land in Fresno and Tulare counties, in this state, called the "Rancho Laguna de Tache." The facts about their title and possession, as proven and found by the court, are these: On and prior to September 23, 1868, the title in fee to the said *rancho* was in Jeremiah Clarke, to whom it had come by mesne conveyances from Manuel Castro, to whom before that time it had been patented by the United States government. On said September 23, 1868, said Clarke leased the *rancho* to Edwin St. John for a term of 10 years from and after November 1, 1868. St. John took possession under the lease, and so held possession until the 10th day of September, 1874, on which day, with consent of Clarke, he transferred his unexpired leasehold to the plaintiffs herein, who then entered and have been in possession continuously until the commencement of this action, which was October 12, 1883. On April 24, 1877, Clarke made a contract with plaintiffs by which the term of the lease to St. John was extended for the further period of six years, ending November 1, 1884, and plaintiffs were given the privilege of buying a part of the land at a specified price. On May 1, 1880, Clarke made another contract with plaintiffs, by which he leased said *rancho* to plaintiffs for the term of 10 years from said May 1st, with the privilege of buying the whole of the land, and canceled the contract and lease of April 24, 1877. And since May 1, 1880, plaintiff's possession has been under the said contract made that day. Clarke is still the owner in fee of the land. He is not a party to this action. Along this land, and forming a boundary of it for many miles, there is a natural water-course, called "King's River." The defendant, by means of a dam and ditch, has diverted a large amount of the water of this river and carried it away from said land, and continues to so divert and carry it. Plaintiffs bring this action to restrain such diversion, and for damages, basing their cause of action upon the right of a riparian owner to have a natural stream continue to flow as by nature it is wont to flow, over, through, or along his land. Defendant contends that, by an adverse user for a period of more than five years before the commencement of the action, it has acquired the right to have the water continue to flow in its ditch, and pleads the statute of limitations. The court below finds that in 1874 defendant constructed the ditch through which the diversion complained of is accomplished, and that in that year it turned the water of said stream to the extent of a certain number of inches into said ditch, and has ever since continuously used and diverted that amount of water, and no more, claiming the right to do so; "and that said use and diversion by defendant was actual and continuous, open, peaceful, notorious, and known to plaintiffs, and adverse to them for a period of more than five years immediately preceding the commencement of this action." And there is clearly evidence sufficient to support this finding. Plaintiffs contend, however, (and this contention raises the main issue in the case,) that during the lease to St. John, the land being in possession of tenants, the landlord or reversioner, Clarke, could not have maintained an action for the diversion of the water; and that therefore the



statute of limitations did not begin to run against him during the tenancy. And they invoke the doctrine that title by prescription is based upon the fiction of a lost grant; that no grant can be presumed as against the reversioner, because he has no means of resisting the adverse user; and that a tenant for years can make no grant longer in duration than his term.

It is not entirely clear how this proposition, if tenable, could be made available upon the facts in this case. If the principle contended for were correct, still if after the adverse user had commenced the term of lease had expired, thus giving the landlord the right to the possession, he could not continue to make new leases, and thus indefinitely postpone the running of the statute of limitations. The theory of appellants is that as the first lease to St. John did not expire until November 1, 1878, and the complaint was filed October 12, 1883, therefore, the action—according to their contention—was commenced in time. But in April, 1877, while the adverse user was in full force, Clarke, by written contract, extended the lease for six years; thus putting it out of his power, according to the principle asserted, to sue at the end of the first lease. And by contracts and leases overlapping each other, Clarke has, by the rule contended for, disabled himself indefinitely from bringing an action for the alleged diversion of the water. We mention these difficulties in appellants' way because they are obvious; but, as counsel for respondent have not very strenuously insisted upon them, we will examine the case as though the only question presented were: Can the owner in fee of land, having leased it, and while it is in the possession of the tenant for years, maintain an action against a third party for the diversion of water from a natural stream running through the land? Section 826 of the Civil Code provides that "a person having an estate in fee in remainder, or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life, or years." And it seems clear upon principle and authority that the diversion of natural water from land is "an injury done to the inheritance." The flow of natural water over land is a continuous source of fertility and benefit, and its withdrawal is followed by consequences which are perpetually injurious to the freehold. This is strikingly illustrated by the averments in the complaint in this case, "that the waters of said King's river have hitherto been accustomed to overflow,—seep through and moisten the lands of said *ranch*o; whereby the fertility of said lands was greatly increased, and a large and valuable quantity of natural grass was produced upon said lands;" and that, by reason of the diversion of the water by defendant, "said lands have failed to produce their accustomed crops of natural grass." The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation; and the growth and decay of vegetation add, not only to the fertility, but to the very substance and quantity of the soil. It is not true, therefore, as claimed by appellants, that the water of a natural stream may be taken away from land for a great number of years, and then turned back, without any permanent injury to the land. Moreover, according to the riparian doctrine (upon which appellants rely in this case) "the right to the flow of water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, but as a parcel." *Lux v. Haggin*, 69 Cal. 390, 10 Pac. Rep. 674, and cases there cited. In *Cary v. Daniels*, 5 Metc. 238, the court say that the right to the use of water flowing over land is undoubtedly identified with the realty, and is a real and corporeal hereditament. And consequently it has been repeatedly held that a reversioner may maintain an action for interference with natural water, although the land be in the actual possession of a tenant for years. In section 378 of Gould on Waters it is said that "the reversioner may sue for any wrongful interference with the future enjoyment of property. This includes all acts directly injuring his freehold, and all adverse uses tending to establish easements or to abridge his rights." And at section 379 the learned author

says: "In America it has been held that the freehold is injured by causing water to flow back upon the plaintiff's land, or into his race, or by the obstruction of his mill by backwater; or again by withholding water from his mill, or by diverting a natural water-course from his land, or by polluting the stream; and that the reversioner may recover for such injuries." In *Hart v. Evans*, 8 Pa. St. 14, it was held that "the water-course was a permanent advantage to the inheritance, and taking it away was an injury to the inheritance, for which an action would lie;" and that "the gist of the action for diverting a water-course is the diversion, which, in whatever way it is done, is an injury both to the freehold and the possession." It seems clear, therefore, that Clarke might have maintained an action against the defendant for the alleged diversion at any time after it commenced in 1874, and within the statutory period of limitation, (whether that period be four or five years,) and that, not having done so until nearly nine years afterwards, he and the plaintiffs were barred, and defendant acquired title by adverse user. And this is so without considering section 738, Code Civil Proc., which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim;" and without regard to the contention of respondents that the statute of limitations cuts off the remedies of all persons whom it does not expressly except. The point that respondents are not found to "have paid all the taxes, state, county, or municipal, which have been levied and assessed upon said land," (section 325, subsec. 2, Code Civil Proc.,) is sufficiently answered by the fact that it does not appear that any taxes were ever levied or assessed upon the ditch and water-right in question to defendant, or to any person or persons, known or unknown. Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

PATERSON, J. I dissent. The findings respecting adverse use are contradictory; there can be no adverse use to set the statute in motion where the use is by consent.

The description of the quantity, viz., "14,400 cubic inches per second under a 4-inch pressure of the waters of said river," is uncertain. If it means "14,400 cubic inches per second," or "14,400 inches under a 4-inch pressure," it is not supported by the evidence.

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HEILBRON *et al.* v. EMIGRANT DITCH CO. (No. 11,468.)

(*Supreme Court of California.* February 15, 1888.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*D. S. Terry and Brown & Daggett*, for appellant. *Tupper & Tupper*, for respondents.

PER CURIAM. The points in this case are so nearly identical with those passed on in the case of *Heilbron v. Ditch Co.*, ante, 65, (No. 11,391,) that another opinion on those points is unnecessary. On the authority, therefore, of the last-named case, the judgment and order are affirmed.

**HEILBRON et al. v. PEOPLE'S DITCH CO. (No. 11,393.)***(Supreme Court of California. February 15, 1888.)*

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*Brown & Daggett* and *D. S. Terry*, for appellants. *Wells, Van Dyke & Lee* and *Atwell & Bradley*, for respondents.

PER CURIAM. Upon the authority of *Heilbron v. Ditch Co.*, ante, 65, (No. 11,391,) the judgment and order are affirmed.

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**LOWER KING'S RIVER WATER DITCH CO. v. HEILBRON et al. (No. 11,443.)***(Supreme Court of California. February 15, 1888.)*

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*Brown & Daggett* and *D. S. Terry*, for appellants. *Bronson & Wells, Atwell & Bradley*, and *Wells, Van Dyke & Lee*, for respondents.

PER CURIAM. Upon the authority of *Heilbron v. Ditch Co.*, ante, 65, (No. 11,391,) the judgment and order are affirmed.

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(75 Cal. 250)**QUINLAN v. NOBLE. (No. 12,113.)***(Supreme Court of California. March 14, 1888.)***EASEMENT—PURCHASER TAKES SUBJECT TO.**

The owner of a tract of land through which a water-ditch had been dug, divided the tract, and conveyed the same to different grantees, one of whom obstructed the ditch, so as to cut off the supply of water to the other's land. Held, that he took subject to the easement, and could not obstruct it.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action by Michael Quinlan against George A. Noble to remove an obstruction in a water-ditch. Judgment for plaintiff, and defendant appeals.

*Ward & Grady* and *Stuart S. Wright*, for appellant. *R. B. Terry*, (*H. S. Dixon*, of counsel,) for respondent.

MOFARLAND, J. This is an action to remove an obstruction in a water-ditch. The verdict and judgment were for plaintiff, and defendant appeals. At the close of plaintiff's evidence defendant moved for a nonsuit, which was denied. It does not appear that any evidence was offered by defendant, and the verdict went for plaintiff. Appellant's argument is addressed mainly to the point that the court erred in denying the nonsuit.

The evidence was sufficient to warrant the court and jury in finding the following facts: At the commencement of the action, June 1, 1886, plaintiff was the owner of a certain tract of land called "Lot No. 10," and defendant was the owner of a tract of land adjoining said lot 10. On the 18th day of May, 1878, William S. Chapman was the owner in fee of both these tracts, and continued to be the owner thereof until he disposed of them as herein-after mentioned. In November, 1875, he made a written contract with one F. A. Pierce for the conveyance to the latter of said lot 10, and put Pierce in possession. In May, 1878, Pierce assigned and conveyed all his title and interest in the contract and land to D. W. Shepard; and in March, 1879, Shepard, in like manner, assigned and conveyed to Julia A. Fink Smith (widow.) In January, 1881, Chapman conveyed said lot 10 to said Mrs. Smith and T. C. White in fee-simple, in pursuance of the said contract with said Pierce.

Afterwards, through mesne conveyance, the title to said lot 10 was vested in plaintiff on September 1, 1885. The said adjoining tract, owned by defendant, was conveyed by said Chapman to the Bank of California on the 20th of April, 1879; and, through mesne conveyances, the title to it vested in defendant in December, 1882. As early as 1877 Chapman, while he owned both tracts, built a ditch across the tract now owned by defendant, to said lot 10, for the purpose of irrigating the latter; and from 1877 until after the conveyance of lot 10 to plaintiff in September, 1885, there has continuously been a ditch across the tract owned by defendant to lot 10, and used by the owners of the latter for its irrigation, although the course of the ditch over defendant's tract was at one time changed by the owners of said tract from what was called "Ditch No. 1" to "Ditch No. 2." It was there when plaintiff purchased lot 10, in September, 1885, but was obstructed shortly afterwards by defendant.

Taking these to be the facts, we think that the judgment of the court below was right, and that without reference to the question of adverse user. While Chapman owned all the land there probably could have been no relation of dominant and servient tenement between the tracts, but when he severed them by sale and conveyance, the grantee of each took it in the form which it assumed when he acquired it. This was held to be the law in *Cave v. Crafts*, 53 Cal. 139. In that case Mr. Justice MCKINSTRY, delivering the opinion of the court, quotes approvingly the language of DENIO, J., in *Lampman v. Mills*, 21 N. Y. 505, as follows: "The rule of the common law on this subject is well settled. The principle is that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. \* \* \* No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale."

Judgment and order denying a new trial affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

(75 Cal. 284)

#### PHARIS v. MULDOON. (No. 12,208.)

(Supreme Court of California. March 20, 1888.)

#### MINES AND MINING—RELOCATION—WHAT CONSTITUTES.

Rev. St. U. S. § 2324, provides, upon failure of a locator to expend \$100 each year on his mining claim, the same shall be open to relocation, unless the original locator resume work thereon before such relocation. Defendant's claim became, under that statute, open to relocation January 1, 1886, and at 1 A. M. plaintiff posted his notice. He did not, however, mark out his boundaries until January 5th, and defendant, on January 1st, at the usual hour in the morning, resumed labor, did work to the amount of \$10 up to January 5th, and \$200 during that year. Held, plaintiff's proceedings, not amounting to location before work was resumed, conferred no right upon him.

Commissioners' decision. Department 2. Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

Defendant, E. Muldoon, on July 14, 1884, located the claim in controversy, but during the year of 1885 expended thereon no more than \$60. Plaintiff, Alfred Pharis, claiming under a relocation, on January 1, 1886, brought this action to quiet title. Judgment was entered for defendant, and plaintiff appeals.

*Curtis H. Lindley and D. B. Spagnoli*, for appellant. *Eaton & Rust*, for respondent.

FOOTE, C. Action to quiet title to a mining claim. It is found by the court, and assumed by counsel upon both sides, that the claim of the defendant was not open to relocation until January 1, 1886. At 1 o'clock A. M. of that day plaintiff posted his notice, but did not mark out his boundaries until January 5th. In the mean time, that is to say, at the usual hour of commencing work of that kind, on the 1st day of January, 1886, the defendant resumed labor on his claim, did \$10 worth of work on it up to the 5th of January, 1886, and afterwards, during that year, performed labor upon it to the amount of \$200 more. The marking of boundaries is a necessary part of the location, (*Newbill v. Thurston*, 65 Cal. 419, 4 Pac. Rep. 409,) and this was not done until January 5, 1886. The defendant had resumed work "after failure and before location." This being the case, the plaintiff's proceedings conferred no right upon him, (*Mining Co. v. Deferrari*, 62 Cal. 163,) even if we concede, what we are not prepared to admit, that an entry by stealth at 1 o'clock in the morning is within the contemplation of the act of congress (section 2324, Rev. St. U. S.) The other points made require no special notice. It results that the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(75 Cal. 282)

SCHUMACHER v. CONNOLLY, Sheriff. (9,711.)

(*Supreme Court of California*. March 20, 1888.)

ATTACHMENT—WRONGFUL—DAMAGES—EVIDENCE.

Judgment for \$300 damages for wrongful attachment sustained, the evidence being conflicting as to the value of the property attached.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action for damages for wrongful seizure of property under writ of attachment against a third party, brought by Frederick Schumacher against Patrick Connolly, Sheriff. Judgment for plaintiff, and defendant appeals.

*Geo. A. Knight*, for appellant. *Henry Eickhoff*, for respondent.

FOOTE, C. This was an action for damages against Connolly, as sheriff, for the alleged wrongful seizure of the plaintiff's property, under writ of attachment against one R. White. The cause was tried by a jury. The plaintiff had a verdict for \$600. A motion for a new trial was duly made, and the court below ordered "that said motion be granted, unless the plaintiff shall consent in writing to a reduction of the judgment herein from the sum of six hundred dollars to the sum of three hundred dollars, in which case the judgment will be modified accordingly, and the said motion for a new trial denied." The plaintiff consented to have the judgment modified as required by the court, and from the judgment thus made and given, and the order denying a new trial, this appeal is taken.

The point is made by the appellant that the judgment should be reversed because the evidence shows that there was no immediate transfer and actual and continued change of possession of the property attached, either from White, the defendant in the attachment suit, to one Seligman, who first bought the goods, or to his vendee, Schumacher, the present plaintiff. It was also claimed that the sale was fraudulent. We perceive nothing in the record to warrant us in sustaining the last contention. The evidence sufficiently shows

an immediate transfer, and an actual and continued change of possession of the property attached from White, the defendant in attachment, to Selligman, and from him to the plaintiff. There was a conflict in the evidence as to the value of the property attached, and the modification of the judgment under the order of the trial court should stand.

We advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Ariz. 442)

BLACKMORE v. REILLY.

(Supreme Court of Arizona. March 16, 1888.)

1. PUBLIC LANDS—TOWN-SITE—MINING CLAIM—CONFLICTING PATENT.

Where a patent to a town-site and a patent to a mining claim conflict, that one will be sustained which first vests the right.

2. SAME.

A town-site patent does not vest a right in lands known at the time to be mineral lands.

3. SAME.

A town-site patent will not be defeated by discovery of mineral and location of mineral lands as such after the town-site patent.

4. SAME—MINING CLAIM—WHEN RIGHT VESTS.

The right to mineral lands vests at the time of a valid location. A location void for uncertainty prior to a town-site afterwards amended and made the basis of a patent will not defeat a town-site patent prior to such amendment.

5. SAME—EFFECT OF PATENT.

The granting of a patent is *res adjudicata* that lands were mineral lands at the time of location, and known to be such.

6. SAME—EVIDENCE.

A location uncertain as to lands claimed, unaided by proof of monuments, possession, or working, cannot be evidence that lands were then known to be mineral lands; following *Town-Site Cases*, 15 Pac. Rep. 26.

Appeal from district court, Cochise county; STREET, Judge.

Thomas Mitchell, for appellant. Geo. G. Berry, for appellee.

PER CURIAM. This case is the same as the *Town-Site Cases* in 15 Pac. Rep. 26, and upon the authority of those cases the judgment will be reversed and the cause remanded.

WRIGHT, C. J., and PORTER and BARNES, JJ., concur.

(11 Colo. 9)

HARDENBROOK v. HARRISON.

(Supreme Court of Colorado. January 27, 1888.)

1. HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR WIFE'S DEBTS—PROOF OF RELATIONSHIP.

The account in suit, which was made out against "Mrs. Frank Hardenbrook," was presented on several occasions to "Mr. Frank Hardenbrook," the defendant, for payment. He said that it was all right, and would pay it as soon as he could. Held, in the absence of evidence to the contrary effect that the presumption arose that defendant was husband to the person against whom the account was charged.

2. SAME—NECESSARIES—WEARING APPAREL.

Ordinary wearing apparel and dress-making services in making it up are *prima facie* necessities, and the husband is liable therefor in the absence of proof that such articles and services are not necessities.

3. SAME—RATIFICATION OF CONTRACT.

A husband who, when a bill for necessities furnished his wife is presented to him, says that it is all right, and promises to pay it as soon as he is able, thereby ratifies the purchase by the wife, and is liable therefor.

4. JUSTICE OF THE PEACE—JURISDICTION—WAIVER OF OBJECTION.

Gen. St. Colo. 1888, § 1932, provides that "suit shall be commenced before justices in the township in which the person sued resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." *Held*, where defendant made no objection to the jurisdiction, either before the justice or before the county court on appeal, that an objection upon that ground would not be entertained in the supreme court, but would be considered as waived.

Appeal from Arapahoe county court.

This action was brought against Frank M. Hardenbrook, appellant, before a justice of the peace, to collect a claim for dress material and dress-making services furnished to Mrs. Frank Hardenbrook. Judgment was rendered for appellee, Harrison, by the justice, and an appeal taken by the present appellant to the county court. There the cause was retried without a jury, and judgment again rendered in favor of the plaintiff below. To review that judgment the present appeal was taken. Section 1932, Gen. St., reads as follows: "Suit shall be commenced before justices in the township in which the debtor or person sued resides, unless the cause of action occurred [accrued] in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." And section 1988, relating to trials in the county court of causes appealed from justices of the peace, is as follows: "If it shall appear, however, that the justice had no jurisdiction of the subject-matter of the suit, the same shall be dismissed at the cost of the plaintiff." The remaining facts sufficiently appear in the opinion.

*Bullick & Dixon*, for appellant. *E. C. Stimson*, for appellee.

HELM, J., (after stating the facts as above.) The record before us does not affirmatively show that defendant resided, or the cause of action accrued, or the claim sued for was payable, in the township (precinct) of the justice before whom suit was originally brought. A reversal of the judgment is urged upon this ground, under section 1932, Gen. St. It is doubtful if any of the assignments of error are broad enough to cover this question of jurisdiction; but if so, the objection must be overruled. The point was not made before the justice of the peace, and while defendant did not appear in that court at the time of trial, he afterwards took his appeal to the county court, entered therein a full appearance, and conducted the trial to judgment, without in any way calling attention to the subject. It does not appear that even at the time of making his application for a new trial in the county court he presented this ground. That court would have had complete original jurisdiction of the subject-matter of the action, and, under the circumstances, the objection, now interposed for the first time, comes too late. This court has held that while the statutory provision mentioned is jurisdictional, it does not refer to the *subject-matter* of actions, and is not covered by section 1988, Gen. St.; that it relates to "jurisdiction of the person," (*Melvin v. Latshaw*, 2 Colo. 81;) that it confers "a personal privilege enacted for the convenience of the debtor, which, like the service of process, he may waive." *Railroad Co. v. Roberts*, 6 Colo. 333. Appellant must be held to have waived his rights in the premises, and cannot now be heard upon the objection.

The record in this case shows that a written statement or bill representing the account in controversy was made out against "Mrs. Frank Hardenbrook," and that on several different occasions it was presented to "Mr. Frank Hardenbrook," the defendant, for payment. It further appears that on each and every of these occasions he acknowledged the correctness of the account, saying that it was all right, and that he would pay it; but stating that he did not just then have the means at hand, and postponing the payment from time to time. These facts, there being no objection or counter-proofs at the

trial, we shall hold sufficient to authorize a presumption that defendant and Mrs. Hardenbrook were husband and wife. There is not, in our judgment, as counsel assert, a total absence of evidence on the subject. These circumstances tend to establish this relationship.

The proofs before us disclose the fact that the bill or account was incurred in the purchase of ordinary wearing apparel for Mrs. Hardenbrook, whom, we feel authorized to assume, for reasons above stated, was defendant's wife. *Prima facie*, the articles were "necessaries," and her prior authority to make the purchase is presumed. "His (the husband's) assent shall be presumed to all necessary contracts, upon the account of cohabiting, unless the contrary appears." Lord Holt, quoted in Schouler, Dom. Rel. § 82. The burden was on defendant to show the contrary by proper proofs; but he offered none. Besides, in this as in other cases of agency, a subsequent ratification by the principal of an unauthorized act, is equivalent to prior consent. Defendant's conduct in the present case amounted to such ratification. The burden was on him to overcome the presumption of ratification arising from his acts, by showing such misrepresentations or mistakes of fact as would destroy the legal inference of intent. Schouler, Dom. Rel. §§ 82, 83. This case does not present the question argued, concerning liability under the statute of frauds, upon oral promises to pay the debts of others.

The judgment of the court below is affirmed.

(7 Mont. 264)

OWSLEY v. WARFIELD.

(*Supreme Court of Montana*. January 7, 1888.)

**APPEAL—DISMISSAL—SECOND APPEAL.**

Code Civil Proc. Mont. § 955, provides that "the dismissal of an appeal is in effect an affirmation of the judgment or order appealed from, unless the dismissal is made without prejudice to another appeal." *Held* that, under this section, where an appeal has been dismissed, and the dismissal is not made "without prejudice to another appeal," a subsequent appeal, involving the same judgment and order, must be dismissed.

Appeal from district court, Silver Bow county; before Justice GALBRAITH. *Robinson & Stapleton*, for appellant. *Cole & Whitehill*, for respondent.

BACH, J. This cause is before the court at this time on a motion to dismiss the appeal for the reason "that an appeal heretofore made in said action was dismissed at the July term, 1887." At the last term of this court an appeal, involving the same judgment and order from which the present appeal is taken, was dismissed for certain irregularities in the transcript. 14 Pac. Rep. 646. The order of dismissal was absolute in its terms; it was not made "without prejudice to another appeal."

Section 955, Code Civil Proc., (Comp. St.,) provides that "the dismissal of an appeal is in effect an affirmation of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal." The statute controls this court and the motion to dismiss must prevail. It is true, as counsel for appellant states, that at the last term the court intimated that the appellant had time to take another appeal properly. Prior to the July term the rules relating to transcripts had been frequently violated; and those violations had been frequently commented upon by the court, although no appeal had been dismissed for such irregularities, because the respondent had never invoked the rules. The comments of the court, not having effected any change, the court, for its own protection, at the July term dismissed this cause for certain violations of the rules; but as this cause was the first one to be dismissed, the court of its own motion gave the intimation referred to, so that the appellant might protect himself; but, in giving the intimation, we went as far as we thought proper, relying upon counsel for appellant to take such steps as were necessary to perfect the second appeal. One step neces-



sary was that the appellant should move, at the July term, to have the order of dismissal modified. That the appellant neglected to do then; in fact we have never been asked to modify the order of dismissal. The motion to dismiss the appeal is granted.

MCCONNELL, C. J., and McLEARY, J., concur.

(5 Utah, 436)

UNITED STATES v. HARRIS.

(*Supreme Court of Utah*. February 2, 1888.)

1. LASCIVIOUS COHABITATION—COHABITING WITH MORE THAN ONE WOMAN—PROOF OF MARRIAGE RELATION.

On the trial of an indictment, under act of congress of March 22, 1882, prohibiting any male person from cohabiting with more than one woman, cohabitation with a woman to whom defendant has been legally married is proved by showing that she lives in his vicinity and bears his name; that he contributes to her support and visits her.

2. SAME—EVIDENCE—REVIEW ON APPEAL.

When a verdict is supported by evidence, an appellate court will not set it aside because the evidence is conflicting.

Appeal from district court, First district; before Justice HENDERSON.

The defendant, John Harris, was convicted on an indictment for unlawful cohabitation, and he appeals.

*S. R. Thurman* and *Geo. Sutherland*, for appellant. *Geo. S. Peters*, for the United States.

BOREMAN, J. The defendant was indicted for the crime of unlawful cohabitation; was tried and convicted. He made his motion for a new trial, which, being overruled, he has appealed to this court from the judgment and from the order overruling the motion for a new trial. It is assigned for error that the court charged the jury as follows: "If in this case, or any other, the legal wife of the defendant lives in the same vicinity with him, in a household maintained in part by him, that is cohabitation with his legal wife. It is absolutely and conclusively cohabitation with his legal wife." The objection to this language of the court is that proof that the legal wife lives in the vicinity of the defendant and he contributes to her support, is not sufficient to warrant a conviction for the offense charged. The language quoted is but a small extract—a mere part of one sentence of the charge of the court. It does not fairly represent the lower court. All that the court said upon the point should have been given. The residue of the charge upon that point may have given a different meaning from the extract which is objected to. There is no warrant in the law for cutting out a part or a whole of a sentence of a charge and making objections thereto. The whole of a charge bearing upon the objectionable part must be considered with it. We have heretofore called attention to this practice. The appellate court will consider the whole charge together, and will not reverse when the law has been thus properly presented to the jury. The other parts of the charge, bearing upon the portion objected to and including it, read as follows: "The prosecution is brought under the act of congress of the United States, which was approved March 22, 1882, commonly known as the 'Edmunds Law,' and the section under which it is brought reads as follows: 'That if any male person, in any territory, or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction shall be punished,' etc. The section of the statute under which the prosecution is brought is to be construed with the balance of the act, and is intended to prohibit a man, who has formerly entered into the plural marriage relation, from actually or apparently before the world continuing the plural marriage relation. It aims at the wrongful ex-

ample or appearance, as well as the actual continuance, of the polygamous relation, without reference to what may actually take place with his plural or polygamous wife. Therefore if you believe beyond a reasonable doubt, from the evidence given before you, that before the earliest date mentioned in this indictment, to-wit, October 1, 1884, the defendant entered into marriage or assumed marriage relations with the two women named in the indictment, and that within the time covered by the charge he continued such relations with both of said women, by living with, holding them out, or doing any of the acts which usually characterize the relation of husband and wife, and that it was done by virtue of such marriage relation, then he would be guilty as charged; and it is not necessary to show that he has actually had intercourse with either of the wives within the period named. If you find that the defendant was married to Ann Harris, and that the marriage was legal, and that he afterward entered into a marriage relation with the other woman named, Emma Ainge Harris, and that at the time he entered into the second marriage he was living with the woman first named as his wife, then the presumption would be that he was married to her and that she was his wife. Now, gentlemen, in proving cohabitation with two women, the rule is different as to proving cohabitation with the legal wife and with the illegal wife, because the law presumes that a man does what it is his legal duty to do; that is, cohabits with his legal wife. If in this case, or any other, the legal wife of the defendant lives in the same vicinity with him, bearing his name, in a household maintained in part by him; that is cohabitation with his legal wife. It is absolutely and conclusively cohabitation with his legal wife; because, whatever he does with her is done as a husband. He is her husband, and he cannot throw off the obligation that he bears to her voluntarily; and it would make no difference that they have made an agreement that they will separate and go apart, because it is against public policy, and against the policy of the law under which this prosecution is brought to encourage the practice of a man leaving his legal wife and living with another wife. It is also against the policy of the law to practice the maintaining of other wives than his legal wife. So, if you find in this case, beyond a reasonable doubt, that during the time covered by the indictment he was in the habit of contributing to the support of his legal wife, who lived in his vicinity and bore his name openly before the world, that would be cohabitation within the meaning of this act. When you come to cohabitation with the illegal wife, then the presumptions are all against it. All legal presumptions are against cohabitation with the illegal wife," etc. Subsequently the jury returned into court for further instructions, and, in answer to their inquiry, the court said: "As I told you in the general charge, the charge against the defendant is for cohabiting with two women. Now, in this case, as I understand the argument of counsel and the testimony of defendant, cohabitation with the plural wife, or illegal wife, is not denied; so the question is as to whether cohabitation with the legal wife is shown. If you find that, at the time he married the second wife he was living with a wife, at that time, that he was living with a wife and maintaining a household, the presumption would be that that was his legal wife, because the presumption would be that their relations were proper, and there is a presumption that a man lives and cohabits with his legal wife—a presumption just—simply upon proof that she is his legal wife and is alive—there is a presumption that he cohabits with her. I charged you before and I charge you again that proof that the legal wife lives in the vicinity of the husband, where he is living with his illegal wife, bearing his name openly and maintaining a household, and he is maintaining her or contributing to her support, and visiting her for that purpose; that is cohabitation with her. That amounts to cohabitation. That is upon the theory that it is the duty of the husband to cohabit with his wife. Their relations are legal. They can't agree to separate. No agreement between husband and wife can

resolve the marriage relation. It is against public policy and the law that any such thing should be permitted; it is against the public law to separate by agreement and live with some other woman. If the legal wife was living in a household, bearing his name, maintaining a household, and he was furnishing it and visiting her for that purpose at all, he visited her as her husband, she being his wife, and that would amount to cohabitation with her. That is what I intended to say and supposed I did say. \* \* \* Of course it requires proof that he contributed to her support." Mr. Sutherland, one of the attorneys for the defendant, remarked: "I didn't understand your honor to charge the jury that the presumption arising from marriage is conclusive cohabitation?" In reply the court said: "No, I don't mean to say that in a case if the only testimony was that a man married 20 years ago, and the proof stopped right there, it would be presumptive evidence and sufficient of itself to show that he was still cohabiting with her; but when that is followed by proof that she is still alive, and lives near to him, and bears his name, living in a household that he maintains and visits; that is cohabitation. I don't think a husband can say, when his legal wife is living in his vicinity, bearing his name, and he is maintaining the household she lives in—I don't think that because he has illegal relations with some other woman he can be heard to say that he does not associate and cohabit with his wife when this is shown." A juror asked as to the effect of defendant's contributing anything, however small, to his wife's support. The court said: "If he contributes, and visits her for that purpose, that is sufficient. Now, remember, all this must be within the time covered by this indictment," etc. The defendant's attorney requested the court to charge that the question whether he lived and cohabited with his first wife was one of fact for the jury, etc. The court in reply told the jury as follows: "Yes, it is a question of fact; all these things are questions of fact for you to determine. But no matter what they have agreed between themselves, or what may be the understanding; if this condition of things I have mentioned exists; if the wife is living in the vicinity of the husband, maintaining a household, bearing his name; and he contributes to her, maintaining her household, and visits her for that purpose; it is cohabitation for that purpose." To an inquiry by the assistant district attorney, in reply the court said: "Mr. Evans, I charged the jury in the *Clark Case*, distinctly, that whenever the husband visited the wife that he visited her as his wife, and he could not be heard to say that he visited her in any other capacity, and I mean to say that same thing to this jury; that if the husband visits his wife, she is his wife—that that is the relation between them, and they cannot by agreement sever it."

The supreme court of the United States has said that "it is the practice of unlawful cohabitation with more than one woman that is aimed at,—a cohabitation classed with polygamy and having its outward semblance. It is not, on the one hand, meretricious, unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the territorial government. Nor, on the other hand, does the statute pry into the intimacies of the marriage relation." *Cannon v. U. S.*, 116 U. S. 72, 6 Sup. Ct. Rep. 287. It is not necessary therefore to prove what occurs in the intimacies of the marriage relation. It is only necessary to prove that which has the outward semblance of polygamy. That is substantially what the court in the case at bar told the jury. It said in effect that if the jury believed from the evidence, beyond a reasonable doubt, that the defendant had a wife when he entered into the illegal relationship with Emma, and that at that time he lived and cohabited with his wife, the presumption was that such relationship between him and his legal wife continued to exist. That from the fact of marriage between him and the first wife, with the additional proof that he and his first wife lived in the same vicinity; that she was recognized by him and by the community as his wife, that he contributed to her support, that he visited her,

the proof of cohabitation was complete. That from such facts the jury were authorized to conclude that the defendant was cohabiting with his first wife. We see no error in such a presentation of the law to the jury. It was not necessary for the court to tell the jury that there had to be direct proof that the defendant was occupying the house with the first wife—that he was sleeping there and taking his meals there, and having sexual intercourse with her. It is often in these cases, as in other criminal cases, that direct proof cannot be made, but circumstances can be shown from which the ultimate facts can be inferred.

It is insisted that the verdict is contrary to the evidence. It has repeatedly been stated by this court, and the doctrine is well settled elsewhere, that, if there is a substantial conflict of the testimony, the court will not reverse the case on the ground that the verdict is contrary to the evidence. In the case at bar the evidence showed that defendant had, even down to the day of trial, two wives, one a legal wife, and the other a woman to whom he had been married as a polygamous wife. To his legal wife he had been married over 40 years ago in England, and to his plural wife he had been married only some 12 years ago. He admits that he is living and cohabiting with his illegal wife; that he is flaunting the polygamous life in the face of the public, but denies that he is cohabiting with his lawful wife. He has never been divorced from his lawful wife. The polygamous wife and his legal wife live close together in the same village, and on the same block, on the same side of the block, and not on the corner lots, but on the lots lying between the corner lots, and they live only as far apart as across the street. The defendant had been seen in the yard of the first wife. He watered his horses at her well, and passed back and forth. He has always recognized the first wife as such, and the community in which they live have also recognized her as such. He deeded to her the property where she lives. He has found her a living. He supports her. He sends her provisions; and, whenever she has wanted a sack of flour, he would take it to her and put it in her flour-bin. He visited her in taking the flour there, and he was seen in her yard. He associated with her in taking her from her house and going to the bishop's, and from there to Armistead's. They together agreed that she "would separate from him as his wife, if he would deed her certain property and build a certain house." The condition does not seem to have been carried out, but it "stopped there" at the making of the agreement. From these and like facts we can well see that the jury were justified in concluding that he cohabited with his first wife. It does not require very strong proof to show that a man does what the law presumes he does do and ought to do. It would, as the court charged the jury, require much stronger proof to show cohabitation with the illegal wife, but there is no question raised as to cohabitation with the illegal wife, as it is fully admitted and proved. Because there was some evidence tending to show that the defendant had not lived and cohabited with his legal wife, this court would not be justified in setting aside the verdict of the jury. There was sufficient evidence upon which to base the verdict. As we cannot say there was not sufficient evidence, we would not be justified in reversing the case on the ground of insufficiency of the evidence to authorize the verdict.

The other points raised in the case are covered by what we have said above, and do not require any further consideration. We see no error in the record. The order and judgment are affirmed.

ZANE, C. J., and HENDERSON, J., concurring.

(4 N. M. [Gild.] 644)

## UNITED STATES v. HANNA.

*(Supreme Court of New Mexico. January Term, 1888.)*

Post-Office—ROBBING THE MAILS—BY STAGE DRIVER—REV. ST. U. S. § 5467.

Rev. St. U. S. § 5467, provides that "any person employed in any department of the postal service who shall embezzle \* \* \* any letter \* \* \* intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail or delivered by any carrier, mail agent, route agent, letter carrier, or other person employed in any department of the postal service" \* \* \* shall be guilty of the offense of robbing the mails. *Held*, that a stage driver employed by a stage company, which had a contract for carrying the mails, and who was sworn as a mail carrier, is an employe of the postal service, within the meaning of this section, though he was hired and paid by the stage company and received no compensation from the government.

Appeal from district court, Socorro county.

Rodey &amp; Childers, for appellant. Thomas Smith, for appellee.

HENDERSON, J. The defendant, John Hanna, was indicted under sections 3891 and 5467, Rev. St. U. S., for robbing the mails. Nineteen counts of the indictment were framed under section 5467, charging the defendant "as a person employed in one of the departments of the post-office establishment of the United States, to-wit, a mail carrier, carrying the mail on a postal route between Carthage and Mountain station, in said district, said route being a part of the postal Star route between Carthage and Fort Stanton, in the territory of New Mexico." Thereafter follows the charging part of the indictment; showing the deposit in the mail or post-office of Fort Stanton of a registered package to be carried through the mail to Santa Fe, with an accurate description of the package, and to whom addressed, and alleged to have contained coin of the United States of certain value, which came into the hands of the defendant as a driver of the stage in which the mail was carried; and that the defendant, on the 19th day of March, 1886, feloniously did secrete, embezzle, and destroy the letter thus in his possession as a person employed in one of the departments of the postal service. The defendant was convicted, but the verdict was general, and the court sentenced the prisoner to two years' imprisonment. Defendant appealed, and in lieu of a full bill of exceptions a stipulation was filed in the words following:

## "STIPULATION.

"And now, to-wit, on this 8th day of October, A. D. 1882, it is hereby stipulated and agreed, by and between the counsel for the United States and the defendant herein, that the evidence in this case proved that the defendant, John Hanna, at the time of the alleged commission of the offense charged in the indictment, was in the employ of the Southwestern Stage Company as a driver of their stages; that said stage company paid him his wages, and that he [Hanna] received no compensation from the government of the United States, but that said stage company had a contract with the government of the United States for carrying mails, and that the defendant, among other like drivers, was sworn as a mail carrier. It is further stipulated that the above statement of facts may be used upon the hearing in the supreme court of the territory in lieu of a full bill of exceptions, and may be considered as a part of the record herein, and that the foregoing was all the evidence upon that point in the cause.

[Signed]

"THOMAS SMITH, U. S. Atty.

"W. B. CHILDERS, and

"BARNARD S. RODEY,

"Attorneys for Defendant."

The stipulation was made and appeal taken for the purpose of having this court determine whether or not the facts agreed and stated bring the defendant within the scope of section 5467, Rev. St. U. S. The section reads as follows: "Any person employed in any department of the postal service, who

shall secrete, embezzle, or destroy any letter, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or delivered by any carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the postmaster general, which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock, or other pecuniary obligation or security of the government," etc., through a long list of enumerated articles. The averment in the indictment, although not in the exact language of the statute, is substantially so. Appellant's counsel contend that section 3858 must be construed, at least in part, as a statutory definition of what constitutes an employment in the post-office department within the meaning of section 5467. Section 3858 is in these words: "No person employed in the postal service shall receive any fees or perquisites on account of the duties to be performed by virtue of his appointment." Had this section declared that no person shall be deemed an employe of the United States who does not directly receive his fees or compensation for services rendered from the United States, it would have been an interpretation of section 5467; but it only declares that no person employed in the postal service shall receive any fees or perquisites on account of the duties to be performed by virtue of his appointment. Had the defendant received fees or perquisites on account of the duties he performed by virtue of his employment, he might have been guilty of a violation of that section of the statute; but that circumstance cannot be appealed to to determine the real character of the employment; that must be ascertained from the nature of his duties, and whether, in their performance, he was within the words and intent of the statute. It will be observed that the persons against whom the penalties are denounced need not be officers of the United States nor in the employment, directly, under the government; it is sufficient if the person be employed in any department of the postal service. Defendant was a sworn stage driver, into whose possession the mails were delivered by authority of the United States. He was their lawful custodian from the point of delivery to the end of his run on the Star route described in the indictment. If he had the lawful possession of the mails,—as he assuredly did,—he had them not as the private property of the Southwestern Stage Company, but as the employe or agent of the United States in the performance of its public duties to the citizens. The United States conveys the mails, not the contractor who engages to furnish teams and drivers to perform the work. The statutes of the United States provide for letting contracts for carrying the mails, and in contemplation of these statutes the contractor who engages to do the work will engage stage drivers, horseback riders, and other subordinate agencies, in order to carry out the work. Whenever, therefore, an employe is engaged in the execution of the contracts, whether directly by the United States or indirectly by the mail contractor, the person so engaged is in the employment of the postal department of the United States. Chief Justice MARSHALL, on the circuit, in construing the eighteenth section of the post-office act in the statutes as they stood under the act of 1810,—almost identical with so much of section 5467 as is under consideration,—said: "The counsel for the prisoner supposes that no person can be the object of the eighteenth section who is not appointed directly by the postmaster general, or for whose appointment a special provision is not made by the act. He insists that he must be an officer. But this is not the object of the law; the terms of the enactment do not require an officer; they are satisfied with an agent, or any person employed in any of the departments, or in any other business allotted to the general post-office; nor do they require that he shall be employed by the postmaster general, or by authority expressly designated by him; it is enough to satisfy the law that they are so employed.

The contractor cannot himself carry the mail through the whole extent of his contract."

The reason as well as the language of the law leads to the opinion that all persons intrusted with the mail should be alike subjected to the penalties of the law for a fraudulent violation of the trust reposed in them. The carrier of the mail is as much intrusted with it as the person who makes it up and places it in his custody, and there are the same motives for subjecting him to the penalties inflicted on the violators of that trust. If then, as we think, the words employed do, in their natural import, comprehend him, the court will not be justified in a strained construction to exclude him from their operation. *U. S. v. Belew*, 2 Brock. 280.

Further argument or citation is needless. The judgment is affirmed.

LONG, C. J., and REEVES, J., concur.

(15 Or. 442)

PAUL v. LAND *et al.*

(*Supreme Court of Oregon*. November 25, 1887.)

EQUITY—JURISDICTION—ACCOUNTING.

In an action to construe a deed and certain bills of sale to be mortgages, and for foreclosure, it was conceded that such writings were mortgages to secure advances from plaintiff to defendant. *Held*, that equity, having obtained jurisdiction, would settle the entire accounts between the parties according to their real rights, and decree foreclosure for the balance found to be due.

Appeal from circuit court, Klamath county; L. A. WEBSTER, Judge.

*Nichols & Hamaker* and *H. K. Hanna*, for appellant. *Cogswell & Cogswell* and *P. P. Prim*, for respondents.

STRAHAN, J. The object of this suit is twofold: *First*, to have a deed and certain bills of sale mentioned in the complaint declared mortgages; and, *second*, to take an account of the amount due the plaintiff thereon, and to obtain a decree of foreclosure for that sum. No objection is made to the jurisdiction of the court to foreclose these chattel mortgages; but aside from that, the necessity of an account and matters of trust between the parties are sufficient to give the court jurisdiction. It is now conceded by both parties that these writings were intended to secure the plaintiff in advances made to the defendant by the plaintiff. There is therefore nothing remaining of the case, except to ascertain from the evidence the amount of the advances.

It appears from the evidence that on the 24th day of May, 1883, the defendant Louis Land conveyed to the plaintiff an undivided one-half interest of his stock ranch in Poe valley, on Lost river, in Klamath county, Oregon, for the price and consideration of \$2,750. Prior to this time he had mortgaged the ranch to one Webster, to secure the payment of a large sum of money; that at the time the plaintiff purchased an undivided one-half of said ranch, there was due on said mortgage between \$2,800 and \$3,000; that the same had been assigned to one Morrison, who had caused proceedings to be instituted in the circuit court of Klamath county, Oregon, for the purpose of foreclosing the same; and that said suit was then pending. On the same day that the plaintiff purchased his interest in the ranch, the mortgage thereon, and the note evidencing the debt secured, were assigned to him for the consideration of \$1,730. In this accounting the plaintiff claims the entire sum secured by said mortgage, as well as the expenses of a foreclosure thereof. On the other hand, the defendant claims that the mortgage was temporarily kept alive after the assignment to the plaintiff, as a matter of convenience; but that the \$1,730, which the plaintiff paid to Morrison when said mortgage was assigned, was in fact so much money advanced for the defendant's use, and was the first payment made by plaintiff for the half of said ranch. A careful consideration of the evidence leads us to believe that this version of

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the matter is the more reasonable and probable, under all the circumstances, and, without reviewing the evidence leading to this conclusion, we have adopted it as the true one. This will exclude from the account the item claimed on account of the mortgage. The following items claimed by the plaintiff appear to us to be proven by a preponderance of the evidence to have been furnished, paid, and advanced to and for the use of the defendant Louis Land, and with which he is chargeable in this case:

Two checks for \$100 each,	-	-	-	-	\$	200	00
Interest at 10 per cent., from October 28, 1882,	-	-	-	-		101	99
Cash advanced for state lands, ( $\frac{1}{2}$ .)	-	-	-	-		135	75
Interest at 10 per cent., from May 30, 1883,	-	-	-	-		60	70
Cash advanced at land-office,	-	-	-	-		3	00
Interest at 10 per cent., from May 24, 1883,	-	-	-	-		1	35
Cash advanced to G. T. Baldwin,	-	-	-	-		81	00
Interest at 10 per cent., since June 6, 1883,	-	-	-	-		36	17
Cash paid for searching records in Yreka,	-	-	-	-		5	00
Interest at 10 per cent., from June 15, 1883,	-	-	-	-		2	29
Cash paid for goods at Linkville, \$44.37, ( $\frac{1}{2}$ .)	-	-	-	-		22	18
Interest at 10 per cent., from July 10, 1883,	-	-	-	-		9	68
Cash paid for 124 head of cattle, \$1,869.62, ( $\frac{1}{2}$ .)	-	-	-	-		934	81
Interest at 10 per cent., from October 30, 1883,	-	-	-	-		380	16
Cash paid O. A. Stearns,	-	-	-	-		3	00
Interest at 10 per cent., from November 10, 1883,	-	-	-	-		1	21
Cash by Reams & Martin, \$111.00, ( $\frac{1}{2}$ .)	-	-	-	-		55	00
Interest at 10 per cent., from January 11, 1883,	-	-	-	-		26	99
Cash for provisions, \$5.00, ( $\frac{1}{2}$ .)	-	-	-	-		2	50
Interest at 10 per cent., from November 30, 1883,	-	-	-	-		1	01
Cash paid taxes, \$53.00, ( $\frac{1}{2}$ .)	-	-	-	-		26	50
Interest from March 1, 1884, at 10 per cent.,	-	-	-	-		10	08
Cash paid W. C. Hale,	-	-	-	-		9	31
Interest at 10 per cent., from September 29, 1884,	-	-	-	-		2	90
Cash advanced to E. McElvey, \$36.00, ( $\frac{1}{2}$ .)	-	-	-	-		18	00
Interest at 10 per cent., from March 1, 1884,	-	-	-	-		6	71
Cash for fixing pistol and watch,	-	-	-	-		7	75
Interest at 10 per cent., from March 1, 1884,	-	-	-	-		2	90
Cash paid to redeem land sold on execution,	-	-	-	-		727	29
Interest at 10 per cent., from January 29, 1884,	-	-	-	-		278	08
Cash paid to redeem land sold on execution,	-	-	-	-		548	25
Interest at 10 per cent., from February 9, 1884,	-	-	-	-		181	95
Cash paid taxes and expenses, \$83.00, ( $\frac{1}{2}$ .)	-	-	-	-		41	50
Interest at 10 per cent., from March 28, 1885,	-	-	-	-		11	08
Cash paid for taxes, \$102.50, ( $\frac{1}{2}$ .)	-	-	-	-		51	25
Interest at 10 per cent., from March 25, 1885,	-	-	-	-		13	73
Amount of note,	-	-	-	-		25	00
Interest at 10 per cent., from October 6, 1881,	-	-	-	-		15	54
Amount of note,	-	-	-	-		70	00
Interest at 10 per cent., from March 15, 1883,	-	-	-	-		32	81
Amount of note,	-	-	-	-		100	00
Interest at 10 per cent., from May 24, 1883,	-	-	-	-		45	00
Amount of note,	-	-	-	-		200	00
Interest at 10 per cent., from August 30, 1883,	-	-	-	-		84	64
Amount of note,	-	-	-	-		100	00
Interest at 10 per cent., from November 24, 1883,	-	-	-	-		40	00

Total, - - - - - \$4,714 05

The purchase price of one-half of the ranch referred to was \$2,750. From this sum must be deducted the amount paid by the plaintiff on the Morrison



mortgage,—\$1,790,—which leaves a balance due on the farm of \$1,020. To this sum must be added interest at 10 per cent., from time of purchase, May 24, 1883,—\$459,—which, added, makes \$1,479, balance due defendant on the ranch. Deduct this sum from amount due plaintiff, and there remains due plaintiff on this accounting, the sum of \$3,235.05, for which there will be a decree.

Equity does not do justice by halves. Its principles require the complete administration of justice between the parties before the court. Therefore we have not hesitated in this case to examine the entire account submitted in evidence, and to adjust the same according to the real rights of the parties as they appeared to us, notwithstanding some items involved belong to the partnership of Land & Paul; but in such case we have only charged the defendant one-half of the sum advanced by the plaintiff. We have seen proper to allow the defendant interest on the balance of the unpaid purchase money for one-half the ranch, though the item was not specially claimed upon the trial; but he is manifestly entitled to it. Annexed hereto is an itemized statement of the items claimed by plaintiff and disallowed:

October 21, 1882, to $\frac{1}{2}$ of 500 tons of hay, - - -	\$ 500 00
December 7, 1882, to expenses to the ranch, - - -	50 00
March 15, 1883, to cash, by Martin & Reames, - - -	180 00
May 24, 1883, to expenses in suit at Linkville, - - -	65 00
August 27, 1883, to expenses at Linkville at court, - - -	50 00
July 5, 1883, to amount paid Nichols & Abell, - - -	250 00
November 30, 1883, to cash, by Reames & Martin, - - -	100 00
November 30, 1883, to amount of attorney's fees claimed in Paul v. Land, on foreclosure, - - - - -	721 00

Amount disallowed, - - - - - \$1,916 00

We do not give any direction as to the order in which the property is to be sold or which shall be first sold. Usually, in such case, equity would require that personal property should be sold first; but that question is remitted to the court below for such directions as may be equitable, upon the application of either party. The settlement of these accounts, and the adjustment of the rights of the parties growing out of the several writings mentioned in the pleadings, are matters in which the parties are mutually interested, and as to which there might well be honest differences. We therefore direct that neither party shall recover costs against the other, neither in this court nor the court below, and that each party shall pay one-half of the clerk's fees in each court.

Let the decree of the court below be reversed, and a decree entered here in accordance with this opinion.

On petition for a reargument of the above cause, it was decreed by the court that the plaintiff pay the mortgage on the land in controversy, placed there by him in favor of the Siskyou County Bank for \$2,981.85, and that such payment be made a condition precedent to the enforcement of this decree by him. This final decree was made February 29, 1888.

(2 Idaho [Hasb.] 420)

BACK v. SIERRA NEVADA CON. MIN. CO.

(Supreme Court of Idaho. February 27, 1888.)

MINES AND MINING—LOCATION OF CLAIM—TUNNELING—ADVERSE CLAIMS—RIGHT TO FILE.

A tunnel located and run for the development of veins or lodes, pursuant to the provisions of section 2323, Rev. St. U. S., becomes a mining claim, and entitles the owner thereof to make an adverse claim against one claiming to locate upon the line of the tunnel, and while the same was being prosecuted with reasonable diligence such tunnel owner is entitled to proceed under the provisions of section 2326, Rev. St. U. S.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; before Justice BUCK.

Action brought in support of an adverse claim made on behalf of the Pilgrim tunnel location, owned by the plaintiff, H. S. Back, against the Sierra Nevada Consolidated Mining Company. From a judgment sustaining the defendant's demurrer to the complaint the plaintiff appeals.

*W. B. Heyburn*, for appellant. *F. Ganahl* and *Albert Hogan* for respondent.

HAYS, C. J. This is an appeal from the judgment of the district court of the First judicial district of Idaho territory, in and for Shoshone county, rendered on failure of plaintiff to amend the complaint after demurrer thereto was sustained, the plaintiff having elected to stand on the complaint as filed. The action is one brought in support of an adverse claim filed in the United States land-office against the issuance of a patent for the Sierra Nevada lode mining claim, said adverse claim being made on behalf of the Pilgrim tunnel location made under the provisions of section 2323, Rev. St. U. S. At the time of filing the adverse claim and the complaint in this action, the Sierra Nevada lode mining claim was owned by the respondent, a corporation, and the said tunnel location was owned by the appellant. During the period of publication of the application of the Sierra Nevada claim the appellant filed an adverse claim, accompanied by a map made from actual survey, showing the relative position of the said mining claim and tunnel location, in the United States land-office in the district in which said claims were situated, and in which application for patent of said claim was filed, and said adverse claim was duly allowed by the register of said land-office, and within 30 days after so filing said adverse claim appellant filed his complaint in an action brought in support thereof, in the district court aforesaid. Respondent appeared and demurred to said complaint on the grounds hereinafter stated.

Appellant in his complaint alleges that one Philip Kirby, a citizen of the United States, on April 5, 1886, located a tunnel site under the provisions of section 2323, Rev. St. U. S., 3,000 feet in length, in the Yreka mining district, Shoshone county, Idaho territory, and that at the time of making such location he marked the line thereof by planting posts at every 100 feet along the said line, each post being plainly marked "Pilgrim Tunnel Line," and that he posted a notice of the location of said tunnel at the face thereof; that he had cut out trails to said tunnel, three miles in length, and had cut out said tunnel six feet wide and six feet high, and run the same four feet under cover, prior to said location and during said month of April; that on April 12, 1886, said Kirby appeared before the recorder of the mining district in which said tunnel was located, and made the affidavit required by the regulation of the general land-office, and the same was duly attached to a copy of the notice of location posted at the face of said tunnel, and said copy of notice and affidavit were on said 12th day of April, 1886, filed in the office of said recorder, and have there remained; and said notice and affidavit were afterwards, on the 16th day of April, 1886, recorded in the office of the recorder of Shoshone county; that said Kirby and his grantee, the plaintiff, have continuously and diligently prosecuted the work of running said tunnel along the line as marked out ever since said 5th day of April, 1886; that at the time of making the location of said tunnel there were no known ledges existing or cropping along the course of said tunnel location as the same was located and marked on the ground; nor were there any known ledges that crossed said tunnel location in their course or trend; nor were there any ledges previously known to exist, or which crossed said tunnel location at the time of its location; that after said tunnel had been located as aforesaid, to-wit, on April 6, 1886, defendant's grantors entered upon the line of said tunnel location, at a point where post No. 9 on said line was planted, and with full knowledge of the existence of said post, and the location of said tun-

nel commenced to prospect for minerals, and in so prospecting sunk a shaft through the loose surface and slide earth and rock to a depth of 12 feet before entering upon any solid formation or rock in place; that at or near the place where the shaft was so sunk there was no lode or ledge of valuable mineral-bearing rock previously known to exist, nor did any such crop or show upon the surface of the ground; that at or about said depth of 12 feet in said shaft a ledge of valuable mineral-bearing rock was discovered by said grantors of defendant; that said discovery was made on and within the line of the said tunnel location while the same was being actively occupied and diligently worked; that said lode or ledge is, and was at the time of striking the same in said shaft, a blind lead or lode on the line of said tunnel; that the tunnel, on being continued in its present course on the located line thereof, would cut and intersect the said lode on its dip within the length and location of said tunnel; that said grantors of defendant located and recorded a mining claim based upon their said discovery, and called said claim the "Sierra Nevada;" that defendant, claiming to be the grantee of said locators, did on May 23, 1887, make application for United States patent for said claim, and filed their application for patent in the United States land-office at Cœur d'Alene, Idaho, and afterwards caused notice of said application to be published, as required by law, and during period of said publication the plaintiff filed a protest and adverse claim in said land-office against the issuance of a patent for said claim on behalf of said tunnel location, and within 90 days after filing such protest and adverse claim commenced the action in the district court of the county in which said claim and tunnel location is situated; that the plaintiff was and is by virtue of certain conveyances duly made the grantee of Philip Kirby, the locator of said tunnel location; that he is now, and intends to continue, diligently running said tunnel along the line of said tunnel site, and in the direction of said lode so discovered and called the "Sierra Nevada," for the purpose of intersecting and cutting the same, and that he intends, when the same shall have been so intersected, to locate the same according to the provisions of section 2323, Rev. St. U. S.; that the ground upon which the discovery of the said lode was made by defendant's grantors was not vacant and unoccupied public mineral lands of the United States at the time of such discovery and location, and that such location was void; and prays the court to adjudge that the location of the Sierra Nevada mining claim was null and void. To which complaint the respondent demurred, and alleged as grounds of demurrer: "That the plaintiff herein has not legal capacity to sue in this action; that it does not appear from said complaint that the plaintiff has any right, interest, or adverse claim upon which he can base an action against the Sierra Nevada Mining Company, by reason of its application for a patent herein; that he is not the owner of any lode, vein, or surface ground, by location or otherwise, authorizing him to file any adverse claim herein, or to maintain any action upon any pretended adverse claim." "Second. That the said complaint does not state facts sufficient to constitute a cause of action." It is contended that the court erred in sustaining the demurrer, and a reversal of the judgment entered therein is now asked.

We have the light of but few adjudicated cases to aid us in an investigation of this subject. We are satisfied, however, from an examination of the provisions of section 2323, Rev. St. U. S., that it was the intention of congress that rights might be secured to all such as should run tunnels for the development of a vein or lode pursuant to its provisions, and to aid in securing such rights it was there enacted that "locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid." It seems evident from this enactment that congress intended to withdraw from exploration for lodes not ap-

pearing on the surface so much of the public domain as lay upon the line of such tunnel and to reserve such for the benefit of the proprietor of the tunnel so long as he prosecuted work thereon with reasonable diligence, and to give to him the right of possession for this purpose. True, the act does not so state in direct terms, but this is the effect of its provisions, and any other construction would but imperfectly protect the rights of the proprietor of the tunnel. The rights of the tunnel locator being created by statutory enactment, the courts should be therefore clothed with power to protect such rights, and we are unable to see how they can be fully protected but by permitting such locator to avail himself of the provisions of section 2326. Doubtless it was the legislative will that he should have such privilege. Such being the case, we must hold that a tunnel location constitutes a mining claim within the meaning of the statute, as was held by Commissioner Kirkwood in his opinion of December 12, 1881, (Copp. Dec. 318,) and that it is such a claim as may be asserted and protected under the provisions of section 2326, Rev. St. U. S., and the act amendatory thereof. While this appellant would have no right under his complaint to have a patent issued to him since he does not claim to have discovered any vein or lode, yet we think he has the right of possession for prospecting purposes to the area in dispute, and to show that respondent's location was made upon the line of his tunnel. The act of March 3, 1881, provides what shall be done when neither party shows title to the ground in conflict.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings according to law.

BUCK and BRODERICK, JJ., concur.

(38 Kan. 492)

#### HOLLIS v. SHAFFER.

(*Supreme Court of Kansas. February 11, 1883.*)

##### 1. PARTNERSHIP—DISSOLUTION—GOOD-WILL—INJUNCTION.

H. and S., copartners, dissolved. H. agreed to take all the property, and pay all the debts of the partnership. S. agreed to give H. his good-will in the business, and not to engage in it at a certain place so long as H. should carry it on. In an action by H. to enjoin S. from prosecuting the business at such place, he must aver and prove that he has performed his part of the contract substantially, before he is entitled to an injunction.

##### 2. SAME—PERFORMANCE OF AGREEMENT—PROOF.

When, at the commencement of such action, H. has not paid a debt of the partnership that is overdue, but has deposited with the creditor notes due the firm, as collateral security, but there is no evidence tending to show the value of such notes, a substantial performance of his contract with S. is not proven.

(*Syllabus by Holt, C.*)

Commissioners' decision; Error to district court, Clay county; E. HUTCHINSON, Judge.

*M. M. Miller* and *C. M. Anthony*, for plaintiff in error. *Harkness & Godard*, for defendant in error.

HOLT, C. In 1883, S. M. Hollis, the plaintiff in error, plaintiff below, entered into a copartnership with J. W. Shaffer, the defendant, to engage in the business of selling windmills, pumps, etc., in Cloud, a part of Clay and adjacent counties. Upon the 7th of November, 1884, the copartnership was dissolved by mutual consent, and a contract was entered into whereby the plaintiff purchased all of the stock, notes, and property of the partnership, for the purpose of carrying on the old business in the territory formerly occupied by the firm. It was agreed that Hollis should pay all liabilities of the firm; and also, in the language of the contract: "It is further agreed by the said J. W. Shaffer that he shall give to the said S. M. Hollis his good-will in the busi-

ness, and also agrees not to engage in the same business, in the territory now belonging to said Hollis and Shaffer, while said S. M. Hollis is engaged in the same." The plaintiff continued to prosecute this business in the same territory until this action was tried. The defendant on the 20th of April, 1885, formed a copartnership with one Seger for the purpose of selling windmills and pumps within the territory formerly occupied by Hollis & Shaffer. Plaintiff brought this action in the district court, and obtained a temporary injunction enjoining the defendant from carrying on such business. At the January term, 1886, the cause was tried by the court, and judgment was rendered for the defendant. No special questions of fact were submitted, and none found by the court.

It is not questioned that the court had authority to enjoin defendant from again engaging in this business in the territory embraced in his contract of dissolution with plaintiff. He had conveyed his good-will on the business, and had contracted not to engage in the same business again as long as the plaintiff should carry it on. The courts have ample authority to execute such a contract, perhaps negatively, by an injunction restraining the party so contracting from setting up a new business, and thereby designedly drawing off the customers from the one established.

The defense urged is that the plaintiff had not performed his part of the contract. It appears from the testimony that, when the partnership existing between plaintiff and defendant was dissolved, the firm was indebted to Sherrard & Searles, of Atchison, Kansas, in a considerable sum; perhaps, in the aggregate, amounting to \$2,000. The firm had given notes at various times to Sherrard & Searles, and had deposited, as collateral security, notes made payable to themselves. There is a conflict of testimony whether a portion of the notes made payable to Hollis & Shaffer were transferred to Sherrard & Searles as collateral security, or to be applied as part payment of their indebtedness. We shall not pass upon this question, except to say that, as the judgment was for the defendant, it will be presumed that the court below found, as it had ample grounds under the evidence to do, that there was remaining of the indebtedness of Hollis & Shaffer to the Atchison firm, upon their notes, an amount which the plaintiff himself regarded as secured by collateral notes, furnished them by himself and the firm of Hollis & Shaffer. Among other notes given by Hollis & Shaffer to Sherrard & Searles was one of \$1,783.60, due on the first day of January, 1885. That note was not paid in full when it became due, and at the time of the trial of this action about \$650 remained unpaid upon it, according to the testimony of the plaintiff himself. It is in evidence that there were collateral notes in the hands of the Atchison firm, nominally for \$1,300, to secure the payment of this amount remaining unpaid. There was testimony offered tending to show that the Atchison firm was not pressing plaintiff for the payment of said balance, and it was established that he had paid every demand presented to him, except the one item of three dollars, about which there is a great amount of testimony, which is unimportant in this case. The defendant claims, because the amount of \$650 was due and unpaid, that the plaintiff had not fully complied with his part of the contract, and therefore could not maintain this action. The principle is fundamental that the party seeking a remedy of this nature against another must show, as a condition precedent to his obtaining such remedy, that he has fully complied with the contract on his part, or that he is willing and ready to comply. There is no averment in plaintiff's petition that he has performed the conditions of the contract entered into with the defendant. There was some evidence introduced during the progress of the trial, however, in regard to the payment of the liabilities of the firm. The defendant contends that the payment of the liabilities of the firm was an essential part of the contract, and must have been fully complied with before the bringing of this action, while the plaintiff claims that at the time of the payment was not designated in the

contract itself, it is not necessary that he should have paid the full amount of the liabilities of the firm, provided he had relieved the defendant from liability thereon. We are inclined to believe that the contention of the plaintiff in this matter is correct; but from an examination of the testimony, we fail to find that the defendant, as a matter of fact, was relieved from such liability. There is some evidence that the defendant was insolvent, and it might fairly be inferred, although not positively testified to, that the plaintiff was solvent; yet it is in testimony that the Atchison firm informed the defendant that they should look to him for payment of their claims against the old firm of Hollis & Shaffer, if necessary. If the deposit of these collateral securities had been equivalent to payment, we presume the defendant might fairly have been presumed to have been relieved of all liabilities under the contract between Sherrard & Searles and plaintiff. But a part of those notes were turned over as security, and there is no testimony concerning their value. We believe that the absence of an averment in the petition that the plaintiff had performed his contract in full, or was ready and willing to do so, and the absence of the proof establishing the fact that Sherrard & Searles took the notes deposited with them as payment of the indebtedness of Hollis & Shaffer, or that those collaterals were of sufficient value to pay said indebtedness, are fatal to the plaintiff's claim of relief. There is considerable testimony that did, apparently, seem favorable to the plaintiff in this action, and it may be that the real facts might justify the granting of an injunction; but, under the pleadings and the evidence brought here, we are constrained to believe that the decision of the court was correct, and therefore recommend that it be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 462)

OBERLANDER *et al.* v. CONFREY.

(*Supreme Court of Kansas.* February 11, 1888.)

1. TRIAL—RECEPTION OF EVIDENCE—AFTER DEMURRER TO EVIDENCE.

Where a plaintiff introduces her evidence and rests her case, and the defendant demurs to the evidence, and, while making an argument upon the demurrer, the court, over the defendant's objection, grants leave to the plaintiff to open her case, and to introduce further testimony, *held* not error; that it is all within the sound judicial discretion of the trial court.

2. FRACTION IN CIVIL CASES—DISMISSAL AND NONSUIT.

A plaintiff, without any order or judgment of the trial court, cannot actually dismiss his case from the court.

(*Syllabus by the Court.*)

Error to district court, Elk county; E. S. TORRANCE, Judge.

*Brush & Carr*, for plaintiffs in error. *D. W. Dunnett*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Elk county by Ester A. Confrey against S. B. Oberlander and T. C. Hatton, to recover on an attachment bond. The case was tried before the court without a jury, and the court made a general finding, and rendered judgment in favor of the plaintiff and against the defendant for the sum of \$71.95, and to reverse this judgment the defendants, as plaintiffs in error, bring the case to this court.

The first ruling of the court below complained of is the overruling of an objection made by the defendants below to the introduction of any evidence under the plaintiff's petition, upon the ground that it did not state facts sufficient to constitute a cause of action. It would be useless to discuss this point; there is nothing in it.

The next ruling complained of is that the court below, after the plaintiff had introduced all her testimony and rested her case, and after the defendants

had demurred to her evidence, upon the ground that it did not prove any cause of action, and while the defendants' counsel were making their argument upon the demurrer over the objections of the defendants, granted the plaintiff leave to reopen her case, and to introduce further testimony. There was no error in this; it was all within the sound judicial discretion of the trial court. *Cook v. University*, 14 Kan. 548; *Railroad Co. v. Dryden*, 17 Kan. 279; *Railroad Co. v. Reeher*, 24 Kan. 228; *Mason v. Ryus*, 26 Kan. 467.

After the plaintiff below had introduced further testimony, and again rested, the defendants below again demurred to the evidence, for the reason that it did not prove any cause of action, and the court below overruled the demurrer. This is claimed to be erroneous for several reasons, among which are the following: It is claimed that the attachment proceedings were against Vincent Confrey alone, and not against the plaintiff, Ester A. Confrey; that such proceedings were regular and valid; that the attachment bond was given only to Vincent Confrey; that none of the property of Ester A. Confrey was disturbed; that there is nothing in the case to show that any of the attachment proceedings were irregular or wrongful, except an order of the judge of the court below, made at chambers, discharging the attachment; and it is claimed that, before this order of discharge was made, the entire action in which the attachment proceedings were had, had been dismissed. In every one of the foregoing matters, the plaintiffs in error, defendants below, are mistaken. In the attachment case no cause of action was stated as against Mrs. Confrey. No sufficient affidavit for the attachment was filed as against her. The attachment bond was given to her, as well as to Vincent Confrey. The order of attachment was issued against her, as well as against Vincent Confrey. Her property was attached by means of garnishment proceedings connected with the attachment proceedings. The attachment suit was not dismissed when the judge of the court below discharged the attachment. Her property had not been released at that time from the garnishment proceedings; nor had any notice been given to the garnishee of the supposed dismissal of the action, or the supposed release of the plaintiff's property. On the day preceding the discharge of the attachment, a paper was filed in the attachment case by the plaintiff in that case, Oberlander, purporting to dismiss the action, and notice was given to Mrs. Confrey's attorney, but no judgment was rendered or order made by the court dismissing the case, nor was the supposed dismissal called to the attention of the court until a long time afterwards; and therefore the cause was not dismissed. Dismissals under the Civil Code (article 17) are judgments, which neither of the parties, nor the clerk, nor all together, but only the court, can render. Besides, the plaintiff in that case, Oberlander, did not release Mrs. Confrey's property from the attachment and garnishment proceedings, nor give notice to the garnishee that it was released; and the only means by which she could procure its release was by obtaining a discharge of the attachment, as she did. But, really, it makes but very little difference in this case whether the suit was dismissed before the attachment was discharged or not; and it is at least questionable whether this question is properly presented to this court by the assignments of error and the record.

It is further said that the court below erred in excluding evidence offered by the defendants below. No page of the record is cited, however, and we fail to discover any such error. The judgment of the court below will be affirmed.

All the justices concurring.

(38 Kan. 482)

**NATIONAL SOLAR SALT-WORKS v. WEMYSS.**

(Supreme Court of Kansas. February 11, 1888.)

**TRIAL—INSTRUCTIONS—HARMLESS ERROR.**

When erroneous instructions are given, but it is evident from all the facts shown by the record that the jury were not misled, and that the party excepting to the instructions was in no manner prejudiced, the error is an immaterial one, and the supreme court will not reverse the judgment of the district court therefor. *Woodman v. Davis*, 32 Kan. 344, 4 Pac. Rep. 232, cited and approved.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Saline county; S. O. HINDS, Judge.

This action was commenced in the district court of Saline county, on the 10th day of October, 1884, by R. J. Wemyss against the National Solar Salt-Works, a corporation organized under the laws of the state of Colorado, to recover on the three following promissory notes:

**EXHIBIT C.**

"\$1,500.

SOLOMON CITY, KANSAS, October 1, 1881.

February 1, 1882, after date, the National Solar Salt Company promise to pay to the order of R. J. Wemyss fifteen hundred dollars. Payable at First National Bank of Abilene, with interest at the rate of eight per cent. per annum from date until paid. Interest payable annually. Value received.

"No. ——— Due. ———.

"THE NATIONAL SOLAR SALT COMPANY.

"BY ROBERT LAMBORN, Prest."

The indorsements on note are as follows:

"\$150. Received January 12, 1884, the amount of one hundred and fifty dollars, on account. R. J. WEMYSS.

"\$50. Received fifty dollars on account, March 1, 1884.

R. J. WEMYSS."

**EXHIBIT A.**

"\$2,000.

SOLOMON CITY, KANSAS, October 1, 1881.

February 1, 1882, after date, the National Solar Salt Company promise to pay to the order of R. J. Wemyss two thousand dollars. Payable at First National Bank of Abilene, with interest at the rate of eight per cent. per annum from date until paid, interest payable annually. Value received.

"No. ——— Due ———.

"THE NATIONAL SOLAR SALT COMPANY.

"BY ROBERT H. LAMBORN, Prest."

The indorsements on above note are as follows:

"\$275. Received July 12, 1884, two hundred and seventy-five dollars, on account. R. J. WEMYSS.

"Received seventy-five dollars, on account. R. J. WEMYSS."

**EXHIBIT B.**

"\$2,000.

SOLOMON CITY, KANSAS, October 1, 1881.

"January 1, 1882, after date, the National Solar Salt Company promise to pay to the order of R. J. Wemyss two thousand dollars. Payable at First National Bank of Abilene, with interest at the rate of eight per cent. per annum from date, until paid. Interest payable annually. Value received.

"No. ——— Due ———.

"THE NATIONAL SOLAR SALT COMPANY,

"BY ROBERT H. LAMBORN, Prest."

The indorsements on above note are as follows:

"\$275. Received January 12, 1884, the sum of two hundred and seventy-five dollars, on account. R. J. WEMYSS.

"Received March 1, 1884, seventy-five dollars, on account.

"R. J. WEMYSS."



The salt company filed the following answer, to-wit:

"The said defendant, for answer to said plaintiff's petition, says that defendant admits that it is a corporation duly organized and existing under the laws of the state of Colorado, but denies that it is indebted in any sum whatever to the said plaintiff in manner and form as claimed in plaintiff's petition. The said defendant, further answering said plaintiff's petition, for a just cause of defense, alleges that said plaintiff ought not to have and maintain his action aforesaid against said defendant company, because said plaintiff obtained from the defendant the promissory notes, mentioned in said plaintiff's petition, by false and fraudulent representations made to defendant by plaintiff at the time of the making said notes, for the purpose of obtaining the same, in this, to-wit: That the said plaintiff having at that time, to-wit, October 1, 1881, and for a year previous thereto, the sole and actual control and management of the defendant's affairs and salt works, for making and manufacturing salt in Saline county, Kansas, represented to the defendant that he had, in addition to \$35,000 before that time advanced by defendant to plaintiff at his instance and request, for the purchase, completion, and operation of the said works, but without the knowledge, consent, instance, or request of defendant, advanced for the use and benefit of the defendant the sum of \$5,500, the aggregate sum of said notes, for the purpose of enlarging and completing said salt-works, and the facilities and money-making capacity of the same; so that from that time said works would pay as profits 20 per cent. on defendant's paid-up capital stock of \$35,000. That by reason of said outlay of his own money said works had been so fully and thoroughly equipped and completed that they would necessarily yield under his management increased and increasing profits over the said stipulated 20 per cent. on said capital stock, and that said defendant would not be called upon to contribute any money for the payment of said notes to be given for said money of his own, expended as aforesaid, because the expenditure of said sum of money had made the defendant's salt-works so efficient for making money as profits on the invested capital that said notes would be paid, as they would become due, out of surplus clear profits resulting from his operation of said salt-works. That if defendant would execute notes for his said unsolicited advances, said defendant should never hear of such notes as obligations against defendant, as he would certainly pay the money due him on said notes in four months' time without said defendant's contributing anything therefor, but from the large profits resulting from his successful management and operation of defendant's salt-works. That the advance and expenditure of said sum or sums of money had been necessary and was required on account of \$35,000 being insufficient for carrying out the proposed improvements and completion of said salt-works. That the same had been judiciously expended therefor, and was properly accounted for in the books and records of defendant. And said defendant avers that, solely relying upon the aforesaid representations of plaintiff to it, and the truth thereof, it caused said promissory notes to be executed and delivered to plaintiff, but, as defendant further avers, the said representations to it by plaintiff, hereinbefore set forth, were false, and that plaintiff knew them to be false when he made them as aforesaid, and that they were then and there made by the plaintiff for the purpose of obtaining said promissory notes, all of which plaintiff well knew at the time; and defendant further says that defendant did not know the said representations were false, and falsely and fraudulently made as aforesaid, until after defendant had paid the sum of \$900 thereon.

*Second Defense.* The said defendant, further answering, for a second defense to said plaintiff's petition, refers to the foregoing part of this answer as part thereof, and further avers that said plaintiff ought not to have and maintain his action aforesaid against defendant for that there was a total failure of consideration for the notes mentioned and sued on in plaintiff's petition; for the consideration of said notes was for money advanced and used by plaintiff

at his own instance for fully completing salt-works in Saline county, Kansas, so that the same would thereafter, under plaintiff's sole management, produce large clean profits to defendant on the said capital stock, and for no other consideration whatever; when, in truth and fact, as defendant avers, said money was not advanced and used for said purpose as aforesaid, nor for any purpose of use, benefit, or profit to defendant, but was used by plaintiff himself in useless experiments, and in replacing money which had been before that time furnished to him by defendant for improving said salt-works, but which had been recklessly squandered and wasted by plaintiff in useless and worthless matters and purposes.

*Third Defense.* The defendant, further answering plaintiff's petition, for a third cause of defense, as a counter-claim, says: That on the 10th day of October, A. D. 1880, plaintiff and defendant made and entered into an agreement of writing of that date in words and figures as follows:

"COLORADO SPRINGS, COL., October 16, 1880.

"This agreement, made this 16th day of October, 1880, witnesseth: That R. J. Wemyss, party of the first part, hereby agrees to become the general manager of the National Solar Salt Company, and take charge of all their property connected with salt-works and lands, and sales of salt, etc., collection of debts, payment of taxes, and all other matters pertaining to the business of the company in Kansas, for a period of three years from March 1, 1881, and will reside at Solomon, Kansas, from that time, and will devote himself assiduously to the affairs of the company. That the said party of the first part first pay all the expenses of wages, taxes, etc., necessary for operating the company, and twenty per cent. on the sum of twenty-five thousand dollars out of the earnings from its business, whereupon, from the excess over the said expenses and dividends, the said party of the first part shall receive two-thirds of all the remaining net receipts for the first year in full remuneration for his services hereunder, and for each of the two succeeding years, one-half of said excess, as said remuneration. It is also agreed that the president, secretary, and treasurer of the company shall serve without salary, for the above-named three years. In case a sum less or more than twenty-five thousand dollars is put into the works of said salt company, the said dividends of twenty per cent. shall be reduced or increased, so that it shall be twenty per cent. of the average amount of paid-up cash furnished by the stockholders. In witness whereof, the said R. J. Wemyss, party of the first part, and Robert H. Lamborn, president of the National Solar Salt Works Company, party of the second part, have hereunto set their hands and seals this 16th day of October, 1880.

[Seal.]

"R. J. WEMYSS.

[Seal.]

"ROBERT H. LAMBORN, Prest. N. S. S. Co.

"Witness: A. H. DANFORTH, Secy."

That in pursuance of the foregoing contract said plaintiff on March 1, 1881, was in charge of the affairs of said defendant, and of the said salt-works hereinbefore mentioned, situated very near Solomon, Kansas, to which place plaintiff then came to reside. That defendant furnished as required of it to plaintiff, between October 1, 1880, and October 1, 1881, the sum total of \$35,000, and also did everything else required of it under said contract. But defendant avers that said plaintiff failed, neglected, and refused to construct and manage the said salt-works, and affairs thereof, in a provident, prudent, careful, and business-like manner, and to expend the money furnished as aforesaid to him, for judicious and appropriate purposes. That he willfully and negligently disregarded efficient and well-tried plans and approved methods, and the use of the appropriate material in constructing the said works, and vats and covers therefor used in making salt, although such plans were furnished to plaintiff, and he was specially requested so to do by defendant, and was also advised thereunto by competent and experienced men in such busi-

ness; but in the place thereof, the plaintiff constructed said works and vats and covers, but at no less cost and expense to defendant, with green and unsuitable material, and on inefficient and unskillful plans and methods, so that the defendant has been and will be compelled, by great outlay in money, to replace unsuitable materials used by him with suitable and durable material. That he willfully and stubbornly failed and refused to locate and set the steam-engine and appurtenances thereto, used at said works, in a proper and skillful manner, or permit the same to be so located and set by competent persons, which necessitated, and still requires, large expense by defendant to relocate and reset the same. That in managing defendant's affairs and salt-works, as aforesaid, plaintiff negligently and carelessly failed to construct such part of said works that were made by him in a substantial and workman-like manner, and also that he negligently and carelessly failed to properly preserve, care for, and keep said works in an efficient manner for the uses and purposes for which said works had been built and constructed. That he negligently failed to operate said works with care and assiduity, but left such operation to other and inefficient men, and that he recklessly and extravagantly expended large sums of money, furnished to him as aforesaid, for constructing, improving, and completing said works, for ill-advised and useless experiments in and about the construction of said works, and for other experiments for worthless and inappropriate purposes, by reason of all of which said defendant has been damaged in the sum of \$10,000.

*Fourth Defense.* Said defendant, further answering, for a fourth cause of defense, says: That it refers to the foregoing parts of this answer, and particularly to the written agreement hereinbefore set forth, and as a part hereof, and further avers that defendant on its part did and performed each and all the duties, obligations, and requirements obligatory and required of it by the terms of said written agreement, but that the plaintiff disregarded his duties and obligations thereunder; failed, neglected, and refused to be the general manager of the defendant, and to take care of its property connected with its salt-works and lands, and matters generally pertaining to its business in Kansas, and to sell its salt, collect its debts, pay its taxes, and to devote himself assiduously to the affairs of said defendant for the space of three years from March 1, 1881, and also failed and refused to reside at said Solomon, Kansas, for said three years; for said plaintiff, about October, A. D. 1882, wholly abandoned said salt-works, and the management thereof, and of the defendant's said affairs, and without the knowledge or consent of defendant, and from that date, refused to perform any of the duties and obligations required of him, and did also, about said last-mentioned date, without defendant's knowledge or consent, leave and cease to reside at said Solomon, Kansas, and did at that date move to the county of Ramsey, in the state of Minnesota, where he has since resided; all of which to defendant's damage of \$2,500.

*Fifth Defense.* The defendant, further answering, for a fifth cause of defense says: That the plaintiff was, at the commencement of this action, justly indebted to the defendant in the sum of \$2,660, for so much money before that time had and received by said plaintiff to and for the use of defendant, which sum of money was then due, and payable to defendant, and is still wholly unpaid.

Wherefore defendant prays judgment in its favor on said promissory notes, that the same be delivered into court, and canceled, and that defendant have judgment against plaintiff for the sum of \$15,360, and its costs."

*Garver & Bond*, for plaintiff in error. *J. H. Mahan*, for defendant in error,

SIMPSON, C., (after stating the facts as above.) We shall take notice only of the specific errors complained of in the brief of counsel of plaintiff in error. If there are other errors in the record, they should have been called to the attention of the court here, as well as to that of the trial court. It is contended

that, among other defenses urged on the trial, the main one was that the notes had been obtained by Wemyss through false and fraudulent representations, and this was the principal question passed upon by the jury. There was a verdict and a judgment on the notes for \$6,594.50, and costs. The court charged the jury upon the question of fraud, as a defense to the action, as follows: "The defendant, to sustain his defense that the notes were procured by the false and fraudulent representations of the plaintiff, must prove—*First*, that the false and fraudulent representations, or some of them, were made as alleged in the second count of the defendant's answer. *Fourth*. They (such false and fraudulent representations) must have been made by the plaintiff, with the intent and for the purpose of inducing the defendant to execute said notes to the plaintiff. *Fifth*. The plaintiff must have known such representations to be false when he made them. *Sixth*. The defendants must have been ignorant of the real facts, and must have relied solely upon such false and fraudulent representations, if any such are shown to have been made by the plaintiff." With respect to these, the plaintiff in error says: "When a contract is sought to be avoided because of false representations made as an inducement to its execution, it is not essential to show that the persons making the representations knew them to be false,"—and cites *Wickham v. Grant*, 28 Kan. 517: "Whoever positively and generally makes a false assertion as an inducement for another to contract with him, and succeeds on that ground, is guilty of a fraud that vacates the contract. It must be as represented, or it is fraudulent. A man who does so ought to suffer; he must answer for the truth."

The state of facts developed by the evidence preserved in the record is substantially as follows: The plaintiff in error pleaded fraud and misrepresentation in the inception of the notes; that there was a total failure of consideration; and finally attempted to show that the defendant in error had relied upon a particular fund for the payment of these notes, and this fund being under his control, and the subject of his creation, he negligently, and from want of business care and knowledge, rendered the property so unproductive that no fund was created out of which to pay the indebtedness. We have very carefully read all the evidence, and must say that there is very little positive evidence, or even trivial circumstances, to support any or all of these alleged defenses. Wemyss advanced the money represented by the notes, at a time when the company would have suffered great loss and inconvenience if he had not done so. He advanced it at the suggestion, and probably on the request, of the president, and it was known to all interested for months before the notes were executed. It is true that he had expressed a hope, possibly a belief, that he might be reimbursed by sales of salt, but there is not a particle of testimony to sustain the contention that he had agreed to look solely to this source for repayment. The instructions complained of were not necessary, in our view, to be given; there was not a state of facts proven that justified them; there was no substantial defense made of the payment of the notes. A cursory reading of the evidence of both Wemyss and Lamborn, and the correspondence between them, is enough to warrant the assertion that none of the defenses pleaded in the answer had any real tangible support from the facts and attending circumstances. In this view of the case, an error in the instructions becomes an immaterial one, for the reason that no such error could have produced a different verdict. The verdict rendered was the necessary product of the evidence; any other would be difficult to sustain. Hence, conceding that there was error in both instances cited in the brief of counsel, it could not have prejudiced the plaintiff in error. *Woodman v. Davis*, 32 Kan. 344, 4 Pac. Rep. 262, and authorities cited. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered.

(38 Kan. 417)

VAN FOSSEN *et al.* v. MOSHER.

(Supreme Court of Kansas. February 11, 1888.)

## EVIDENCE—DECLARATIONS—WHEN ADMISSIBLE.

Where plaintiff and defendants engage in the business of selling real estate on commission, and plaintiff is to receive one-third of the commissions on such sales as compensation, and, while so engaged, they enter into a real-estate speculation not connected with their other business, and by agreement plaintiff was to receive one-third of the net profit of said speculation, and afterwards, by agreement, the general real-estate business was closed up, and afterwards the defendants made a profit from said speculation, and refused to account therefor to the plaintiff: in an action to recover such interest, *held*, not error to exclude statements and declarations made by plaintiff in relation to and in connection with the general business, which had no relation to or connection with that particular transaction or speculation.

(Syllabus by Clogston, C.)

Commissioners' decision. Error to district court, Bourbon county; C. O. FRENCH, Judge.

S. P. Mosher brought this action against D. J. Van Fossen and Henry Wilcox for one-third of the profits from the sale of lot 11 in block 103, in the city of Fort Scott, Kansas. Trial by jury and judgment for the plaintiff for \$249.63. The defendant brings error.

J. D. McCleverty and W. C. Perry, for plaintiffs in error. E. M. Hulett, for defendant in error.

CLOGSTON, C. Van Fossen and Wilcox were partners, engaged in the real estate and insurance business in the city of Fort Scott. S. P. Mosher, the defendant in error, was at the time of the transaction complained of employed by them in their office, in connection with their business, and had charge of the real-estate business of the city, and was to receive as compensation one-third of the commission on the sales made in that department. Some time in the winter of 1883 plaintiff discovered that lot 11, block 103, in Fort Scott, could be purchased, and he conveyed this intelligence to Van Fossen & Wilcox, and was by them instructed and authorized to purchase the lot, if the same could be purchased for \$1,000, provided a good title could be procured thereto. Plaintiff purchased the lot for \$750, and after some correspondence procured the title to the property, the deed being taken in the name of one Havens, and was dated March 27, 1883. At the time of the purchase, plaintiff ascertained that one McDonald desired to purchase the lot, and that he would give \$1,500 for it. Plaintiff at once informed the defendants of this fact, and was directed by them to sell the lot to McDonald if that sum could be realized for it. Up to this time there seems to have been no arrangement as to what interest the plaintiff should have in the transaction, and it is claimed by him that this transaction was independent of and not connected with the general business he had been doing for the defendants, and that he desired to know what his interest was to be in the property. In a conversation with Van Fossen it was arranged that if he sold the property to McDonald he should have as his share one-third of the profit realized from the transaction. A deed was prepared, and plaintiff presented it to McDonald, whereupon McDonald desired not to take the property. In the mean time the plaintiff had ascertained that another person was desirous of purchasing the property and had offered \$1,800 for it. Knowing this fact, he released McDonald from his agreement to take the property, and informed the defendants of the offer of \$1,800, and the release of McDonald, and asked that a deed be made to the person making the offer. Van Fossen then refused to sell the property on this last offer, and said he would take it himself, and no settlement was made between the parties in relation to the plaintiff's share in the property, but, without the knowledge of plaintiff, defendants gave him credit on his general account on their books for \$37.50, the commission they allowed him in the transaction. Shortly after-

wards plaintiff purchased the insurance business of the defendants and severed his connection with them, drawing his balance on his general account, including the \$37.50, but claimed that the defendants were indebted to him for his share in the lot transaction.

The only errors alleged are that the evidence does not sustain the verdict, and that the court ruled out competent testimony material to their defense. On the first of these propositions this court has often laid down the rule that where there is some evidence to sustain a verdict this court will not disturb it. This was a disputed question of fact, and the defendants gave their theory of the matter, and the plaintiff gave his, and the jury were the exclusive judges of the matter, and we cannot disturb their verdict on that ground. The evidence excluded is as follows: "The defendants offered to prove in answer to that question that Van Fossen then stated to the witness, in the presence of Mosher, that Mosher had no interest in the real-estate business of Van Fossen & Wilcox, and that Mosher assented thereto." This was a conversation said to have taken place in the office of the defendants, in the presence of Van Fossen and their book-keeper, in which Van Fossen purported to have made the statement in Mosher's presence, and addressed to Mosher, that he (Mosher) then had no interest in the business. This was after the lot transaction. We think this evidence was properly excluded. This related to their partnership real-estate business, and not to this individual transaction. There is no controversy in relation to their general business, and no dispute about it. They closed and settled it up, and no claim was made, so far as the record shows, that there was any difference between them in relation to the general partnership business. This being true, it was not competent to bind the plaintiff by any declarations that related solely to that partnership, or that general business in which they were engaged, and which had no reference to this particular transaction. This was not a sale on commission, but was a purchase by the firm for the firm's benefit. The evidence further discloses that in September, 1883, the defendants sold the north half of this lot for \$1,300, and on November 9, 1883, they sold the south half for \$1,500. We think there is ample evidence to support the verdict and judgment, and the exclusion of the evidence complained of was not error. It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(3 Ariz. 390)

## BRYAN v. PINNEY.

*(Supreme Court of Arizona. March 16, 1888.)*

## COURTS—TERRITORIAL SUPREME COURT—ADJOURNED TERMS.

Under Rev. St. U. S. § 1934, providing that the supreme court of Arizona may hold adjourned terms at any time and place agreed upon, and ordered by the judges, and that any business which such court might do at any regular term may be done at such adjourned term, *held*, such adjourned terms are not sessions, but distinct and separate terms.

Appeal from district court, Maricopa county. Motion to dismiss an appeal.

BARNES, J. In this case appellee moves to dismiss the appeal on the ground that the transcript was not filed on the first day of the term. Section 938, Rev. St., provides that "it shall be the duty of the appellant or plaintiff in error to file a transcript of the record with the clerk of the supreme court on or before the first day of the next succeeding term, held after the appeal was perfected, or the summons for writ of error was served, and that if after 30 days before the next term it shall be filed at the next term." In this case the final judgment was rendered on the 13th day of December, A. D. 1887, and notice of appeal given; and bond was filed and appeal perfected on the 16th day of January, A. D. 1888. The regular term of this court began on the second Monday of January at Prescott. At that term the judges signed an order for an adjourned term of said court at Tucson March 1st, and an order for an adjourned term in June, at Prescott. Rev. St. U. S. § 1934, provides that the supreme court of Arizona may hold adjourned terms thereof at any time and place in the territory agreed upon by a majority of the judges of the court at any regular term thereof. The order for an adjourned term shall be signed by a majority of the judges thereof at a regular term of the court, and entered upon the minutes of the court, and any business which said court might do at any regular term thereof may be done at such adjourned term. It is insisted that this is not a term of court, but is merely an adjourned session of the January term, and hence that this transcript will be due under the statute at the January term of this court, 1889. We are referred to the case of *Bank v. Withers*, 6 Wheat. 107. There the law provides that "said courts are hereby invested with the same power of holding adjourned sessions that is exercised in Maryland," and the court held this did not make the adjourned session a distinct session. There is a broad distinction between an "adjourned session" and an "adjourned term." The word "session" means a meeting of the court. Term has a definite meaning, well known and well understood. Counsel argues that the words "sessions" and "terms" are synonymous. If they are synonymous, then this is the next session of the court. It is evident, however, that it was the intention of the act of congress that these adjourned terms should be distinct and separate terms, and that the business transacted should be the same as at a regular term. However, section 938 above, provides that where a party is unable to file such transcript in the time limited by this section, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period. The appellant in this case, upon what is deemed a sufficient showing, has made a cross-motion for leave to file the transcript; which motion is allowed.

WRIGHT, C. J., and PORTER, J., concur.

(11 Colo. 41)

## COOPER v. MCKEEN.

*(Supreme Court of Colorado. January 27, 1888.)*

## 1. APPEAL—FROM COUNTY TO DISTRICT COURT—WAIVER OF OBJECTIONS.

Under Gen. St. Colo. § 500, relating to appeals from the county court to the district court, which provides that the "appellate court shall consider and pass upon

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all objections to the pleadings and proceedings in said cause which may have been made in the county court," where the appellant having answered and gone to trial in the district court without in any way calling the attention of the district court to a motion made in the county court to set aside a judgment by default, on the ground that there was no service of summons, he must be held to have waived the objection.

**2. PLEADING—AMENDMENT DURING TRIAL—DISCRETION OF COURT.**

Plaintiff, during the trial of an action, was allowed to amend his complaint by alleging a date when the amount in controversy became due, without terms and conditions, and to proceed with the trial without refiling his complaint. *Held*, that granting the amendment was entirely within the discretion of the court.

Error to district court, Jefferson county.

James M. McKeen filed a complaint in the county court of Jefferson county against Isaac Cooper, alleging a sale and conveyance to defendant of an undivided one-fourth in certain mining claims in Columbia mining district, Pitkin county, Colo., to-wit, the Central, Great Western, Chrisocalla, Champion, Tunnel, Jennette, and Cinnamon; that defendant promised to pay for the same \$1,800, and convey back an undivided one-tenth of the Central claim; that he conveyed said one-tenth interest June 12, 1883, but has not paid the said \$1,800, except \$500, June 3, 1882. Plaintiff demands judgment for \$1,300, and interest. From an order of the county court overruling a motion to set aside a judgment by default, on the ground of want of jurisdiction, in that no service of summons was had upon the defendant, defendant appealed to the district court. On the hearing of a motion in the district court, by plaintiff, to dismiss defendant's appeal, defendant's attorney appearing specially to resist said motion, defendant was given time to perfect his appeal and answer to the complaint; whereupon he filed his answer to the merits, admitting the conveyance, but alleging that the purpose was to consolidate titles to said claims with a view to forming a stock company, the defendant to have full control of the property for that purpose; that plaintiff was to receive his due proportion of the proceeds of the sale of stock of said company, which was afterwards agreed should not exceed \$1,500; that the \$500 was paid under said agreement, and that the balance was not due,—and upon trial plaintiff recovered judgment and verdict for \$1,576.75. Defendant did not raise the question of jurisdiction in the district court. Defendant brings error from a judgment of the district court overruling a motion for a new trial, and assigns error as follows:

(1) The court erred in assuming, without authority of law, the jurisdiction of the person of the defendant, and in compelling him to answer and go to trial. (2) The court erred in ordering defendant to answer said complaint, while a motion and plea to the jurisdiction of the court was pending and undisposed of. (3) The court erred in allowing the plaintiff during the trial to amend his complaint without terms, and to proceed to the trial without refiling his complaint. (4) The verdict and judgment were contrary to the evidence and the weight of evidence. (5) The verdict and judgment should have been for the defendant. (6) The verdict and judgment were excessive, and not warranted by the testimony nor the weight thereof. (7) The district court erred in admitting improper evidence at the trial for the plaintiff, and in rejecting proper evidence for the defendant. (8) The court below erred in other matters and things apparent on the face of the record.

*H. P. Bennett*, for plaintiff in error. *A. H. De France*, for defendant in error.

**ELBERT, J.** 1. In the matter of appeals from the county court to the district court, section 500, Gen. St., provides that the "appellate court shall consider and pass upon all objections to the pleadings and proceedings in the said cause which may have been made in the county court. \* \* \*" It does not appear in the case before us that the appellant in any way called the attention of the district court, to which he had appealed, to his motion made in



the county court, asking that the judgment by default be set aside on the ground that there was no service of summons. Having answered and gone to trial without calling the attention of the court to his motion made in the court below, he must be held to have waived it.

2. The permission given the plaintiff to amend his complaint, by alleging a date when the claim sued upon became due, was a matter entirely within the discretion of the court, and in harmony with the spirit of the Code.

We have examined the exceptions taken to the admission of evidence, so far as our attention has been called to them in the argument of counsel, and we find nothing to justify a reversal of the judgment. We think the testimony excepted to was clearly in rebuttal. The record before us presents a case of conflict of testimony, upon which the jury has passed. We have examined the evidence carefully, and instead of its being insufficient to sustain the verdict, we are inclined to the opinion that the verdict is in accordance with the right of the case. The judgment of the court below is accordingly affirmed.

(11 Colo. 44)

LOGAN v. LOGAN.

(Supreme Court of Colorado. January 27, 1888.)

1. WILLS—DEVISE TO WIDOW—EFFECT OF RENUNCIATION—STATUTES—CONSTRUCTION.  
Gen. St. Colo. 1883, § 3627, provides that where, upon renunciation by the widow, "legacies and bequests" to other persons named in the will are increased or diminished, the court shall, in settling the estate, take from or add to them so as to put them upon the same relative footing they had under the will. *Held*, that "legacies and bequests," as used in the statute, embraced "devises," and that upon renunciation by the widow, under section 2270, giving her in such case half of the whole estate, the will was not revoked as to a devise to one not an heir at law, but that such a devise abated one-half.
2. SAME—RIGHT TO RENTS OF PROPERTY DEVISED.  
Where the widow renounces under Gen. St. Colo. 1883, § 2270, giving her, in such case, one-half of the whole estate, and the estate is solvent, she is entitled to half the rents arising out of land devised under the will to one not an heir at law of the testator.

Error to Arapahoe county court.

*L. B. France*, for plaintiff in error. *I. E. Barnum*, for defendant in error.

BECK, C. J. The matters in controversy in this case arise upon the construction of the statutes of this state relating to the disposing by will of the property of married men. Samuel M. Logan died in 1883, leaving him surviving, as his only heirs at law, Mary E. Logan, his widow, and three sons and one daughter. His estate consisted of four city lots in the city of Denver and some personal property. By his will he devised one lot to Mary J. Logan, the plaintiff in error, who was not an heir at law. A life-estate in another lot was devised to Mary E. Logan, the widow, with remainder in certain proportions to his three sons. A third lot was devised to the three sons, in the same proportions, and the fourth in fee to his daughter, Isadore S. Logan. The widow renounced the provisions of the will in her behalf, and elected to take under the statute.

The main contention is as to the *status* of the lot devised to Mary J. Logan, upon the renunciation of the widow, and as to the effect of the renunciation upon the rights of said devisee. The view taken by counsel representing the plaintiff in error, as we understand him, is, that a renunciation by a widow of the provisions made for her in the will of her husband, while it sets aside the will as to the heirs at law, does not in any manner affect devises or bequests made to persons not heirs at law of the testator, unless more than one-half of the estate is thereby given such persons. The reason assigned is that a testator is duly empowered by statute to dispose of one-half of his estate as he may see fit. In support of this view the first section of the statute of

wills is cited, which provides that all persons having certain qualifications shall have power to dispose of their estate, real and personal, by will or testament, "except as provided in the statute concerning married women." That exception is: "In case any married man shall hereafter deprive his wife of over one-half of his property, by will, it shall be optional with such married woman, after the death of her husband, to accept the conditions of the will, or one-half of the whole estate, both real and personal." Gen. St. § 2270, c. 72. It is contended that inasmuch as less than one-half the estate was devised to plaintiff in error, (the only devisee or legatee who was not an heir at law of the testator,) the will must be wholly sustained as to her, and as to the lot devised to her. Counsel says that plaintiff in error must take the whole of this lot or nothing. These propositions are based upon the assumption that if the devise of this lot is affected by the renunciation, the will is wholly set aside or destroyed in relation thereto. The counsel's attention was called by opposing counsel to the provisions of section 3627, c. 105, Gen. St., viz., "in all cases where the widow shall renounce all benefit under the will, and the legacies and bequests therein contained to other persons shall, in consequence thereof, become increased or diminished in amount, quantity, or value, it shall be the duty of the court, upon the settlement of such estate, to abate from or add to such legacies and bequests in such manner as to equalize the loss sustained, or advantage derived thereby, in a corresponding ratio to the several amounts of such legacies and bequests, according to the intrinsic value of each." To this it was replied that the section quoted has nothing to do with the question in controversy, for the reason that the terms "legacy" and "bequest," according to their well-defined meaning in law, refer to gifts by will of personal property, and not of real estate; that this statute refers to a subject-matter purely personal, whereas, the controversy arises upon a devise which is a gift of real estate. The controversy depends upon the proper construction of the latter section. If the words "legacies" and "bequests," as used therein, relate to gifts by will generally, the section clearly indicates the legislative intent that wills are to be upheld, notwithstanding the renunciations of their provisions by widows of testators, as to all gifts of property thereby made to other persons, save only as to the *pro rata* change in "amount, quantity, or value" produced by the renunciation. It is true that in their strict legal application the terms "legacy" and "bequest" refer to gifts by will of personal estate. There is nothing in the derivation of these words to so distinguish them, but such is their proper legal signification, as all authorities agree. It is a conceded fact, however, that they are not always employed according to their technical meaning, and that they are not always to be so construed. Mr. Webster says of the words, "bequeath" and "devise:" "These words both denote the giving or disposing of property by will. Devise, in legal usage, is properly used to denote a gift by will of real property, and he to whom it is given is called a 'devisee.' 'Bequeath,' is properly applied to gifts by will or legacy; *i. e.*, of personal property. The gift is called a 'legacy,' and he who receives it is called a 'legatee.' In popular usage the word 'bequeath,' is sometimes enlarged so as to embrace 'devise,' and it is sometimes so construed by courts." Mr. Bouvier defines the term "legacy" to be a gift by last will. He says: "The term is more commonly applied to money or personal property, although sometimes used with reference to a charge upon real estate." And again: "A legacy to one and his heirs, although generally conveying a fee-simple in real-estate, and the entire property in personalty, may, by the manner of its expression and connection, be held to be a designation of such persons as are heirs of the person named, and thus they take as purchasers by name." In 6 Bac. Abr. 161, it is said: "The word 'devise' is specially appropriated to a gift of lands; the word 'legacy' to a gift of chattels, though both are used promiscuously. The word 'legacy,' used in a will, often refers to real as well as

personal estate. It must be explained according to the intention of the testator."

Our legislature has not always used these words in their strict legal sense, which fact of itself would authorize us to inquire in what sense they were employed in the present instance. Section 9481, Gen. St., empowers testators to devise all their estate in "lands, tenements, hereditaments, annuities, or rents, charged upon or issuing out of them, or goods and chattels and personal estate of every description whatsoever, by will or testament." Section 2269 permits a married woman to make a will, but provides that, "she shall not bequeath away from her husband more than one-half of her property, both personal and real, without his consent in writing." It will be observed in the former section the word "devise" is applied to gifts of both real and personal estate, and in the latter the word "bequeath" is used in the same sense. Mr. Dwarris lays down, as the rule for construing wills, that "the intention shall prevail," and adds: "Where the intention of the testator is clear and obvious, it has been held that it will control the legal operation even of technical words." Page 176. In the same connection, with reference to the construction of statutes, he says: "The construction of a statute, indeed, like the operation of a devise, depends upon the apparent intention of the maker, to be collected either from the particular provision or the general context. Acts of parliament and wills ought to be alike construed, according to the intentions of the parties that make them. So far, instead of dissimilarity there is resemblance." Page 174. He gives as a more guarded rule for the construction of statutes, "that effect shall be given to the intention whenever such intention can be indubitably ascertained by permitted legal means." Page 181. In seeking, then, for the sense in which these words were used in the present instance, the first essential to a proper construction of the section is easily acquired, viz., a clear idea of the object in view. A previous section authorizes the widow to partially defeat the provisions of the will in certain cases. The power to interfere extends to the entire estate of the testator, real and personal. The plain purpose of this section was to authorize the courts to treat the various provisions of the will as modified, to the extent of the derangement, in order to preserve, as to the balance of the estate not taken by the widow, the same ratio of distribution thereof among the donees, so far as values are concerned, as fixed by the terms of the will. That this was the evil to be remedied, and the object and purpose of the section, is patent upon its face. Now it is apparent this purpose cannot be accomplished by such an interpretation of doubtful words as will limit the remedy to one class of property which often comprises an insignificant part of an estate. The remedy being provided for, "all cases where the widow shall renounce all benefit under the will," and "loss is sustained, or advantage derived thereby," by the donees, the construction contended for would very clearly be in conflict with the intent apparent on the face of the section, and legitimately collectible from the general context. While courts have nothing to do with the policy of an act of the legislature, and no right of control over the motives of legislators, it is their duty to carry into effect their intentions, where they can be definitely ascertained. We have here, as guides to the intention, the object in view, and likewise the cause or necessity of enacting the law. The statutes are to be construed with reference to the objects to be accomplished by them, and where a particular construction would lead to unreasonable results, a different construction is to be given, if it can be done without doing violence to the letter of the statute. No violence is done by giving the words referred to the enlarged application which the authorities above referred to hold to be admissible, and which the framers of these statutes have themselves applied. Our conclusion is that the provisions of the section are applicable alike to all classes of property, and to all legatees and devisees.

Were this a new question, as counsel suggest, we would not only deem the

foregoing interpretation duly authorized by the reasons and considerations given, but consider it the duty of the court to accept it as the more reasonable construction. It is, however, not a new question. The same right to renounce the will and take under the provisions of the statute is afforded the widow under the statute of Illinois. Substantially the same provisions for equalizing gifts of real and personal estate exist there. They were literally identical with our section 3627, under consideration, from the year 1845 up to 1872. The only change made by the act of 1872 was to extend the provisions to a "surviving husband," so that the section now reads: "In all cases where a widow or surviving husband shall renounce all benefit under the will, and the legacies and bequests therein contained," etc. Am. St. Ill. § 79, p. 225. The section appearing in our statute is a literal transcript of section 44, page 545, of the Illinois Revised Statutes of 1845. Since the appropriation of that section by our legislature, and since the addition thereto of the words "or surviving husband," the supreme court of Illinois has decided that a will is not destroyed or set aside as to any gift made, whether of personal or real estate, by the renunciation of the widow, but that all legacies and bequests (which words are construed to include devises of real estate) are to be equalized under this statutory provision. *Marvin v. Ledwith*, 111 Ill. 144.

It follows that one-half of lot 32, block 49, east division of the city of Denver, devised to the plaintiff in error, became the property of the widow upon the renunciation by her of the provisions of the will. Also that the county court committed no error, the estate being solvent, in decreeing that the deficit in the widow's allowance should be paid out of the rents of the real estate, including said lot, and that one-half of the rents of said lot, in the hands of the administrator, belonged to the widow, as owner in fee of one-half of said lot.

The judgment is affirmed.

(11 Colo. 106)

#### HOOD *et al* v. SAUNDERS.

(*Supreme Court of Colorado*. February 10, 1888.)

1. CREDITORS' BILL.—BY SECURED CREDITOR.—FAILURE TO PURSUE LEGAL REMEDIES.  
Plaintiff, holding a promissory note and an account secured by a deed of trust of certain mining lands and an unsecured judgment against H., brought an action in equity, making his alleged trustees co-defendants, alleging in the complaint fraud on the part of defendants, and praying for a discovery of all property belonging to H., and that it be applied to the payment of his debt, but not alleging that the secured property had been sold, or asking that the trust deed be foreclosed, there being no allegation of insolvency, or that defendant was not possessed of other property than that mentioned sufficient to satisfy plaintiff's debt. *Held*, that the complaint does not state such a cause of action as will warrant any equitable relief.
2. SAME.—CLAIM NOT REDUCED TO JUDGMENT.  
A complaint, in the nature of a creditors' bill, showing on its face that part of the indebtedness upon which the complaint is based has not been reduced to judgment, is fatally defective.

Appeal from Clear Creek county court.

The purpose of this action was the discovery of property which might be held liable to the payment of certain demands existing in favor of the plaintiff below, Gabriel Saunders, against the defendant William B. Hood, consisting of a promissory note, an account, and a judgment. The plaintiff obtained these demands by assignment from one Charles W. Pollard, a grocer of Georgetown, who had for several years supplied said defendant (who was engaged in mining) with miner's supplies, and to whom defendant had become indebted in the manner stated. Upon a settlement had between Pollard and Hood on May 14, 1878, there was found to be due Pollard the sum of \$514.73, for which Hood gave the former his promissory note at four months, and secured the payment thereof by a trust deed on certain mining claims owned by him, Ed. C. Parmlee being named therein as trustee. On October

27, 1879, a further indebtedness of \$200 having been contracted, it was secured by a written contract purporting to convey, as collateral security for this and the former demand, certain other mining claims of said Hood. By this instrument both of said demands were to be paid in 60 days from its date. Upon the day last named Hood executed an order upon the defendant Thomas O. Old, requiring him, in the event of a failure to pay Pollard in pursuance of this agreement, to convey to the latter all the property held by said Old in trust for him, but not specifying what property was so held. Nor is this defect supplied by the complaint. A further bill was subsequently contracted by Hood at Pollard's store, amounting to the sum of \$117, for which Pollard obtained judgment against Hood in the county court on the 8th day of August, 1882, together with costs of suit, taxed at \$16.40. The above claims and judgment were transferred and assigned by Pollard to Saunders prior to the institution of the present action. The plaintiff alleges promises made by Hood to Pollard, during the transactions above detailed, to preserve his property free from other liens or incumbrances, and representations that the property owned by him was ample security for the indebtedness owing and accruing. The complaint alleges breaches of these promises by said Hood; various conveyances of his mining claims to and by the other defendants; a joint conspiracy of all said defendants to cheat and defraud Pollard out of the several sums of money so due him by said defendant, by changing the names of said mining claims, and procuring the same to be patented to some of the defendants under other names. It is alleged that execution had been issued on said judgment and returned unsatisfied, and that all said demands remain wholly unpaid. Full discovery is prayed of all property, effects, and choses in action, in the hands or knowledge of any of the defendants, and belonging to or held in trust for said Hood, and of all sales or assignments of property made to any of the defendants in which said Hood was in any manner interested, with full disclosures as to the present situation of the property. Judgment is prayed for the sum of \$1,555, and interest, which includes the entire indebtedness claimed; also that all moneys, property, etc., held by the other defendants, or any of them, for said Hood, be applied in satisfaction of said indebtedness. To this complaint Rebecca Hood filed a separate demurrer, and the other defendants a joint demurrer, assigning 22 grounds of objection thereto. The county court overruled these demurrers, and, defendants electing to stand thereby, entered a joint judgment against all of the defendants for the sum of \$1,657.50, and costs of suit.

*Morrison & Fillins*, for appellants. *W. T. Hughes*, for appellee.

BECK, C. J., (*after stating the facts as above.*) The scope and object of the bill filed in the county court, by the plaintiff, Saunders, appears to have been the discovery of property and credits belonging to the defendant William B. Hood, and alleged to be held by or in the names of his co-defendants in order that it might be in some manner subjected to the payment of plaintiff's claims. This complaint was framed after the style of a creditors' bill, but fatally defective as such, in that the main part of the indebtedness had not been reduced to judgment. *Burdsall v. Waggoner*, 4 Colo. 256; *Allen v. Tritch*, 5 Colo. 222. The plaintiff's remedy seems to have been wholly misconceived. No proper foundation was laid either for discovery, for the cancellation of conveyances, for the subjecting of property to execution, or for any specific relief. The property embraced in the deed of trust had not been sold. No application was made in the bill to foreclose the real estate securities executed by Hood; nor was there an allegation of insolvency of said defendant, or that he was not possessed of other property than that mentioned, sufficient to satisfy the plaintiff's claims. Something more than the oft-reiterated charge of fraud is necessary to constitute such a pleading as warrants the granting of equitable relief. In a proper case fraudulent con-

veyances will be set aside, and the property of a debtor subjected to the payment of his debts; but the necessary foundation must be laid upon which to invoke such relief, and the proceedings must be conducted in accordance with the forms of law. The complaint failed to state a cause of action, and the court erred in overruling the demurrers filed thereto. It also erred in rendering a general judgment against all the defendants for the debt of defendant Hood, and there was no warrant of law for including in a second judgment that part of the plaintiff's demand already merged in a prior judgment. *Barnes v. Beighly*, 9 Colo. 475, 12 Pac. Rep. 906. The judgment is reversed, and the cause remanded.

(11 Colo. 106)

### BROWN v. PEOPLE.

(*Supreme Court of Colorado*. February 17, 1888.)

#### 1. CONSTITUTIONAL LAW—ACT REGULATING PRACTICE OF MEDICINE.

Gen. St. Colo. 773 entitled, "An act to protect the public health and regulate the practice of medicine in the state of Colorado," is not unconstitutional in not providing that each school of medicine named in the act should be represented by equal numbers on the state board of medical examiners.

#### 2. SAME—DE FACTO BOARD OF MEDICAL EXAMINERS—CERTIFICATE PROTECTS.

The state board of medical examiners appointed under the provisions of Gen. St. Colo. 773, entitled, "An act to protect the public health and regulate the practice of medicine in the state of Colorado," being *de facto* the state board of medical examiners, acting under the provisions of the statute, its certificate protects the holder from prosecution under the statute, notwithstanding the mode of appointment might be unconstitutional.

Error to county court, Arapahoe county.

*Wells, Smith & Macon* and *Knapp & Benton*, for plaintiff in error. *Theodore H. Thomas*, Atty. Gen., for defendants in error.

ELBERT, J. The plaintiff in error was found guilty and fined \$50 on an information preferred against him for practicing medicine within the state, without having received from the state board of medical examiners a certificate authorizing him to practice. The questions presented by the record and discussed by counsel are, in the main, identical with the questions raised and decided in the case of *Harding v. People*, 10 Colo. —, 15 Pac. Rep. 727. In so far as this is the case, we shall not notice the assignments. This leaves us for consideration two objections, going to the constitutionality of the statute under which the plaintiff in error was convicted.

1. There is nothing in the constitution which requires that each school of medicine named in the act should be represented by *equal numbers* on the state board of medical examiners. The framers of the constitution did not attempt the establishment of a government that should be administered absolutely free from prejudice. In this respect the restraint of an official oath is the chief safeguard prescribed.

2. A point is made that section 2 of the act we are considering is unconstitutional, in that it provides for the appointment of the state board of medical examiners by the governor, whereas, under the provisions of section 6, art. 4, Const., it is contended the governor should nominate, and by and with the consent of the senate appoint. In *People v. Osborne*, 7 Colo. 605, 4 Pac. Rep. 1074, this constitutional provision is construed not to apply to offices created by statute to be filled as therein otherwise provided. Independently of this, the office being *de jure*, one appointed to it is *de facto* an officer, notwithstanding the mode of appointment may be unconstitutional. *Ex parte Strang*, 21 Ohio St. 610. As was said in the case of *Harding v. People*, *supra*, "it is enough that the board was *de facto* the state board of medical examiners, acting under the provisions of the statute, and that its certificate would have protected defendant from prosecution under the statute." The judgment of the court below must be affirmed.

(11 Colo. 113)

DUGGAN v. COLORADO MORTGAGE & INVESTMENT CO.

(*Supreme Court of Colorado.* February 17, 1888.)

CORPORATIONS—DE FACTO—MORTGAGE BY—MORTGAGEE PROTECTED.

Plaintiff, in an action of replevin against a sheriff, claimed the property under a mortgage from a *de facto* corporation. Defendant offered evidence to show the non-existence *de jure* of the corporation by reason of a defective certificate of incorporation. *Held* inadmissible, and that the mortgagee was entitled to assume that the corporation *de facto* rightfully possessed corporate powers, the certificate being colorable.

Error to superior court of Denver.

On the 2d day of October, 1882, the defendant in error, a corporation, was the owner of the chattels here in controversy, consisting of printing-presses, engines, type, machinery, and printing supplies. Upon that day it sold and delivered the same to the World Printing & Publishing Company for the price of \$1,840, and at the same time received from said company therefor, \$140, and 17 notes for \$100 each, and a chattel mortgage of the said chattels as security for the payment of said notes. The notes and the chattel mortgage were executed under the corporate seal and in the name of the said the World Printing & Publishing Company, by Arthur Shepherd, as president, and W. C. Williams, as secretary, thereof, and the said chattels were then delivered to said company at the place it was carrying on the business of publishing a newspaper in Denver, called "The Evening World," and about the 2d day of March following, certain writs of attachment were issued by a justice of the peace against the property of said Arthur Shepherd and W. C. Williams, under which the said plaintiff in error, as constable, seized the said chattels. The said notes matured, one each succeeding month, after execution. One of them had been paid. The balance remained unpaid, and were held by defendant in error. By the terms of the chattel mortgage, defendant in error, on such default, was entitled to have possession of the chattels; whereupon it made demand upon plaintiff in error for the chattels, and then replevied the same, and upon the trial of this action had judgment in its favor therefor. The case comes here on error to reverse this judgment. The plaintiff in error offered in evidence at the trial the original certificate of incorporation of the said the World Printing & Publishing Company, which had been filed in the office of the secretary of state, on the 6th day of April, 1882, and recorded there. This certificate was regular in form, the statute requiring at least three incorporators. The requisite number of names, Arthur Shepherd, W. C. Williams and David Lescallett, were affixed thereto as incorporators, but there was no acknowledgment of said certificate attached thereto. This evidence was rejected by the court on motion of defendant in error. Plaintiff in error also offered to prove by said David Lescallett that he never signed nor authorized his name to the said certificate, which evidence was likewise rejected.

*Sullivan & May*, for plaintiff in error. *Hugh Butler* and *A. B. McKinley*, for defendant in error

PER CURIAM. A corporation *de facto* presupposes a charter, or a law authorizing the creation of such a corporation, that there has been an attempt in good faith to comply with its provisions, and that there has been user or the exercise of corporate powers under it. Against such a corporation, as a general rule, a collateral attack by third persons will not avail. The reason is, that if rights and franchises have been usurped, they are the rights and franchises of the sovereign, and he alone can interpose. Until such interposition, the public may treat those possessing and exercising corporate powers under color of law, as doing so rightfully. The rule is in the interest of the public, and is essential to the safety of business transactions with corporations.

Ang. & A. Corp. §§ 635, 636; Abb. Tr. Ev. 18, 26; *Navigation Co. v. Neal*, 3 Hawks, 520; *Hudson v. Cemetery Corp.*, 113 Ill. 618; *Tarbell v. Page*, 24 Ill. 46; *Turnpike Co. v. Cutler*, 6 Vt. 315; *Stout v. Zulick*, 48 N. J. Law, 600, 7 Atl. Rep. 362. In the case of *Railroad Co. v. Cary*, 26 N. Y. 77, it is said: "Under this and similar general acts for the formation of corporations, if the papers filed, by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, no advantage can be taken of such defect in its constitution, collaterally, by any person." In view of the doctrine stated, and the relation which the parties to the suit sustained to the corporation, the existence of which was sought to be impeached, we think the evidence offered by the defendant was properly rejected. Although unacknowledged, the articles of incorporation were otherwise regular, and showed an attempt in good faith to comply with the provisions of the act. In the language of the authorities, they were colorable. There was an open and public exercise of corporate powers and rights by the World Printing & Publishing Company for several months prior to the date of the chattel mortgage and notes executed by it to the plaintiff. This was sufficient to authorize the plaintiff to deal with it as a corporation *de facto*, and to warrant the refusal of the court below to allow the defendant to attack its existence collaterally. We are aware of the distinction between mere omissions or irregularities, and what are called "prerequisites" of the statutes. The distinction may well be taken in a direct proceeding or other exceptional cases where strict proof is required, but we do not regard it as having any controlling place in the case at bar. What is or what is not a prerequisite is often a difficult question for a professional man, and much more for a layman, to determine. To cast such a burden upon the public as between its individual members is to lose sight of the reason for, and largely abrogate, the salutary rule respecting *de facto* corporations. Where a stricter rule is enforced it is generally upon some exceptional ground, as where persons are seeking in bad faith to avoid individual liability, under cover of alleged incorporation. Mr. Abbott says: "The cases in which it is necessary to give strict proof of incorporations, that is, to prove not only the being, but the right to be, are: (1) Actions by the state to ascertain or to put an end to corporate existence. (2) Proceedings by a private corporation, in the exercise of a franchise in derogation of common right; for instance, to divest title to private property. (3) Proceedings of a penal character by a private corporation. (4) Actions in contracts, like subscriptions for stock, if the very consideration is the legal organization of the corporation having a right to existence. In such cases the inquiry may extend to the due compliance with all the requirements of the law, but often, even in these cases, it is narrowed or precluded by estoppel or admission. (5) Where the question is whether there is corporate power to take by will, sufficient regularity of origin to show an attempt in good faith to comply with the law may be required." Abb. Tr. 19, § 3. What we have said applies not only to the offer to show that the articles of incorporation were unacknowledged, but likewise to the offer to show by Lescallett that he never signed the articles of incorporation. If such were the fact, the defendant Duggan could not avail himself of it. The objection goes to the existence of the corporation *de jure*, not to its existence *de facto*, under colorable authority, upon which basis the plaintiff must be supposed to have dealt with it. We do not question the right of an alleged incorporator in his own behalf to put in issue the genuineness of his signature, but so far as the general public is concerned, articles of incorporation purporting to be signed by certain incorporators must be deemed genuine until the sovereign power interposes. Upon like ground, evidence that a charter was obtained by fraud is held inadmissible. Abb. Tr. Ev. 31; § 26.



A point is made respecting certain admissions of counsel of the defendant in error upon the trial of the cause. We think the general admission of "all that is set up in the answer" must be taken as qualified by the specific statement made in the same connection, namely: "We simply admit that the defendant in this case claimed to have possession under the writs he had in his hands. We do not admit that Mr. Williams and Shepherd had possession."

The judgment of the court below is affirmed.

(11 Colo. 111)

WESTERN UNION TEL. CO. v. CONANT.

(*Supreme Court of Colorado.* February 17, 1888.)

CORPORATIONS—SERVICE OF PROCESS ON—COUNTY OF PRINCIPAL OFFICE.

Gen. St. Colo. § 1936, provides for service of summons in justice court upon "some officer, agent, or clerk" of a defendant corporation. A later act (Gen. St. § 267) provides that "summons shall be served in that county where the principal office of the corporation is kept or its principal business carried on," etc. *Held*, that the latter section repeals the former in so far as it provides that service shall be in the county where the principal office or business of the corporation is carried on.

Error to district court, Lake county.

On February 12, 1884, a writ was issued by H. P. Krell, Esq., a justice of the peace in Lake county, summoning the Western Union Telegraph Company to appear and answer to a money demand of Fred H. Conant. The constable returned this writ as served at Leadville upon C. M. Davis, agent of the plaintiff in error. On February 19th the plaintiff in error appeared specially and moved the justice to quash the summons, on the ground that the Western Union Telegraph Company was a foreign corporation existing under the laws of New York; that the summons was neither served upon any officer of the company, nor in the county where its principal business was carried on; and that the plaintiff in error had filed its certificate in the office of the county clerk of Lake county, as provided by law, designating an agent upon whom process could be served, and the city of Denver was the principal place where the business of the corporation should be carried on. This motion was supported by the affidavit of Mr. Davis as to the capacity in which he was acting, and by a duly-certified copy of the recorded certificate of the plaintiff in error, showing the appointment of an agent residing at Denver, the principal office of the corporation in Colorado. The justice of the peace denied the motion; the plaintiff in error made no further appearance; the judgment was entered for the full amount claimed. On March 3d the petition of the plaintiff in error was presented to the district court for a writ of *certiorari*, removing the case to that court. The petition stated the facts shown before the justice of the peace; also that the plaintiff in error had a good and meritorious defense to the claim, and that this was a case in which an appeal would not lie. The writ was issued. The justice made a complete return, and on April 29th a hearing was had upon the petition and the return. The district court found the return sufficient and affirmed the judgment. The writ of error is prosecuted to reverse this judgment. Section 13 of the justice act (Gen. St. § 1936) passed in 1861, provides that in case the defendant is a corporation, service may be had "by reading the summons and delivering a copy thereof to some officer, agent, or clerk of such corporation." Section 260 of the General Statutes, p. 186, enacted in 1877, provides that "foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state upon whom process may be served. \* \* \*" Section 267, Gen. St. p. 187, provides that "in suits against

any corporation summons shall be served in that county where the principal office of the corporation is kept, or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but if he is absent therefrom, then the summons shall be served in like manner in such county on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent, or stockholder of said corporation, within such time and under such rules as are provided by law for service of such process in suits against real persons. \* \* \*

*John L. Jerome*, for plaintiff in error.

ELBERT, J., (*after stating the facts as above.*) There may be some question touching the sufficiency of the petition for a writ of *certiorari* upon which the district court reviewed the proceedings before the justice. No objection, however, is made by counsel, and we do not consider it.

The rule prescribed by section 267, Gen. St. p. 187, for the service of summons upon corporations, is plain. The language is: "In suits against any corporation, summons shall be served in that county where the principal office of the corporation is kept, or its principal business carried on. \* \* \*" The object of the requirement was to prevent the abuses arising from service upon irresponsible subordinates, and to secure it upon some one of the principal officers of the corporation charged with the management of its affairs. Its propriety is obvious. It prescribes not only a general, but an exclusive rule, and, being subsequent in date, it must be taken as repealing by implication section 13 of the justice act, in so far as it prescribes another and different service. Under this section, for the purpose of service of summons, a defendant corporation is to be found only in the county where the principal office of the corporation is kept, or its principal business carried on, subject to the exceptions named in the section. In the case at bar the justice acquired no jurisdiction by the service on Davis, the local agent of the defendant company, and the district court erred in affirming the judgment. The judgment of the court below must be reversed.

(7 Mont. 346)

#### GRANITE MOUNTAIN MIN. CO. v. WEINSTEIN *et al.*

(*Supreme Court of Montana. January 14, 1888.*)

##### 1. APPEAL—WHEN LIES—ORDER FOR COSTS AFTER JUDGMENT—AT CHAMBERS.

Under Code Civil Proc. Mont. § 444, subsec. 2, which provides that an appeal may be taken from the district to the supreme court from any special order made in a case after final judgment, an appeal will lie from an order adjudging costs against a plaintiff made after a judgment was entered dismissing his petition, and this is true though the order was made by the judge at chambers.<sup>1</sup>

##### 2. SAME—JUDGMENT ROLL—BILL OF EXCEPTIONS—ORDER APPEALED FROM.

Under Code Civil Proc. Mont. § 436, which provides that the appellant shall furnish a transcript of the notice of appeal, undertaking on appeal, pleadings which formed the issues tried in the case, the judgment, and such parts of the judgment roll, and no more, as are necessary to present and explain the points relied on, certified to by the clerk of the court or by the attorneys of the parties to the appeal to be correct, it is not necessary that the order appealed from shall be incorporated in the judgment roll by a bill of exceptions or statement on appeal, when it is properly certified to by the clerk of the court.

Appeal from district court, Deer Lodge county; before Justice GALBRAITH. Motion to dismiss appeal.

<sup>1</sup>Concerning appealable orders, see *Dodd v. Una*, (N. J.) 5 Atl. Rep. 155, and note; *Farson v. Gorham*, (Ill.) 7 N. E. Rep. 104, and note; *Burroughs v. Gaither*, (Md.) 7 Atl. Rep. 243, and note; *Bicklin v. Kendall*, (Iowa,) 34 N. W. Rep. 283; *Nelson v. Brown*, (Vt.) 10 Atl. Rep. 721; *Winter v. Frankel*, (La.) 3 South. Rep. 226; *State v. Seddon*, (Mo.) 6 S. W. Rep. 342; *McMillan v. State*, (Md.) 12 Atl. Rep. 8; *Thompson v. Thompson*, (Utah,) 16 Pac. Rep. 400; *U. S. v. Corporation*, (Utah,) Id. 723; *McMillan v. State*, (Md.) 12 Atl. Rep. 8; *Railroad Co. v. Railroad Co.*, (Mo.) 6 S. W. Rep. 691.

*Robinson & Stapleton*, for appellant. *Cole & Whitehill*, for respondents.

MCCONNELL, C. J. This is a proceeding to condemn the right of way to a mining claim, instituted before the judge at chambers, under section 1459 *et sequitur*, Comp. Laws Mont. From the record it appears that on the 26th day of February, 1887, the judge rendered the following judgment, to-wit: "After hearing the testimony of the witnesses produced by both parties, the same having been given orally, both parties being present by counsel and cross-examining the witnesses, and after hearing the arguments of the respective counsel for both parties, and having duly considered the same, and being fully advised in the premises, the petition for a right of way is hereby refused." It appears further from the record that on the 21st day of June, 1887, the judge made the following order: "Motion to require the plaintiffs to pay the costs in this proceeding is hereby sustained. The matter of costs in this case has been considered by me, and it is ordered that William Weinstein and others do have and recover costs of the plaintiff, the Granite Mountain Mining Co., taxed at \$438, and that execution issue therefor." It further appears from the record that the notice of appeal recites that the appeal is taken from the judgment and order of the said judge of said court, made and rendered in chambers, awarding to said defendants, Weinstein *et al.*, the costs of defending said matter, and attorney's fees therein.

The appeal, then, is not from the final judgment dismissing the petition of the appellant, but from the order subsequently made adjudging costs against it. There is no bill of exceptions or statement on appeal. We are of the opinion that the order appealed from is a special order made after final judgment in the sense of our statute. See the case of *Clarke v. Gouy*, 2 Mont. 538, and authorities there cited. In the case of *Orr v. Haskill*, Id. 350, an order overruling a motion to quash an execution was held to be a special order made after final judgment, from which an appeal will lie to this court. In the case of *Rader v. Nottingham*, Id. 157, this court held that an order overruling a motion to retax costs is not appealable, and this decision is affirmed in the case of *Orr v. Haskill*, *supra*. But there is a material difference between a motion to retax costs, and an order thereon, and an order adjudging costs. The decision in the case of *Rader v. Nottingham* was made under the authority of the case of *Lasky v. Davis*, 33 Cal. 677, and rested upon the ground that the legal effect of the order is to modify the judgment, and it becomes a part of it, and hence can only be reviewed with the judgment. But the case of *Lasky v. Davis* was virtually overruled in the case of *Dooly v. Norton*, 41 Cal. 441, and *Calderwood v. Peyser*, 42 Cal. 112, and *Clark v. Crane*, 57 Cal. 629, so that the later cases in California hold that even an order made on a motion to retax costs is appealable. The judgment for costs is usually a final judgment, and the clerk, in taxing the costs in the blank left for that purpose, is supposed to have committed error, and hence the order to retax the costs is but to change the items of the costs as filled in by the clerk, and hence may be construed as a part of the judgment, and reversible only with it. In the case at bar judgment dismissing the petition of appellant was made in February, and it is the judgment for costs against it from which this appeal is taken, made in the following June, so that it presents an entirely different kind of order from the one to retax costs.

But it is insisted that the order under consideration is not appealable because made by the judge at chambers, and not by the district court. We have two chapters on the subject of appeals: one entitled appeals in general, and the other appeals to the supreme court from the district court. Section 421, subsec. 3, Code Civil Proc., is as follows, to-wit: "An appeal may be taken from an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving, or refusing to dissolve, an attachment;

from an order granting, or refusing to grant, a change of the place of trial; from any special order made after final judgment," etc. In this section nothing is said as to where the orders have been made, whether before a court or the judge at chambers. In section 444, subsec. 2, we have the same cases enumerated in which an appeal may be taken to the supreme court from the district courts; both sections embracing any special order made after final judgment. We find, by reference to the Code of Civil Procedure of California, that that state has precisely the same statute, and as our statute was taken from that of California, we will follow in its construction that given by the highest court of that state; and, consulting these cases, it will be found that that court held all orders and judgments made by a court at chambers appealable, as well as those which were made in the district courts, and upon the same grounds. The only inquiry made in order to determine the appealable character of the order was as to whether it was judicial or ministerial. See *Bond v. Pacheco*, 30 Cal. 532; *Brewster v. Hartley*, 37 Cal. 23; *Gilmer v. Lime Point*, 18 Cal. 260. An order granting or refusing an injunction, an order dissolving an injunction or attachment, or refusing to do so, is made appealable, and these orders may all be made at chambers; but to give the strict interpretation of the statute that we are asked to do would render all such orders non-appealable when made at chambers. Our statutes on appeals were enacted by the first legislative assembly of this territory, which convened at Bannock, December 12, 1864, and were taken from the laws of California of 1851; and the right of appeal from orders and judgments made by the judge at chambers has been acquiesced in by the profession ever since, and no question of this kind was ever made before, so far as our reports show. The case of *Clark v. Gou*, *supra*, was from an order refusing a stay of execution until a motion to quash could be heard at the next term of court, and was made at chambers; but no exception was taken on that account. We think, therefore, that the proper interpretation of these two statutes, when taken together, is that the right of appeal exists as well from orders and judgments when made by the judge in chambers as when made by the district court.

But it is further insisted that the order under consideration cannot be reviewed because it was not made a part of the judgment roll by bill of exception or statement of appeal. "The summons, pleadings; verdict of the jury, findings of the court, commissioner, or referee, all bills of exceptions taken and filed in said action, copies of orders sustaining or overruling demurrers, copy of the judgment, copies of any orders relating to the change of parties," constitute the judgment roll. Comp. St. p. 138, § 306. It appears from this statement that the order in question is not a part of the judgment roll. But section 438 of the Code of Civil Procedure provides that on an "appeal from a final judgment the appellant shall furnish the court with a transcript of the notice of appeal, undertaking or undertakings on appeal, pleadings or amended pleadings, as the case may be, which form the issues tried in the case, the judgment and such parts of the judgment roll, and no more, as are necessary to present and explain the points relied on, and the statement, if there be one, certified by the attorneys of the parties to the appeal, or by the clerk, to be correct. On appeal from a judgment rendered on appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, undertaking or undertakings on appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, and such copies to be certified in like manner to be correct." And it is insisted that, under this section, it is not necessary for the order to be made a part of the judgment roll by bill of exceptions. "It is manifest that some identification is necessary, or otherwise this court could not know what papers were before it." See *Ritter v. Mason*, 11 Cal. 214; *Gordon v. Clarke*, 22 Cal. 533; *Johnson v. Muir*, 43 Cal. 542; *Leozinsky v. White*, 45 Cal. 278;

*Hancock v. Thom*, 46 Cal. 643; *Stone v. Stone*, 17 Cal. 514; *Hayne*, New Trial & App. We find that this act was passed by the first legislative assembly of the territory, in 1865, in precisely the form that it is in the present Code of Civil Procedure, except that the authentication was to be made by the clerk alone instead of by the attorneys of the parties to the appeal, or by the clerk, as at present. This was taken from section 346 of the old practice act of California, which was itself taken from the laws of 1851, and provided, as our statute does, that the copies provided for should be certified to by the clerk to be correct. In 1864 the California act was amended so as to provide that the certificate might be made by the attorneys of the parties to the appeal, or by the clerk, and our statute was amended after its original passage in 1865 to correspond with the California statute. This certificate mentioned is the certificate of the clerk to the transcript. *Hayne*, New Trial & App. § 264. Hence, by force of the statute, it is not necessary that the papers upon which the court acted should be made a part of the judgment roll by bill of exception or statement on appeal, as the only authentication required by the law is the certificate of the attorneys of the parties to the appeal, or the clerk, and the transcript in this case shows that they are properly certified to be correct by the clerk, and hence it is not necessary that a bill of exceptions should be contained in the transcript, embracing the order and the paper, which was the final judgment upon which the order was made. We are aware that the supreme court of California, in the cases of *Nash v. Harris*, 57 Cal. 243; *Brown v. Delacau*, 63 Cal. 304, has decided that an appealable order, although deemed to be excepted to in law, nevertheless must be made a part of the judgment roll by bill of exceptions. In commenting upon this, Mr. Hayne, in his work on New Trial and Appeal, uses the following language: "The case in which this was said was correctly decided, because, as appears from the report, the papers used on the hearing in the court below were neither identified or embodied in the bill of exceptions. As was said by the court: 'None of these documents is in any way authenticated.'" And the language quoted is true of some orders. Thus orders made in the absence of a party are deemed to have been excepted to, and many of them require a bill of exceptions. But it is not universally true that orders and decisions which are deemed to have been excepted to require a bill of exceptions, for, under section 647 of the Code, the findings of a judge are deemed to have been excepted to; but where the findings are contradictory or uncertain, or against admissions in the pleadings, no bill of exceptions is necessary. So, where the question is whether the findings support the judgment, no bill of exceptions is necessary. So, under the section mentioned, an order sustaining or overruling a demurrer is deemed to have been excepted to; but no one would contend that a bill of exceptions is necessary to present a question arising on demurrer to a pleading. The distinction is that in some cases the matter in support of the exception is already of record, while in others it is not. In the language of RHODES, J., in *Smith v. Lawrence*, 38 Cal. 28, "neither a bill of exceptions nor a statement is required where the record already presents the question of law and the decision of the court."

We do not pretend to say that one mode of identification of the order, paper, or document, as the evidence upon which it was made, may not be made by statement on appeal or bill of exception; but what we decide is that, by force of the statute, (section 438, Code Civil Proc., above quoted,) the certificate of the clerk is a sufficient authentication of the order appealed from, and of the final judgment, which is the documentary paper upon which it is based. Of course the rule would be different if the order was based upon oral testimony. That only could be made part of the judgment roll by bill of exceptions or statement on appeal. We therefore overrule the motion to dismiss the appeal in this case.

MCLEARY, J., concurs.

BACH, J. While I concur in the result, I cannot agree entirely with the opinion of the majority of the court. It seems to me that the inference fairly to be drawn from that opinion is that the right to appeal in this case is found by construing together section 421 and section 444, Code Civil Proc. (Comp. St.) I think that the right of appeal is found only in section 444, and that the learned chief justice misapprehends the purpose of section 421, when he construes that section with the former (section 444) for the purpose of ascertaining whether or not an appeal will lie in this case. Section 421 is a part of chapter 1, title 11, of the Code. That chapter treats of "appeals in general," or, as I consider it, it gives the general provisions relating to all appeals in all civil cases. The section referred to reads as follows: "An appeal may be taken—*First*. From a final judgment in an action or special proceeding, commenced in the court in which the same is rendered, within one year after the entry of judgment. But an exception to the decision or verdict on the ground that it cannot be supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within 60 days after the rendition of the judgment. *Second*. From a judgment on an appeal from an inferior court, within 90 days after the entry of such judgment. *Third*. From an order granting or refusing a new trial; from an order granting or dissolving an injunction, etc., within 60 days after the order or interlocutory judgment is made and entered in the minutes of the court or filed with the clerk." It will be observed that if the legislature meant by this section to specify from what judgments or orders an appeal might be taken it forgot two great essentials of such a specification. The section in no one instance declares to what court the appeal may be taken, and in only one (subdivision 2) does it provide from what court the appeal may be taken. I cannot believe that the legislature of this territory ever meant to define by that section the orders or judgments from which an appeal may be taken. I think that the only purpose of that section is to provide and limit the time within which an appeal may be taken from judgments and orders which, by other provisions of the Code, are made appealable by apt words enumerating them, and naming the courts from which and to which the appeal may be taken. Section 444 enumerates the appeals which may be taken from the district courts to the supreme court. In other words, section 421 is merely a statute of limitations for appeals. Reference to the Codes from which ours is taken, and to learned commentators on these Codes, will, I think, sustain this interpretation. Title 11 of our Code is taken from title 13 of the California practice act, found in Harston's Practice, and that is taken from the former Code of New York, as found in title 11 of Voorhees' Annotated Code. Section 336 of the California practice act, is that from which our section 421 is directly taken, and from section 347 of the California act is taken our section 444. The sections of the California practice act are numbered 939 and 963 in Harston's Practice. Of those sections the learned author, Mr. Hayne, in his valuable treatise on New Trial and Appeal, says: "The latter section (347) determined the orders which were appealable, and the former (336) the time in which the appeals could be taken." Now referring to the New York Code, we find that section 331 of c. 1, tit. 11, which chapter, like our chapter 1 of the same title, treats of appeals in general, is the source of section 336 of the California act and of our section 421; and we find that that section provides the time within which appeals may be taken, but, instead of containing a repetition of the several orders and judgments, it merely refers by number to those sections the function of which it is to enumerate those orders and judgments. The right to appeal from the order in this case must be found, then, in my opinion, in section 444, or the appeal will not lie. It is claimed that the appeal is made from an order granted by a judge at chambers, and that such an order is not appealable under said section, which provides for appeals from the district court to the supreme court. The point made by counsel is that the judge is not the court; but I think that the expression "to

supreme court from the district courts," as found in that section, refers to the court generally, including the judges thereof when acting in their official capacity, and that the expression does not mean to draw the narrow distinction between a court order and an order granted at chambers. Subdivision 1 of the section does refer to judgments in an action "commenced in those courts," thus using the word "court," and applying it directly to the word "judgment." Subdivision 3, however, does not designate the orders as orders of the court or as orders of the judge, but it does declare certain orders to be appealable, most of which may as well be granted by the judge as by the court. The intention of the legislature is a safe path to follow, and it certainly was not the intention of the legislature to allow an appeal from an order granting an injunction when the order was signed as a court order, and to refuse the appeal when the order was granted at chambers. As to the papers which are necessary on an appeal from an order, I agree with the majority of the court. However, I prefer to limit the doctrine to those orders from which an appeal may be taken directly, and which is to be understood as expressing no opinion on that subject when the order appealed from is of that class which can be reviewed only on an appeal from a judgment.

(7 Mont. 440)

GRANITE MOUNTAIN MIN. CO. v. WEINSTEIN *et al.*

(Supreme Court of Montana. January 25, 1888.)

1. EMINENT DOMAIN—PROCEDURE—COSTS—POWER OF JUDGE AT CHAMBERS.

The law of Montana territory confers upon the judge of the district court power to hear and determine, at chambers, all applications for condemning rights of way to mining claims, and make complete disposition thereof. *Held* that, after a final judgment dismissing a petition for a right of way, the court had power also to adjudge costs at chambers.

2. COSTS—TAXATION—REVIEW ON APPEAL.

On an appeal from the taxation of costs, the record contained the statement that part of the bill of costs allowed was witness fees, and part attorney's fees, which was not signed by the judge, nor made part of the judgment roll by bill of exceptions or statement on appeal. *Held* that, there being no other authentication of the items of the bill as allowed, the question of the legality of the taxing of attorney's fees was not properly before the court.

Appeal from district court, Deer Lodge county; WILLIAM J. GALBRAITH, Judge.

*Robinson & Stapleton*, for appellant. No brief for respondent.

MCCONNELL, J. This case was heard at a former day of this term upon a motion to dismiss the appeal. *Ante*, 108. This motion being disallowed, it was heard upon its merits. Reference is here made to the opinion delivered upon said motion for all matters relevant to those now under consideration.

This is an appeal from an order made by the judge at chambers awarding the defendant the costs of defending a proceeding instituted under section 1497 *et seq.*, to condemn the right of way to a mining claim. The order appealed from is as follows, to-wit: "Motion to require plaintiffs to pay the costs in this proceeding is hereby sustained. WILLIAM J. GALBRAITH, Judge." "The matter of costs in this case have been considered by me. It is ordered that defendants, William Weinstein and others, do have and recover costs of the plaintiff, the Granite Mountain Mining Co., taxed at \$438, and that execution issued therefor. WILLIAM J. GALBRAITH, Judge." This order is authenticated by the certificate of W. F. Shanley, clerk of the district court of Deer Lodge county. We held, in the opinion referred to, that this was a sufficient authentication under our practice act, (section 438,) so that the order is before us for our consideration.

It is insisted, first, that the judge at chambers cannot pronounce judgment for costs. The law confers upon the judge the power to hear and determine at chambers all applications for condemning rights of way, whether to min-

ing claims or for railroads. It vests him with the power to receive petitions for such purposes, and appoint commissioners to assess the damages, and receive and confirm their reports; so that he is vested with plenary power at chambers to make a complete disposition of suits of this description. It is not denied that he had the power to hear this case, and to pronounce final judgment, dismissing the petition, and refusing to grant the right of way prayed for. The transcript contains this final judgment, properly authenticated; and we held, in the opinion referred to, that this judgment was the paper or documentary evidence upon which the order adjudging costs was made. We are of the opinion that the power to adjudge costs follows as a necessary and logical result of the power vested in the court to hear and determine cases of this sort at chambers, and we therefore hold that he had the power to make the order adjudging costs against the appellant. The petition of the appellant was denied, and its cause dismissed; and judgment for costs, therefore, was correctly pronounced against it, and there is no error in this.

But it is insisted that the costs, taxed at \$438, are composed of witness fees, \$138, and attorney's fees, \$300; and that the court erred in allowing said attorney's fees to be taxed against the appellant as a part of the defendant's costs. There is no documentary evidence, authenticated by the certificate of the clerk, by which we can determine the items of costs which make up the \$438,—the amount fixed in the judgment for costs. The record contains this, to-wit: "And that the following is the bill of costs as allowed in said matter, to-wit: Witness fees, \$138; attorney's fees, \$300;" but this is not signed by the judge, nor is it made a part of the judgment roll by bill of exceptions or statement on appeal. The evidence by which the court determined the amount of the costs must have been in parol, and the only way that it can be noticed in this court is to make it a part of the judgment roll by bill of exceptions, or its equivalent, a statement on appeal, properly authenticated. For this reason we decline to consider the question as to whether attorney's fees could be taxed as costs or not; and as the order adjudging costs is good upon its face, and there being nothing in the record to impeach it, we affirm the judgment of the court below, with the costs of this appeal.

MCLEARY and BACH, JJ., concur.

(7 Mont. 360)

VAUGHN v. DAWES.

(*Supreme Court of Montana. January 16, 1888.*)

1. ATTACHMENT—MOTION FOR DISSOLUTION—TIME OF MAKING.

Under Comp. St. Mont. div. 1, § 200, requiring a motion to set aside an attachment to be made before the expiration of the time to answer, such motion, made after the time mentioned in section 68, which provides that the summons shall contain a direction to the defendant to appear and answer within a certain time after its service, comes too late, although made before "the expiration of such further time as the court may allow for answering after the dissolution of a demurrer."

2. SAME—DISSOLUTION—APPEAL FROM ORDER—RECORD.

On an appeal from an order dissolving an attachment, the record sufficiently sets forth the grounds for the action of the court, when copies of the order and of the papers used on the motion are contained in the transcript, and are certified by the clerk to be correct.

Appeal from district court, Gallatin county; before Justice MCLEARY.

Attachment by Alexander Vaughn against John W. Dawes. Attachment dissolved on motion, and plaintiff appeals.

*J. L. Staats*, for appellant. *Armstrong & Hartman*, for respondent.

GALBRAITH, J. This is an appeal from the order of the court dissolving the attachment. It is claimed that the "record or bill of exceptions" should set forth the grounds for the action of the court in dissolving the attachment. The record does this. These grounds are contained in the motion to dissolve



the attachment, which is contained in the transcript, and certified to by the clerk to be correct. It will be presumed that the application itself to dissolve the attachment was used upon the hearing in which the order to dissolve was granted; that it is one of the papers which was used upon the hearing contemplated by section 438, div. 1, Comp. St. It is not necessary that the transcript should contain a bill of exceptions including the order appealed from, or the motion containing the grounds for such order. It is sufficient, as in this case, that the copies of these papers contained in the transcript be certified to by the clerk to be correct. *Mining Co. v. Weinstein*, ante, 108. The record therefore is properly before us for consideration. The record and the arguments of counsel present the question of whether or not the motion to discharge the attachment was made too late. The summons was served on the respondent, in the county where the suit was brought, on the 3d day of October, 1887. On the 8th day of October following the defendant filed a demurrer to the complaint, stating as the sole ground therefor that the complaint did not state facts sufficient to constitute a cause of action. The motion to dissolve the attachment was filed on the 4th day of November, 1887. This was after the time allowed by law for answering the complaint, as contained in the statute in relation to the service of summons. Subdivision 3, section 68, div. 1, Comp. St. But it is claimed that the time for answering, contemplated by section 200, div. 1, Comp. St., within which the motion to discharge the attachment must be made, is not the time mentioned in the subdivision of section 68 in relation to the time for answering after the service of summons, but that the "time for answering does not expire until the dissolution of the demurrer interposed, and such further time as may be allowed by the court for answering. These two sections are as follows: "Sec. 200. The defendant may also, at any time before the time for answering expires, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or the judge thereof, that the attachment be discharged on the ground that the writ was improperly issued." "Sec. 68. The summons must contain a direction that the defendant must appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within twenty days, if served out of the county, but in the district in which the action is brought; and within forty days, if served elsewhere."

We are of the opinion that the phrase, "time for answering," as used in section 200, refers to the time in which the defendant shall appear and answer the summons as required in subdivision 3, § 68. It is true that the party may not answer within the time required by the statute, as the term "answer" is technically used in pleading, viz.: by making specific denials, or by stating new matter, but, nevertheless, that is the time within which he must answer in this sense if he desires so to do. This is "the time for answering" as intended by section 200. We cannot believe that the legislature by the use of this phrase intended to allow a defendant all the time within which to make his motion to discharge the attachment to be obtained by a motion or demurrer, which might be frivolous and made for the purpose of delay. The district courts of this territory in many of the counties are held but twice a year, and often there is an interval of more than six months between the terms. Suits are being brought in these courts at all times, and it is not reasonable to believe that the legislature, by the enactment of section 200, intended that vague and uncertain time extending from the service of summons until and after the commencement of the next term, or that which might occur where there was a default, and the party afterwards permitted to answer, but the fixed and certain time within which the defendant is required to answer after the service of the summons, which in this case was 10 days. That the legislature intended this construction is apparent from the fact that the motion may be made before the judge at chambers. That this construction was rea-

sonable, and was the intention of the legislature, is also sustained by analogy in the proceedings of this character in other jurisdictions. We are not referred to, nor have we had access to, any authorities (if any such there be) from any jurisdiction containing a statutory provision in relation to motions to discharge attachments similar to our own. The motion is evidently made upon the ground, "among other things," that the writ was illegally or improperly issued, and is based upon what is claimed to be insufficiencies or defects in the complaint. These are defects or irregularities appearing on the face of the proceedings. The phrase, "among other things," contained in the motion, is too indefinite to require any consideration. The assignment of the reasons for the discharging of the attachment should be definitely and specifically designated. Wap. Attachm. 417. In this motion those reasons which are so designated are the alleged defects and imperfections of the complaint. In regard to this subject, Drake, in his work on Attachment, (3d Ed.) § 112, uses the following language: "The most usual mode of defeating an attachment on account of defects in the affidavit is by motion to quash or dissolve the attachment. This motion is in the nature of the plea of an abatement, and, if successful, its effect is the same. In Alabama and North Carolina, and also Tennessee, however, the only way to reach such defects is by plea in abatement. Whichever mode is adopted, it should be referred to *in limine*, for, after appearances by the defendant and plea to the action, it is too late to take advantage of the defects in the preliminary proceedings: they will be considered as waived unless statutory proceedings direct otherwise." It is true that the author in using this language mentions only the defects in or omission to make an affidavit. But the motion may be made in any case where "the attachment proceeding is radically defective upon its face, and where the writ has been unwarrantably issued." Wap. Attachm. 417. The above language in Drake on Attachments is applicable in any case where a motion to dismiss may be made. A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is a general appearance and plea in the cause. "At common law, pleas in abatement must be filed within four days after appearance or delivery of declaration." *Pratt v. Sawyer*, 4 Gray, 84. Also at common law, the first day of the term was the return-day of the writ; and the defendant was required to appear on that day or the "*quarto die post*," or fourth day after, (3 Bl. Comm. 278;) and, after a general imparlance, which term signified "time to plead," and which was "an acknowledgment of the propriety of the action," no dilatory plea, which included a plea in abatement, could be pleaded, (3 Bl. Comm. 301.) Reasoning, therefore, from the language of the statute above referred to, and from the analogy of the law in relation to pleas in abatement, we are of the opinion that the motion to discharge the attachment was made too late. "The statutory period is a limitation, and a motion to discharge an attachment, filed after such period, cannot be legally entertained." *Mages v. Fogerty*, 6 Mont. 237, 11 Pac. Rep. 668, WADE, C. J., delivering the opinion of the court. The motion to discharge the attachment should have been made before the time for answering expired, which in this case was 10 days.

The order discharging the attachment is reversed.

McCONNELL, C. J., and BACH, J., concur.

(5 Utah, 525)

#### TERRITORY v. McGRATH.

(*Supreme Court of Utah*. March 1, 1888.)

#### 1. LARCENY—WHAT CONSTITUTES—NOTES OF TESTIMONY.

Under Crim. Code Utah, defining larceny as the "felonious stealing, taking, carrying, leading, or driving away the personal property of another," taking, with

felonious intent, books containing a phonographic report of the testimony taken upon a trial, and having no value except for such report, is larceny; such books being personal property, and not title deeds or choses in action.

2. SAME—VALUE.

Such books having no market price, their value to the person who can use the testimony is the proper standard of value upon the trial.

3. CRIMINAL LAW—REMARKS OF COUNSEL—FAILURE OF DEFENDANT TO TESTIFY.

A conviction for grand larceny will not be reversed because counsel said to the jury that the testimony of two witnesses as to a certain conversation stood unexplained; that it was in defendant's power, if no such thing occurred, to explain it; and that defendant's failure to do so seemed to him to make the testimony on that point conclusive; as such statements merely claim that these witnesses, in the absence of such explanation, must be presumed to have told the truth, and they do not suggest any inference against the defendant because he did not testify in his own behalf.

4. SAME—EVIDENCE—CONVERSATIONS WITH DEFENDANT.

It is not error, in a criminal action, to allow a witness to testify in regard to a conversation with the defendant, the statements made by the defendant appearing to be voluntary.

Appeal from district court, First district; before Justice HENDERSON.

*E. D. Hoge and George Sutherland*, for appellant. *Ogden Hiles and J. N. Kimball*, for the Territory.

ZANE, C. J. The defendant was accused by indictment in the First district court of the crime of grand larceny, and convicted. The indictment charged that the crime was committed by taking from Alma H. Winn, during the trial of the case of *Bullion, Beck and Champion Mining Company v. Eureka Hill Mining Company*, 11 of his books, containing a phonographic report of the testimony of witnesses examined on the trial. It appears from the evidence in the record that the loss of the notes necessitated the retaking of the testimony, there being no duplicate report. The evidence showed that Winn was the official reporter of the court, and that the books were taken from his possession without his knowledge or consent. They were alleged in the indictment to be worth \$500. The evidence showed that the reporter received \$10 per day for reporting, and that he was engaged 11 days in making the report. Winn testified that in view of the cost of making the report, and of the value thereof for transcription, and of the importance of the case, the books taken were of the value of \$1,000. The appellant insists that the phonographic report of the testimony was not the subject of larceny, and we are referred to 2 Russ. Crimes, 262. Having stated that written instruments relating to real estate, and choses in action, were not the subject of larceny at common law, the author gives the reason for the rule: "And the reason why title deeds and choses in action are not the subject of larceny is because the parchment is evidence of the title to land, and the written paper is the evidence of the right, and, though the evidence is stolen, the right remains the same; and a right cannot be the subject of larceny; neither can the paper which is evidence of it." This reasoning is quite refined, if not subtle. We do not concede that choses in action and title deeds are not the subject of larceny at the common law as it is now understood and applied in this country. But if we were to concede that they are not, the books in question are neither title deeds nor choses in action. They are not within the letter or the reason of the rule. Those books contained the expression in phonographic characters of the knowledge of the witness with respect to the subject of the action in which the notes were taken for use therein. Larceny is described in the Criminal Code of this territory as follows: "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." Personal property may be said generally to include everything the subject of ownership, not being land, or an interest in land. We are of opinion that the books in question are personal property.

It is urged that the court erred in adopting a wrong standard of value on

the trial, and that the true standard was the market value of the paper contained in the books. The testimony reported in these books gave to them their value, and for this there was no market. The market value is the right standard of value of property for which there is competition. But this phonographic report was only valuable for the use that could be made of it in the case in which it was taken. The use that may be made of property gives to it its value. If it can be used by many, it will have a market value; if but by one, it will be valuable to him alone. And the value to him is the one that must be taken in estimating its worth. In such a case it is sufficient to prove the market value to that person. 3 Greenl. Ev. § 153. *Com. v. Riggs*, 14 Gray, 376; *Com. v. Lawless*, 103 Mass. 425.

The appellant insists that the judgment of the lower court should be reversed because one of the counsel for the people, in the statement of the case to the jury, said: "The testimony of Pyne and Giblin as to the fact of the conversation having occurred between Giblin and the defendant, with reference to the loss of these notes, on that Saturday, stands here unexplained; and it was in the power of the defendant, if no such thing occurred, to explain it, and his failure to do it seems to me to make that testimony conclusive as to the fact of the conversation occurring on that evening in the drug-store." The counsel said, in effect, that the presumption was that the conversation occurred in the drug-store, as stated by the two witnesses, in the absence of evidence to the contrary. He did say that the statement was unexplained, and that it was in the power of the defendant to explain it; but *how*, counsel did not intimate. He did not refer to the fact that the defendant was a competent witness, and had not testified; and he claimed no inference against him because he had not. He did claim that the presumption was that the witnesses named told the truth. In the absence of explanation, reasonable statements of unimpeached witnesses are presumed to be true when uncontradicted. In a larceny case, when the evidence shows that the property stolen was found in the possession of the defendant soon after the theft, it would not be error to say to the jury that such possession, without any reasonable explanation, would be evidence of guilt. But we do not wish to be understood as intimating that it would not be error for the prosecution to state to the jury that a defendant who had not testified, had the right to do so, or to suggest any inference against him because he had not.

There was no error in the ruling of the court permitting the witness Turner to testify in regard to a conversation with the defendant. The statements made by the defendant appear to have been voluntary.

We find no error in this record. The judgment of the court below is affirmed.

BOREMAN and HENDERSON, JJ., concur.

(5 Utah, 467)

#### TERRITORY v. HALLIDAY.

(*Supreme Court of Utah*. February 18, 1888.)

##### 1. HOMICIDE—MURDER IN FIRST DEGREE—INDICTMENT.

Under Laws Utah 1876, c. 1, § 89, providing that "every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, \* \* \* is murder in the first degree," an indictment which charges in effect that the defendant "unlawfully, feloniously, willfully, and with malice aforethought held a pistol loaded with gunpowder and leaden bullets at and against the deceased, and did then and there unlawfully, feloniously, and with malice aforethought inflict a mortal wound in and through the head of the deceased, of which he instantly died, and that the defendant, in that manner, unlawfully, feloniously, willfully, and with malice aforethought killed and murdered the deceased," sufficiently charges the crime of murder in the first degree.

##### 2. SAME—JUSTIFICATION—ADULTERY WITH DEFENDANT'S WIFE.

In justification of the killing defendant offered evidence tending to show that deceased had committed adultery with defendant's wife. Comp. Laws Utah 1876, §

1925, provides that homicide is justifiable when committed by any one \* \* \* in a sudden heat of passion caused by an attempt to defile a female relation of defendant, or when the defilement has actually been committed. The evidence showed that defendant was informed on Saturday, while away from home, of such adultery; and on Sunday evening following he went armed a considerable distance to the home of the deceased, and, without any provocation at the time, shot him while in bed. *Held*, that under the facts there was no justification for the killing.

3. SAME—THREATS BY DECEASED.

Threats made by the deceased at a time prior to that of the killing are not admissible if there is no evidence tending to prove any circumstances calculated to arouse any fear of danger to the defendant at the time of the killing.

4. SAME—MURDER IN SECOND DEGREE—DEFINITION.

The court instructed the jury that "if you believe from the evidence that the defendant is not guilty of murder in the first degree, and are satisfied from the evidence beyond a reasonable doubt that the defendant did on the 28th day of November, 1888, at the county of Kane and in the territory of Utah, unlawfully, willfully, maliciously, and premeditatedly, and without deliberation kill the deceased in the manner and form as charged in the indictment, your verdict should be that the defendant is guilty of murder in the second degree." *Held*, not prejudicial to defendant.

Appeal from district court, Second district; before Justice BOREMAN.

Indictment of Wilford H. Halliday for the murder of Joseph Dobson. Conviction of murder in the first degree, and defendant appeals.

*Fresley Denny*, for appellant. *C. W. Zane* and *Geo. S. Peters*, for the People.

ZANE, C. J. The appellant was convicted of the crime of murder in the first degree, and upon the recommendation of the jury was sentenced by the court to imprisonment at hard labor for life in the penitentiary. This conviction the defendant assigns for error,—first, because, as he avers, the indictment does not contain an allegation that the homicide was with deliberation. To sustain a conviction of murder in the first degree the indictment must contain all the facts essential to that crime; in other words, the performance of the act and the forming of the intent, together constituting the crime, must appear. The indictment in substance states that the defendant unlawfully, feloniously, willfully, and with malice aforethought held a pistol loaded with gunpowder and leaden bullet at and against Joseph Dobson, the deceased, he being in the place of the people, and then and there unlawfully, feloniously, willfully, and with malice aforethought discharged the same at the deceased, and that he unlawfully, feloniously, willfully, and with malice aforethought did inflict a mortal wound in and through the head of the deceased, of which he instantly died, and that defendant in that manner unlawfully, feloniously, willfully, and with malice aforethought killed and murdered the deceased, contrary to the form of the statute, etc. The indictment was a good common-law indictment. The question is, does it sufficiently describe the crime of murder in the first degree, as defined in chapter 1, entitled "Homicide," Laws Utah 1876? Section 87 of that chapter is as follows: "Murder is the unlawful killing of a human being, with malice aforethought;" and section 88: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature; it is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart." The legislature, in these sections, declared in effect that malice aforethought, when express, shall mean a deliberate intention unlawfully to take away the life of a human being, and is implied when the unlawful killing is without any considerable provocation, or when the circumstances of the killing show an abandoned or malignant heart. Then follows section 89: "Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery,

or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, is murder in the first degree; and any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Whenever the murder is perpetrated with the specific intent to take the life of a human being unlawfully, the killing is deliberate and premeditated.

It is believed that a man cannot form a specific intent to kill a particular individual without such thought as amounts to deliberation and premeditation. Bishop says: "But now comes a statute of dividing—as it is sometimes expressed—murder into two degrees. \* \* \* There is added to the former elements of murder the intent to kill. If the murderer does not have in his mind an intent which was not necessary to constitute murder at common law, he does not commit the statutory offense which is called murder in the first degree." 2 Bish. Crim. Proc. § 582. And Wharton, speaking of the same statute, says: "The general definition of the statutes simply divides murder into two classes,—murder with a specific intent to take life being murder in the first degree; murder without a specific intent to take life being murder in the second degree. \* \* \* To constitute murder of the first degree the intent of the party killing must have been to take life; whereas, by the common law, if the mortal blow is malicious, and death comes, the perpetrator is guilty of murder, whether such an intent does or does not appear to have existed in his mind. The injury being malicious, the common law holds the offender responsible for all the consequences following his unlawful act." 2 Whart. Crim. Law, §§ 1084, 1106.

The question arises, do the facts alleged in the indictment show that the appellant had, at the time of the killing, a specific intent to take the life of the deceased? It is alleged in the indictment that the appellant held in his hand a pistol loaded with powder and leaden bullet, and that he feloniously, willfully, and with malice aforethought held it at and against the deceased, and that he feloniously, willfully, and with malice aforethought discharged the same at the deceased, and thereby wounded him in the head, of which wound he instantly died, and that by that means the appellant feloniously, willfully, and with malice aforethought killed and murdered the deceased. Assuming these facts to be true, no room is left to infer that the appellant intended to commit some other felony, and undesignedly killed the deceased. It cannot be inferred from these facts that the appellant intended to commit a bodily injury without producing death. The weapon, the manner of its use, the place and nature of the wound, forbid such an inference. The appellant must be held to have intended the natural and probable consequences of his act. If a man, knowing what he is doing, shoots a bullet through the head of another person, he will not be heard to say that he did not intend to kill him,—that he simply intended a bodily injury without death. But the averments of this indictment go further and say that the killing of the deceased was willful and with malice aforethought,—not that some other felonious act was willful and with malice aforethought. Here the deliberation and premeditation must have been on the killing of the deceased, not on the commission of some other felony; and, assuming the acts averred to have been willful and with malice aforethought, they manifest a specific intent to take the life of the deceased. LOWRIE, C. J., in the case of *Keenan v. Com.*, 44 Pa. St. 55, after speaking of murder in the first and second degrees, and remarking that their reported jurisprudence was very uniform in holding that the true criterion of the first degree was the intent to take life, and that the deliberation required was not on the intent, but on the killing, and that the malice must be a special malice which aims at the life of a person, said: "Keeping this common understanding of the definition in mind, we shall also get clear of the influence of the

cases in other states, where the terms 'deliberate' and 'premeditated' are applied to the malice or intent, and not to the act, and thus seem to require a purpose brooded over, formed, and matured before the occasion at which it is carried into act. Under such a definition of the intention, all our jurisprudence under which malice and intent are implied from the character of the act and from the deadly nature of the weapon used would be set aside; for we could not from these imply such a previous and deliberate, but only a distinctly formed, intent, and this involves deliberation and premeditation, though they may be very brief. We should therefore blot out all our law relative to implied intent or malice, and require it to be always proved as express; and this would be a most disastrous result, for the most deliberate murderers are usually those who know how to conceal their intent until the occasion arrives for the execution of it." So, in this case, from the character of the act, and from the deadly nature of the weapon used, and the nature of the wound, with the averments that such acts were willful and with malice aforethought, we must infer a specific intent to kill. Such averments show a specific intent to kill, and such an intent must be preceded by deliberation and premeditation. The law does not require that the words "deliberation" and "premeditation" shall be used in the indictment; it is sufficient if equivalent language is used.

On the trial counsel for defendant offered to prove that the deceased, more than a day prior to the killing, had made threats against the defendant. Precisely what they were the record does not disclose. To the admission of them in evidence the prosecuting attorney objected on the ground that there was no evidence tending to prove that deceased had assumed a threatening attitude towards the defendant on the occasion of the killing, and for the reason that the evidence did not tend to show any circumstance sufficient or calculated to excite fear of danger in a reasonable person, and because it did appear from the evidence that defendant did not act from any such fear. The court sustained the objection. To this ruling the defendant excepted, and assigns the same as error.

The only two persons in the room at the time of the homicide besides defendant, the deceased, and his little children,—too young to testify,—were the wife of the deceased and her mother, Mrs. Reeve. Both of them testified that the defendant came into the house and inquired for Dobson, and, seeing him lying on the bed asleep, or apparently so, shot him in the arm and through the head before he spoke, and that deceased died in a very few minutes; that they did not see deceased have a weapon, and that none was found on him. There had been no evidence tending to prove any circumstance to arouse any fear of danger to defendant. Under such conditions, threats at a former time could not constitute any justification. To hold otherwise would be to say that, if one man threatens another, the other is justified in shooting him. After the court had ruled as above, the defendant testified in his own behalf. He was at his father's house, and went from there to the house of Dobson, tied his horse, walked up to the door and rapped. The wife of the deceased told him to come in. He stepped in, and asked if Joseph Dobson was there. No answer was made. Witness looked at the side room; expected a bullet on the side; had been notified that he would "get it on sight." He never saw Dobson till he rose up, and never would have seen him if he hadn't risen up. To use the witness' own language: "It don't matter; I can tell you just exactly how he was lying. He was lying on his left side, with his left arm by his left side, and with his right arm by his right side,—that way,—and his hat on the back of his head." Witness further testified: "And I guess the quietness—nobody speaking—must be what woke him, and made him raise up when he was asleep. I don't know whether he was asleep or not, but he turned over from that way. He threw his hands into the pocket of his overalls—he threw his hands into his right-hand overalls' pocket to draw his pis-

tol, and I fired and caught him. I could put a bullet in his eye just as easy as wink." On cross-examination defendant testified that he shot deceased first in his right arm and then in the left. That they were the only two shots. He had been convicted, he testified, of a felony on the 5th day of January, 1883. The witness first testified that he did not see deceased until he rose up, and that he never would have seen him had he not risen; and immediately said that he could tell exactly how deceased was lying,—that he was lying on his left side, with his left arm by his left side and his right arm by his right side. The defendant did not testify that he saw a pistol or any other weapon on the deceased at the time he shot him. The evidence shows conclusively that defendant went to the house of the deceased armed with a loaded pistol, and, without any provocation at the time of the killing, shot him twice,—once in the arm, and once in the head. After defendant had testified, no witness was asked as to threats.

The evidence shows that defendant was away from home, and returned on Saturday. The defendant offered evidence tending to show that deceased had before that time committed adultery with defendant's wife, and that he was informed of such adultery on Saturday,—as a justification for going armed a considerable distance to the house of the deceased, on Sunday evening, and, without provocation at the time, shooting him while in bed. The defendant relies on section 1925, Comp. Laws 1876. The provision is this: "Homicide is justifiable when committed by any one \* \* \* in a sudden heat of passion caused by the attempt of any such offender to commit a rape upon his wife, daughter, sister, mother, or other female relation of defendant, or to defile the same, or when the defilement has actually been committed." The provision of law quoted justifies a homicide committed by the husband in a sudden heat of passion caused by the attempt of the man slain to defile his wife, or caused by her defilement. But the killing must be without deliberation after knowledge of the fact. The law will not permit the husband to say that he slew the defiler of his wife in a sudden heat of passion after deliberating upon the defilement 24 hours. Bishop states the rule thus: "If a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life or the adulterer's, \* \* \* the homicide is only manslaughter. But if, on merely hearing of the outrage, he pursues and kills the offender, he commits murder. The distinction rests on the greater tendency of seeing the passing fact than of hearing of it when accomplished, to stir the passions; and if the husband is not actually witnessing his wife's adultery, but knows it is transpiring, and, in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer, the offense is reduced to manslaughter." 2 Bish. Crim. Law, (2d Ed.) § 708. The law is that if the husband after learning of the defilement of his wife waits and deliberates, and then kills the defiler, in so doing he commits the crime of murder. And if the fact had been proven that the appellant had heard of the defilement of his wife on the day before the homicide, it would not have constituted any justification for the killing, or a sufficient provocation to reduce the crime to manslaughter.

The court charged the jury as follows: "If, however, you believe from the evidence that the defendant is not guilty of murder in the first degree, yet you are satisfied from the evidence beyond a reasonable doubt that the defendant did on the 28th day of November, 1886, at the county of Kane in the territory of Utah, unlawfully, willfully, maliciously, and premeditatedly, and without deliberation, shoot and kill the said Dobson in manner and form as charged in the indictment, your verdict should be that the defendant is guilty of murder in the second degree." By this language the defendant insists that the court described murder in the first degree, and that it was error to inform the jury that it constituted murder in the second degree. The court said that if the killing was done willfully, maliciously, and premeditatedly, and without deliberation, it was murder in the second degree. The court ev-



idently intended to qualify the meaning of the terms "maliciously, willfully, and premeditatedly," by the use of the words "without deliberation." Murder without deliberation means without sufficient thought to enable the person killing to form a distinct intention to kill. If it were conceded that the court defined murder in the first degree, and charged the jury that it constituted murder in the second degree, we would be unable to see how such an error could have prejudiced the defendant. Had the jury been misled by such a charge, it would have favored the defendant, by securing him lighter punishment. From the fact that the jury found the defendant guilty of murder in the first degree it is apparent that the jury were not misled by the portion quoted of the charge.

Numerous other errors are alleged in the record, but we do not think them well taken. The judgment of the court below is affirmed.

BOREMAN and HENDERSON, JJ., concur.

(5 Utah, 476)

**MUMFORD v. DICKERT & MYERS SULPHUR CO.**

(*Supreme Court of Utah*. February 18, 1888.)

**1. SALE—ACTION FOR PRICE—CORRESPONDENCE WITH SAMPLE.**

In an action for the price of brick delivered, which were rejected by defendant as worthless and unsuitable for his use, plaintiff and one witness testified that they had examined the pile of rejected brick, and selected two, which were exhibited in the trial court, and that over half of the pile was of the same quality. Defendant exhibited brick which he testified were the samples agreed upon. Before the contract in controversy was made, two full consignments of brick had been made and delivered at a price agreed upon, suitable for defendant's use. *Held*, that the trial court was correct in finding that one-half of said pile of rejected brick were such as the contract called for, and were suitable for the defendant's use.

**2. SAME—DELIVERY—QUANTITY—EVIDENCE.**

It was not error (the number of brick being in controversy) to admit, on behalf of plaintiff, the receipts given by defendant to the teamsters for the amount of brick delivered to him.

**3. SAME—EVIDENCE.**

Plaintiff was properly permitted to testify that in company with another person, shortly before the trial, he went to defendant's premises for the purpose of examining the rejected brick, and that defendant's agent, who was a witness on the trial, drove them away, and refused to let them further examine the brick.

Appeal from district court, Second district; before Justice BOREMAN.

*C. W. Zane and Hall & Marshall*, for appellant. *Presley Denny*, for respondent.

HENDERSON, J. This cause was brought in justice's court by respondent for a balance claimed to be due on a contract for the delivery of brick. The defendant, in its answer, claimed that 4,500 of the brick claimed to have been delivered by the plaintiff were not of the quality agreed to be delivered, and were utterly worthless; alleged a tender of \$31, and accompanied its answer with that amount paid into court. Judgment was rendered on trial in justice's court in favor of plaintiff for the amount claimed, and defendant appealed to the district court, where the case was again tried, before the court without a jury, and a judgment again rendered in favor of the plaintiff for \$69.18, being part of plaintiff's claim. The district judge found as facts that on the 25th of September, 1886, the parties entered into an agreement by which the plaintiff was to deliver to defendant at its sulphur works about 40,000 "good and suitable brick, or such number as the defendant might desire or need, at \$15 per thousand;" that, in accordance therewith, the plaintiff delivered 33,059 brick; that 30,726 thereof were "of the quality agreed to be delivered, and that 2,333 were not of such quality;" that plaintiff had received thereon \$371.70; that there was still due plaintiff \$69.18, and gave judgment for that amount. A bill of exceptions was settled, embodying the

testimony; and the case comes to us on appeal from the judgment, and it is claimed that the evidence was insufficient to support the finding that the brick were to be "good and suitable," and "that 30,726 were of the quality agreed to be delivered."

We deem it unnecessary to quote from the testimony at length. We have examined it carefully, and think that there was evidence to support the findings. Before the contract in controversy was made, the parties had been dealing for some time. At least two full consignments of brick had been made, received, accepted, and paid for in full; and then a further order was given, being the one in controversy. We think it a fair deduction from the evidence that the contract was to deliver to defendant at its works, at \$15 per thousand,—a price above the usual price,—such brick as was suitable for the defendant's use in constructing its refining works, to be determined by comparison with the samples agreed upon, and the standards recognized, accepted, and adopted by both the parties in the previous dealings. As to the claim that the evidence does not support the finding "that 30,726 were of the quality agreed to be delivered," the testimony shows that the entire controversy in this case was over 4,666 brick which were rejected by defendant. There was no dispute about the whole number of brick delivered at defendant's works; but, upon examination and assortment of some of the loads delivered, defendant's agents rejected some of them, and other loads were rejected entirely without examination except such as could be made by looking at the load. All these brick so rejected were piled up in one pile, and numbered 4,666, and the controversy was over these rejected brick. The plaintiff testified that he had examined this pile of brick, and had selected two brick from it, which he exhibited on the trial, as brick that were up to the standard or what he was to furnish; and he testified respecting these samples, and the rejected pile, as follows: "When I was out the other day, I saw this pile of brick. I took out two as samples,—these two. They are good brick. There is over half of that pile—I think more than half—of the kind of brick as these two." And his witness Pearson testified: "About half of the pile were of the quality of these two." The defendant also exhibited in court samples which he testified were the samples agreed upon, and were correct samples of what the brick were to be. The trial judge could determine from inspection of these samples how much or how little they varied; and there was positive testimony that half of the rejected pile were equal to the samples selected from it. In view of this testimony we are not prepared to say that the district judge was not warranted in finding that half of the rejected pile were such brick as were agreed to be delivered. It will be observed that judgment was rendered only for the contract price of the brick the court found to be of the quality agreed upon, which included half of the rejected pile.

The appellant also complains of the ruling of the district court in excluding evidence offered to explain receipts given by it to the teamsters for the amount of brick delivered. These receipts were put in evidence by the plaintiff, for the purpose of showing the number of brick hauled to defendant's works, and plaintiff also claimed that they were evidence of acceptance by the defendant. The defendant offered testimony to explain that the defendant did not intend by them to receive and accept the brick. By the finding of the court, this was rendered wholly immaterial. The court did not regard the brick thus delivered as accepted. The theory of the findings is that the brick was subject to inspection and rejection after delivery at defendant's works, and defendant was allowed to reject all that did not come up to the contract standard. The court found in favor of defendant upon the subject of acceptance, and therefore the defendant could not have been injured by the rejection of this testimony.

The plaintiff was allowed to testify, against the objection of the defendant, that, a short time before the trial, the plaintiff with another person went to

defendant's premises, where the rejected brick were piled in an open yard, and was examining them, when one of defendant's agents, and one who was a material witness on the trial for defendant, came out, and drove them away, and refused to let them further examine the brick, upon the pretense that plaintiff had not first asked permission at the office; and this is assigned as error. We think the evidence was proper. It was a fair question as to whether the agent was acting in good faith, or was seeking to deprive the plaintiff of the privilege of making examination of the brick in preparation for the trial, and was proper to be used in determining the weight to be given to the agent's testimony, if for no other purpose. The judgment of the district court should be affirmed.

ZANE, C. J., and BOREMAN, J., concur.

(5 Utah, 490)

WRIGHT v. ASCHEIM *et al.*

(*Supreme Court of Utah*. February 18, 1888.)

MALICIOUS PROSECUTION—OF CIVIL ACTION—PROBABLE CAUSE—EVIDENCE.

In an action for maliciously prosecuting a civil claim, it appeared that defendant had procured the issuance of an injunction, but which was afterwards dissolved, restraining a mining company, formed without defendant's consent, from issuing, and plaintiff from receiving, certain stock to a mining enterprise developed by the parties under an alleged partnership, but which plaintiff claimed to extend only to a certain lagging contract, while the evidence showed that the proceeds from such contract had been used in developing the mine, and other facts and admissions by plaintiff that the enterprise was for the joint benefit of those engaged in it. *Held*, that a judgment against defendant was erroneous, as the evidence negated want of probable cause.<sup>1</sup>

Appeal from district court, Third district; C. S. ZANE, Judge.

*Bennett, Kirkpatrick & Bradley* and *J. G. Sutherland*, for appellant.  
*Frank Hoffman*, for respondent.

HENDERSON, J. The plaintiff brought his action in the Third district court against the defendant and Mocks, for malicious prosecution in instituting and prosecuting a civil action. The complaint alleges that on the 21st day of February, 1881, the plaintiff was the owner of 10,031 shares of the capital stock of the Rebellion Silver Mining Company; that the stock was not then issued, but was ready to be issued, and was placed to the credit of plaintiff, and that he was entitled to then receive it; that the defendants, Ascheim and Mocks, on that day, by an action commenced in the Third district court, wherein said Ascheim and Mocks were plaintiffs, and the plaintiff herein, and Charles A. Matson, David Avery, the said Rebellion Silver Mining Company, William W. Woods, its president, and John Sholdebrand, its secretary, were defendants, and by filing a complaint in said cause, duly verified by said Ascheim and Mocks, and filing an undertaking in said action, procured a restraining order to be issued from said court, by means of which the said company, its president and secretary, were restrained from issuing, and the plaintiff from receiving, said stock; that said restraining order was incorporated with an order to show cause on March 1, 1881, why an injunction should not issue pending the said action in terms the same as the restraining order; that the hearing of the order to show cause was from time to time postponed by the court; and that finally, on April 24, 1882, on motion of the defendants in said action, and upon a hearing, the said restraining order was dissolved;

<sup>1</sup> Upon the question of what is evidence of want of probable cause, see *Taylor v. Rice*, 27 Fed. Rep. 264, and note; *Clements v. Excavating Apparatus Co.*, (Md.) 10 Atl. Rep. 442, and note; *Heap v. Parish*, (Ind.) 3 N. E. Rep. 549, and note; *Moore v. Railroad Co.*, (Minn.) 38 N. W. Rep. 384; *Bell v. Keepers*, (Kan.) 14 Pac. Rep. 542; *McNulty v. Walker*, (Miss.) 1 South. Rep. 55.

and that afterwards, upon like motion, the cause was dismissed. The complaint further alleges damages on account of depreciation of the stock while it was held under the restraining order. Service was had on defendant Ascheim, and he answered, traversing the complaint. Mocks was never served, and did not appear, and the case proceeded against Ascheim alone. The cause was brought to trial before a jury. A verdict was rendered in favor of the plaintiff for \$7,000. Judgment was rendered accordingly. The defendant moved for a new trial on the ground that the evidence was insufficient to support the verdict in this: that it did not show or prove want of probable cause or malice, but, on the contrary, did show probable cause for prosecuting the action; and that, therefore, the verdict was against the law; and for errors committed by the court in instructing the jury at the request of plaintiff.

The motion for a new trial was denied, and the cause comes to us on appeal from the judgment and order denying the motion for a new trial, on the two questions before stated. The first question—the insufficiency of the evidence to support the verdict—involves an examination of the evidence. The plaintiff first put in evidence the proceedings in the cause, the bringing of which is the subject of this action. The complaint contains so full and circumstantial a statement of facts, most of which were not disproved or controverted, that we cannot give a better or more definite statement of the situation of the parties, and the matters concerning which the action was brought, than to give it in full. After entitling in the court and cause, it is as follows:

“The plaintiffs complain of the defendants, and allege and show to the court that they, the plaintiffs, are citizens of the United States of America. That, as the plaintiffs are informed and believe, the defendant the Rebellion Mining Company is a corporation organized under the laws of the territory of Utah, and the defendant William W. Woods is the president, and the defendant John Sholdebrand is the secretary, of said corporation. And the plaintiffs further allege, the plaintiff James M. Mocks, on his knowledge, and the plaintiff Mayer S. Ascheim, on his information and belief, as follows: That on or about the 5th day of August, A. D. 1880, the defendant Frank Wright posted a notice of the location of a mining claim on a claim called by him in said notice the “Rebellion,” situated in the Uintah mining district, county of Summit, territory of Utah. That no ledge or lode of rock in place, bearing silver or any metal, was discovered by said Wright before or at the time of posting said notice, but said Wright posted said notice at a place where, according to the conformation of the country, and the course of the ledges known to exist in said district, it was thought probable there was a blind lode beneath the surface, which might be discovered by development work. That said notice, when posted, bore the name of defendant Frank Wright as the sole locator thereof. That soon after posting said notice of location, and prior to the 13th day of August, 1880, the defendant Charles A. Mattson, at the request of the defendant Frank Wright, commenced work on said Rebellion claim. That on or about the 13th day of August, 1880, the plaintiff James A. Mocks and the defendants David Avery and Frank Wright entered into a contract by which they became partners and jointly interested in filling a contract for supplying lagging to the plaintiff Mayer S. Ascheim, for the Ontario mine, said contract having been made between said Avery and said Ascheim; and by said partnership agreement it was stipulated by and between said defendants Avery and Wright, and the plaintiff Mocks, that each should contribute his time and labor, and his share of all expenses, in filling said contract for supplying lagging, including all expenses incurred for supplies, or otherwise, on and after the 6th day of August, 1880; and that each should share equally in the proceeds and profits derived from said business. And at the same time it was further mutually agreed by and between said defendants Wright and Avery and the plaintiff James M. Mocks that the defendants

Avery and Wright and the plaintiff James M. Mocks should jointly, and as such partners, work and develop the said Rebellion mining claim, and each have an equal interest therein, and in any lodes and mineral veins discovered therein. That neither the plaintiff James M. Mocks nor the defendants Avery and Wright had any money or means to use in the development of said claim, other than his personal services and earnings, and the proceeds of their labor in filling said contract for the supply of lagging, and it was agreed between them that they should continue said lagging contract, and devote the proceeds derived therefrom, and from any earnings they might otherwise make, to work and develop the Rebellion claim. That the defendant Charles A. Mattson had full notice and knowledge of said partnership agreement, and of the relation of the plaintiff James M. Mocks and the defendants Wright and Avery towards each other in respect to said mining claim. That, in pursuance of said agreement of partnership, the plaintiff James M. Mocks, and the defendants Avery and Wright contributed the proceeds received from the plaintiff Ascheim under said contract to furnish lagging, and the plaintiff James M. Mocks contributed all his labor and the proceeds of such labor to the development of said mining claim, and furnished materials and supplies for working the same, and board and pay for other men who were hired to work and worked thereon. That by the joint contribution of the plaintiff Mocks and the defendants Avery and Wright the said Charles A. Mattson was continually kept at work on said mining claim, and one Oscar Rydval and one Frank Molen were employed to work and worked thereon for several months, and were boarded while at work on said claim, the said Mocks working part of the time on the lagging contract and part of the time on said mining claim. That after said 15th day of August, 1880, the plaintiff James M. Mocks and the defendants Avery and Wright and Mattson, and the men employed to work said mine, all camped and messed together, part being at work on said mining claim, and others working in filling said lagging contract as aforesaid, and in doing other work; and said camp was furnished and supplied by said Mocks, Wright, and Avery under their said agreement. That the plaintiff James M. Mocks, in addition to his contributions as aforesaid, personally worked on said mining claim not less than 25 days. That the plaintiff Mocks, with said Avery and Wright, by their joint labor and expense, earned in filling said lagging contract a large amount of money, all the net proceeds of which was applied to subsidize the parties at work on said contract and on said mine, and to pay for labor hired on said mine, and in the development of said mining claim; and the plaintiff Mocks contributed under said agreement at least his equal share of the labor and expense with said Wright and Avery; and that the labor of said Charles A. Mattson, if by reason thereof he became entitled to any interest in said mining claim, would not entitle him to over one-fourth, and the value of his labor did not exceed one-fourth of the expenses in developing said claim. That by joint contributions of the plaintiff James M. Mocks and said defendants Avery and Wright, under the aforesaid partnership agreement between them, a tunnel was run into said Rebellion mining claim, beneath the surface, and, at a distance of about 60 feet from the mouth of said tunnel, a lode of rock bearing silver and lead was disclosed in said claim in the forepart of September, 1880, being the first discovery of a lode therein. That after said lode was reached, and about the middle of September, 1880, the said mining claim was for the first time staked, and the boundaries thereof marked on the ground. That by said joint contributions the said tunnel was further extended on said lode a distance of about 220 feet, making in all a distance of about 280 feet. That the value of the work in running said tunnel is about the sum of \$1,700. That by said joint contributions a shaft in the tunnel was sunk on the vein a depth of 16 feet, of the worth of \$4 per foot. That, by said development work, bodies of ore are disclosed showing the mining claim is of considerable, and probably of great, value. That on or about the 1st day of October, 1880,

the defendant Charles A. Mattson, without the consent of the plaintiff James M. Mocks, caused his name to be put on the location notice of said mining claim, under that of the defendant Frank Wright, and afterwards, on or about the 11th day of October, 1880, the defendant Frank Wright caused a location notice to be recorded in the office of the recorder of said Uintah mining district, and by said notice, as recorded, the said Wright and Charles A. Mattson appear as the locators of said mining claim; and said recorded notice states the claim was located October 4, 1880. That after large bodies of ore were disclosed in said mining claim, and after all or nearly all the development work hereinbefore named had been done, the defendants Wright and Mattson denied that the plaintiff James M. Mocks had any interest in said claim, and proposed to pay him wages at five dollars per day, which he declined to receive. That afterwards, and on or about the last day of December, 1880, the defendants Mattson and Wright conveyed to said defendant Avery 400 feet, undivided, of said mining claim, and since said time three defendants have declined to recognize the interest of the plaintiff James M. Mocks, or to convey to him or his any interest. That on about the 27th day of January, 1881, a corporation was formed, called the "Rebellion Mining Company," with a capital stock of \$20,000,000, divided into 200,000 shares of the denomination of \$100 per share. That in full payment of said capital stock various mining claims were conveyed to said corporation by the corporators. That among the corporators and subscribers to said stock were the defendants Frank Wright, David Avery, and Charles A. Mattson, who conveyed to said corporation the said Rebellion mining claim, and they, or some of them, also conveyed to said corporation the Hecla mining claim, and the Aetna mining claim, and subscribed for and agreed to receive, and it was agreed in the agreement of the incorporation that they should receive, 109,400 shares of said capital stock, in full payment for said claims so conveyed by them. That said Hecla and Aetna mining claims were of no value except as surface ground, and the said Rebellion mining claim constituted the whole substantial consideration for said 109,400 shares of stock to be issued to them. That the amount of stock subscribed for and to be issued to said three defendants is as follows: To the said Frank Wright, 40,123 $\frac{1}{2}$  shares; to the said David Avery, 29,153 $\frac{1}{2}$  shares; and to the said Charles A. Mattson, 40,123 $\frac{1}{2}$  shares. And on information and belief the plaintiffs allege that certificates of said stock have not been issued by said company, and that most of the corporators, at and before the time of the incorporation of said company, and said conveyance of said Rebellion mining claim, had knowledge of the facts herein stated in regard to the development and discovery of said lode, and the contributions of plaintiff James M. Mocks thereto and his interest therein, and of all the material facts hereinbefore stated relating to his rights and interests in said mining claim. And the plaintiffs allege that the plaintiff James M. Mocks has conveyed to the plaintiff Mayer S. Ascheim an undivided half of his interest in said Rebellion mining claim, and assigned to said Ascheim an undivided half of all his rights therein, and of any and all causes of action for the recovery of his interest and the avails of said interest in stock, damages, or otherwise. That the Rebellion mining claim consists of surface ground, 1,500 feet long and 200 feet wide, and the Rebellion lode therein contained. And the plaintiffs further allege that the defendants Frank Wright, David Avery, and Charles A. Mattson are insolvent, and have no property out of which a judgment for damages could be collected. The plaintiffs therefore pray judgment as follows: That the rights and interests of plaintiffs in said Rebellion mining claim may be adjudged, and that it may be determined they are entitled to an undivided one-fourth of said claim; and that a conveyance thereof from the Rebellion Mining Company to the plaintiffs be adjudged. That if in the judgment of the court such conveyance cannot be decreed, or would be inequitable, that the plaintiffs be adjudged entitled to one-fourth of 109,400 shares of the capital

stock of said Rebellion Mining Company, subscribed for by said Wright, Avery, and Mattson, and said company be decreed to issue the same to plaintiffs. That the defendants the Rebellion Mining Company, and the said William W. Woods, its president, and John Sholdebrand, its secretary, and all officers and agents thereof, be restrained by the order of this court from issuing, and the defendants Frank Wright, David Avery, and Charles A. Mattson be in like manner restrained from receiving, pending the action, one-fourth part of 109,400 shares of the said capital stock of the Rebellion Mining Company, being 27,350 shares of said stock; and that, upon trial, said injunction be made perpetual."

This complaint was verified by Mocks and Ascheim, and the injunctive order was issued upon filing it, restraining the company from issuing 10,031 shares of the stock subscribed by Wright, 10,031 of the shares subscribed by Mattson, and 7,288 of the shares subscribed by Avery, and they were each enjoined from receiving these amounts of stock respectively. The principal testimony on the trial in behalf of plaintiff was given by Avery and the plaintiff. Their testimony did not dispute the facts set forth in the complaint last above quoted, except as to the statement that the contract of partnership between Avery, Wright, and Mocks included the development of the mining claim, and that they were to share therein. They both testified that the partnership related to the lagging, but that Mocks had no interest in the mine; that Mocks worked for some time in the mine after they quit the lagging; and that such work was done under a contract to work at five dollars per day in case ore was found; and that he was to have nothing if no ore was discovered; and that he quit in view of the poor prospect of any discovery. Their testimony tended to show that the lagging was got out near the place where the mine was being developed, a considerable distance from Ascheim's store and place of business; that Ascheim was not intimately acquainted with the relations existing between the other parties named, but that he did know that Wright, Avery, and Mocks were partners in the lagging contract, and that the goods furnished by him on that contract were used in developing the mine; that but one camp was maintained in both enterprises. They both testified that they each contributed something to the development of the mine, aside from what the lagging account furnished, Avery testifying that he "believed" he contributed about \$30, and Wright that he furnished, he thought, about \$500, but there was no evidence tending to show that Ascheim knew this, except such as might be inferred from the allegations in his complaint. Their testimony tended to show that they all three, Wright, Avery, and Mocks, worked at getting out and delivering the lagging; that 7,000 were delivered; that they received from Ascheim goods on an account run in the name of Avery—he being the contractor with Ascheim—to the full value of all the lagging furnished, and about \$400 besides; that it went into the maintenance of the camp and the development of the mine, except that Mocks had about \$22 in clothing; and Avery further testified as follows: "Mocks, after quitting the lagging business, worked about two weeks in the mine, I think. The bill run at Ascheim's was in my name, and we turned the lagging so far as delivered. This man, Mocks, took sick, and I drew somewhere between fifty and one hundred dollars to send him away. I forget just how much. He was not working on the lagging, but was working for Wright. I never kept any separate account of the lagging business. Rydvall worked in the mine while Mocks was there, and after he quit the lagging business; and he may have worked some before Mocks quit the lagging. I think he made a car or a wooden truck. Whoever did work in the mine boarded with us at the same camp, and we drew the supplies from Mr. Ascheim. If I recollect right, I had a little remnant of my own money that I put in and bought a blacksmith outfit for the mine. We got our candles, powder, and fuse either at Ascheim's or Lawrence and Shield's. We, of

course, got anything we wanted on this same account. I did not draw anywhere else but at Mr. Ascheim's. I had no interest in the mine at this time, and I let the account for mining supplies run from the fact that when I commenced I told Wright I did not expect to make any money out of the contract. Mr. Wright was a friend of mine, and I felt like I wanted to assist him if I could. I never made any settlement with Mocks on the lagging contract. There never was any separate account made between the lagging business and the mine to see whether there were any profits or not, and the lagging went into the general account for the mine and camp. \* \* \* I put in some of my private money to assist them in getting along with the prospect,—if I recollect right, about thirty dollars. I had drawn much more on the lagging contract for the mine. I don't know where Mocks was standing in all this matter, or what he was getting. We was supposed to make some kind of settlement, I suppose." And further, respecting the deed to himself of an interest in the mine, he testified: "Mattson says, 'It was through you we got our supplies;' and he says, 'I feel as if I wanted to give you something;' and Wright says the same; and they each gave me 200 feet. It was through the grub I was able to get. I never had any understanding until I got the deed. Mattson had told me for a week or two before that he would give me something, but he never said what."

The plaintiff's testimony was to the same effect. It will be seen from this statement that the question in controversy in that case was whether an agreement existed between the parties to develop the mine in partnership; that is, whether the partnership existing between Wright, Avery, and Mocks extended to developing the mine, or was only in relation to the lagging. If the partnership did extend to developing the mine, then Mocks was entitled to his share, and the suit brought by him and Ascheim was properly brought. That was the question to be litigated, and if Ascheim had probable cause to believe that such was the fact when he commenced the action, then the plaintiff could not recover. The record is very voluminous, but the foregoing is substantially all of the testimony on the part of the plaintiff, showing the situation so far as known by defendant when the cause was commenced. The question of probable cause is to be determined as of the time when the action was commenced, and not what the facts may afterwards turn out to be, no matter what subsequent developments may have demonstrated, nor what the actual facts are, but what the defendant had reason to believe they were. *Cooley, Torts, 183; Stewart v. Sonneborn, 98 U. S. 187; Faris v. Starke, 3 B. Mon. 4; Fagnan v. Knox, 66 N. Y. 525; Bacon v. Towne, 4 Cal. 217; Galloway v. Burr, 32 Mich. 333.* Evidence of what the actual fact is or was may be proper, for the purpose of showing what the defendant did know or might have known, but such testimony should be carefully distinguished from evidence of what the defendant knew or might have known at the time the suit was commenced. Court and jury, in determining the question of probable cause, should as nearly as possible imagine themselves in the situation of the defendant at that time, and, judging from what he knew then, or upon reasonable inquiry might have known, determine whether he had such ground as would lead a man of ordinary prudence and discretion to believe the fact alleged. If he did, that would amount to probable cause, and, while it involves the proof of a negative proposition, the burden is on the plaintiff to show a want of probable cause. *Cooley, Torts, 184; Levy v. Brannan, 39 Cal. 485; Cloon v. Gerry, 13 Gray, 201; Bacon v. Towne, supra.* The determination of the question of probable cause, or the want of it, involves a mixed question of law and fact. As to what particular facts in each case will constitute probable cause is a question of law for the court, with which the jury should have nothing to do. But when the facts are in dispute, then as to what facts are established by the testimony is exclusively for the jury. But when the facts are admitted or established by verdict or otherwise, or as shown by the



undisputed testimony of the plaintiff, the question as to whether they constitute probable cause or not is purely a question of law. *Stewart v. Sonneborn* and *Cloon v. Gerry*, *supra*; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. Rep. 491; *Eastin v. Bank*, 66 Cal. 123, 4 Pac. Rep. 1106; *Grant v. Moore*, 29 Cal. 644; *Harkrader v. Moore*, 44 Cal. 145; Cooley, Torts, 181, 182; *Bulkeley v. Smith*, 2 Duer, 261; *Jones v. Jones*, 71 Cal. 89, 11 Pac. Rep. 817; *Allen v. Codman*, 139 Mass. 136. If the defendant in this kind of an action, at the time of commencing the suit complained of, had knowledge of facts tending to show probable cause, but had knowledge of other facts which would tend to explain or modify them, or tending directly to show want of probable cause, and it becomes a question as to which of such facts were believed and acted upon, this would be a question for the jury. This is mentioned in *Stewart v. Sonneborn*, *supra*, as an apparent exception to the general rule that what facts will constitute probable cause is a question of law for the court; but this does not apply to a case where all the undisputed facts known to the defendant, taken together, would justify in a reasonable person the honest belief that the fact charged was probably true. In such case the defense would be absolute as matter of law, and the jury would have no right, under the pretense of saying the defendant did not believe, to find against him. If it were otherwise, the rule that what facts constitute probable cause in an action for malicious prosecution is a question of law for the court would have no meaning or force whatever. The jury might in every case, no matter what the facts might be, under the pretense of unbelief on the part of the defendant, find against him. As said by the supreme court of Vermont in *Barron v. Mason*, 31 Vt. 189, speaking of the proof of probable cause and malice in this class of actions: "Probable cause has reference to the common standard of human judgment and conduct, and malice regards the mind and judgment of the defendant." Belief is not always the controlling question, as is well shown by Justice HOLMES, speaking for the court in *Allen v. Codman*, *supra*. What, then, does the testimony of the plaintiff show the facts to be, as known to Ascheim at the time of commencing his action? Bearing in mind that the whole controversy in that case turned upon the question as to whether the mine was developed by the parties, Wright, Avery, and Mocks, in partnership, and with the understanding that they should share in any discoveries, it shows that Mocks was earnestly and stoutly maintaining to Ascheim that such was the fact. This is clearly shown by the complaint put in evidence by the plaintiff, not only that he was so reporting to Ascheim, but that he swore to it positively, giving circumstances and details in support of it. It shows that he knew the fact that a partnership did exist between the parties as to the lagging contract. It further shows that he knew that all the parties were actively engaged in getting out the lagging, and that the entire proceeds of all that was earned by them jointly were used in developing the mine; that but one camp was maintained in both enterprises; that the lagging account with him was largely overdrawn to maintain the camp and develop the mine. It further shows that he knew that Avery had been admitted to participation in the mine, on account of the fact that the proceeds of the lagging contract had been used in its development. The only fact known to him, tending to refute all this, was the fact that the other parties in interest denied Mocks' right. This is always true in actions for malicious prosecution. In bringing a civil action, the fact that the action was brought presupposes that the right claimed is denied. We think these facts show that probable cause existed for bringing the action. The plaintiff by his testimony has not even attempted an explanation as to how or by what right he was appropriating Mocks' interest in the lagging contract to his own individual use. He admits that it was done, and claims there was no contract or agreement authorizing it, and his witness Avery, who was interested with him, says "he didn't know where Mocks was standing in all this matter, or what he was getting." It is inter-

esting in this connection to note how Avery, in his testimony before quoted, accounts for the interest he got in the mine. It is but fair to say that he himself, in his testimony, states a case that would have entitled Mocks in a court of equity, as a matter of right, to share in what he received. If the plaintiff and Avery, by their unauthorized and unlawful appropriation of what belonged to Mocks, have thereby created circumstances from which damaging inferences might be drawn, they must abide the consequences. *Jones v. Jones*, 71 Cal. 92, 11 Pac. Rep. 817.

We think that the facts shown by the plaintiff's testimony at least fail to establish want of probable cause. If this were not so, the testimony on the part of the defendant fully establishes the fact that he did have probable cause for bringing the action. Besides his own testimony, he proved by at least two witnesses, not only that they informed him before the suit was brought that Wright and Avery had told them that Mocks was a partner in the mine, but that such was the fact. He proved by still another that he was present when Wright and Avery offered Mocks a share, less than one-fourth, to compromise his claim, and that before suit was brought he informed the plaintiff of it. He further showed, by Judge Harkness, who was then acting as his attorney, that he laid all the facts known to him before Harkness, who took the matter under advisement, examined Mocks as to his statement, and after all this advised the bringing of the suit. While this may have raised a question of fact, for the jury to disregard it would be so plainly against the weight of evidence that we should not hesitate to reverse the judgment on that ground. *Moore v. Railroad Co.*, (Minn.) 33 N. W. Rep. 334; *Burton v. Railroad Co.*, 33 Minn. 189, 22 N. W. Rep. 300.

It is unnecessary to discuss the other errors alleged. The judgment and order appealed from should be reversed, and a new trial ordered.

ZANE, C. J., and BOREMAN, J. concur.

(4 N. M. [Hld.] 386)

#### KIRCHNER v. LAUGHLIN.

(Supreme Court of New Mexico. January Term, 1888.)

1. **CONTRACTS—JOINT AND SEVERAL—ACTIONS ON—PLEADING AND PROOF.**  
Under Comp. Laws N. M. §§ 1845, 1846, 1889, providing that all contracts which, by the statute law, are joint only, shall be construed to be joint and several, and that suit may be brought and prosecuted against any one or more of the parties liable thereon, it is not essential to recovery in *assumpsit*, on a contract laid in the declaration as joint, to prove a joint contract by all defendants. Proof of a several contract with one is sufficient to warrant a recovery as against him.
2. **SAME—EXECUTION OF CONTRACT—PROVINCE OF JURY.**  
In *assumpsit* upon a contract under seal, the contract was laid in the declaration as joint by both W. and L., defendants. The plea was *non est factum*. The contract, as proved, was signed "W.," and "L., by W." There was evidence tending to prove that W. was duly authorized by L. to sign for him. *Held*, in New Mexico, where, under Comp. Laws, § 2055, the jury is the judge of the weight of the testimony, and the credibility of the witnesses, that although the burden of proof, both as to execution, and as to W.'s authority to sign for L., was upon plaintiff, yet, there being some evidence to that effect, it was error not to leave those questions to the jury.
3. **SAME—CONTRACT UNDER SEAL—MODIFICATION BY PAROL—EVIDENCE.**  
In *assumpsit*, the cause of action, which was a contract, under seal, for the delivery of sheep and wool, was declared upon as modified and enlarged by a subsequent parol agreement. It was in evidence that the parties had acted under the second contract, and that their situation was so altered that the original agreement could not be enforced without a fraud upon one of them. *Held*, that the contract under seal was admissible in evidence, as tending to show a consideration for the parol agreement.

Error to district court, Santa Fe county.

*Assumpsit* by August Kirchner, plaintiff in error, to recover \$3,500 as damages for an alleged breach of contract by Saron N. Laughlin, defendant in error, and one Joseph W. Wiley.

*Catron, Thornton & Clancy* and *Mr. Knaebel*, for plaintiff in error. *Gildersleeve & Preston*, for defendant in error.

REEVES, J. This is an action of *assumpsit*, brought by August Kirchner, plaintiff in error, to recover damages for the breach of a contract with the defendant, Saron N. Laughlin, and Joseph W. Wiley, by which, as the plaintiff alleges, the defendant and Wiley agreed and undertook to deliver to the plaintiff the sheep and wool mentioned in the written contract described in the declaration, and copied in the record. The plaintiff prayed damages for sum of \$3,500, with interest and costs of the suit, for the breach of the contract. The defendant, Saron N. Laughlin, interposed the plea of *non est factum* to the declaration, denying his signature to the instrument in writing sued on, and denying the authority of any one to execute it for him. The proof adduced on the part of the plaintiff being closed, the defendant, by his counsel, then moved the court to direct the jury to find a verdict for the defendant, upon the pleadings and the proof. The motion was granted, and the jury so instructed; to which the plaintiff, by his counsel, excepted. The jury, pursuant to the direction of the court, returned their verdict in favor of the defendant. After the rendition of the verdict, and before the entry of judgment, the plaintiff moved the court to set aside the verdict, and to grant a new trial in the cause, upon the ground that the court erred in directing a verdict in favor of the defendant; but the court overruled and denied the motion, and the plaintiff excepted. From this judgment the plaintiff in the district court brings the case to this court by a writ of error, and assigns for error: (1) The court erred in refusing to permit the jury to determine the issue of fact; (2) the court erred in directing a verdict for the defendant below; (3) the court erred in overruling the motion for a new trial.

In support of the action of the court in refusing to permit the jury to determine the issue of fact, the defendant in error contends that it was incumbent on the plaintiff in error, before he could recover in this suit, to prove a joint contract as laid in his declaration; that proof of a separate contract with either Wiley or the plaintiff in error would be a fatal variance. Such, it must be admitted, is the doctrine of the common law; but by the statute law of this territory all contracts which by the statute law are joint only shall be construed to be joint and several, and suit may be brought and prosecuted against any one or more of the parties liable thereon. Comp. Laws N. M. §§ 1845, 1846, 1889.

It is further insisted by the defendant in error that the execution of the contract sued on being denied by the defendant in error under oath, it devolved upon the plaintiff to prove the execution of the contract, and that the authority of Wiley to act as agent of the plaintiff must be shown. The above is a correct proposition, but it is not the precise question in this case. The question is, "Did the court err in refusing to permit the jury to decide the issue of fact?" The contract read in evidence is signed by "Joseph H. Wiley," and "Saron N. Laughlin, by Joseph H. Wiley." William Breeden testified as a witness on the trial that he wrote the contract, and that it was executed by Joseph Wiley for himself and Saron N. Laughlin, and that the additional agreement was written by him, (witness,) and signed by Wiley for himself and Saron N. Laughlin. But it is objected by defendant that the power or authority of Wiley to act as his agent was not shown. The plaintiff testified to a conversation between himself and the defendant, Laughlin, Wiley being present; in which conversation he says that Laughlin, addressing him as "My friend," said, "I want to turn over the sheep." Then Mr. Laughlin turned a little to Mr. Wiley. They spoke something together that witness did not understand, when Laughlin said to plaintiff, "Please relieve me from the contract." The plaintiff said, "I should not do it. You turn over my sheep, and I will do it;" when defendant said, "The contract is closed, and I shall

attend to it very quick." In answer to the plaintiff's question, "Attend to what?" Laughlin said, "I will attend to the turning over of the sheep;" and the plaintiff answered that he was satisfied. The sheep were on Laughlin's ranch, where they were kept by Wiley. Wiley was present, and must have heard the conversation between Kirchner and Laughlin, without calling into question the statement of Kirchner, or objecting to Laughlin's offer to turn over the sheep. The witness Ortiz says he received for the plaintiff, Kirchner, in 1883, 1,200 sheep. He also received all the rams turned over to Sena. The sheep were received from Wiley. It is true, as insisted by counsel for defendant, that his plea of *non est factum* put in issue the execution of the contract, and Wiley's authority to execute it as agent for the defendant, Laughlin. But, without further comment, it would have been proper to have submitted the evidence to the jury, to be considered on the question of Wiley's authority to sign the contract as agent for Laughlin, with Laughlin's concurrence, unless the evidence should have been rejected, or withdrawn from the consideration of the jury, on some other grounds.

Among other grounds, the defendant in error calls attention to the statement in the second count of the plaintiff's declaration, to the effect that the plaintiff delivered to and put in charge of Wiley and the defendant, Laughlin, a large number of sheep, "upon the express promise, undertaking, and agreement of them, the said defendant and the said Wiley," etc. As already shown, the statute of this territory, and not the common law, controls a joint contract, by providing that the plaintiff may treat such a contract as joint and several. In the first count of the declaration the plaintiff declares upon the written contract, (as modified and enlarged by the second contract;) the second is the common count in *assumpsit* respecting the use and return of personal property.

It is further objected by the defendant that, though it was shown that Wiley signed the contract for himself and the defendant, it must also be shown, to make this binding on the defendant, that Wiley had authority to act as such agent, and that no such evidence was introduced on the trial. In addition to the testimony as above mentioned, Kirchner further testified that Wiley exhibited a letter which he said was from the defendant in error, Laughlin; and when the letter was shown to Col. Breeden, and he had read it, he said it was from Laughlin, and that he wanted to make a contract, and that Laughlin was responsible, Wiley being present at the time. No sufficient reason has been shown why this evidence was withdrawn from the jury. In *Bank v. Bank*, 10 Wall. 637, the court said: "It appears by the bill of exceptions that, upon the evidence in behalf of the plaintiff being closed, the defendant's counsel moved the court to instruct the jury that it was not sufficient to warrant them to find a verdict for the plaintiff upon either of the counts in the declaration." It is further said, in the same case: "According to the settled practice of the courts of the United States, it was proper to give the instruction, if it were clear the plaintiff could not recover." In the case of *Pleasants v. Fant*, 22 Wall. 121, the court quotes the language of Chief Justice MARSHALL, as follows: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony." In the same case the court held that "the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose, and should be tested by the same rules; and in that case the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by the plaintiff." These cases referred to as cited by the court establish the doctrine that, if the evidence is not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. It is to be borne in mind that the jury must judge of the

weight of the testimony, and the credibility of the witnesses. Comp. Laws N. M. § 2055.

Again, it is objected by the defendant's counsel that a verbal promise cannot change a written contract, or be taken in lieu of it, without part performance. In the case of *Goss v. Lord Nugent*, 27 E. C. L. 37, the court of king's bench said: "By the general rules of the common law, when a contract is reduced into writing, verbal evidence is not allowed to be given of what passed between the parties before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify, the written contract; but after the agreement has been reduced into writing it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner add to, or to subtract from, or vary or qualify, the terms of it; and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." The general rules of the common law are clearly enunciated in the above-cited case. It is, however, to be observed that the English statute of frauds of 29 Car. II., declares that no action shall be brought on certain defined contracts within the scope of this statute. The common-law rule in regard to contracts prevails, when not in conflict with this statute. In *Le Fevre v. Le Fevre*, 4 Serg. & R. 244, it is held that, where the situation of the parties is altered by acting upon the new agreement, parol evidence is admissible to prove that, after signing a written agreement, the parties made a verbal agreement varying the former, provided their variation had been acted upon, and the original agreement could no longer be enforced without a fraud on one party. Also, *Cummings v. Arnold*, 3 Metc. 488, 489; *Emerson v. Slater*, 22 How. 28; *McNish v. Reynolds*, 95 Pa. St. 483; *Lattimore v. Harsen*, 14 Johns. 329; *Canal Co. v. Ray*, 101 U. S. 527.

The court did not err in permitting the plaintiff to read in evidence the written contract; not as being the cause of action, but as an inducement to a parol promise by the defendant to the plaintiff. *Munroe v. Perkins*, 9 Pick. 298; *Lattimore v. Harsen*, 14 Johns. 329. It has been often decided that the altering of a written contract makes it all parol. There must be such an alteration as the parties have acted upon it, and in which the original agreement could no longer be enforced. It is not intended to lay down any rule on this proposition of general application, and causes must be decided on their particular grounds as they arise. *Vicary v. Moore*, 2 Watts, 451; *Carrier v. Dilworth*, 59 Pa. St. 406; *Munroe v. Perkins*, *supra*. In view of modern decisions, it can be no longer doubted that the terms of a written contract under seal may be varied by a subsequent parol agreement. See authorities above cited. Wherever the common law is in force, private seals, being recognized by that system, must be understood as going along with it. The common law has been pruned of many of its excrescences; and it is remarkable that the knife has not been more generally applied to the seal also. "A flourish with the pen at the end of the name, or a circle of ink called a scroll, is taken as a valid substitute for a seal," on which important rights are made to depend. The statute of this territory provides that "hereafter on all documents or instruments in writing requiring a seal, made or used or introduced in evidence in this territory, a scroll may be used as a seal, instead of a wafer, wax, or other impression required by the common law." Comp. Laws N. M. §§ 2742, 2743, 2771. These provisions refer mainly to deeds of conveyance affecting real estate in the territory, and not to contracts like the one in this suit.

We think the evidence in the case at bar as to part performance of the substituted contract, and whether relied upon by the parties, should have been left with the jury for their consideration. Where the situation of the parties is altered by acting upon the new agreement, and the original agreement could

not be enforced without a fraud on one of the parties, it has been shown that parol evidence is admissible to prove such alteration. In such cases the mutual promises of the parties—the one to deliver the property, and the other to receive it—are sufficient considerations to sustain the new contract. As the case is presented by the record, the alleged alteration of the original contract between the parties did not violate the rules of the common law, or the English statute of frauds, which is in force in this territory.

The extent of this opinion is that there was error in withdrawing the evidence from the jury, and no opinion is expressed as to the ultimate rights of the parties on the trial before a jury hereafter. Judgment reversed, and cause remanded for a new trial

LONG, C. J., and BRINKER and HENDERSON, JJ., concur.

(4 N. M. [Cild.] 603)

STAAB *et al.* v. RAYNOLDS *et al.*

(*Supreme Court of New Mexico.* January Term, 1888.)

1. LANDLORD AND TENANT—LEASE—MODIFICATION BY PAROL—ACTION FOR RENT—PROVINCE OF JURY.

In a suit for rent, the cause of action, as laid in the declaration, was a written lease, which called for rent at the rate of \$200 a month. The defense set up was a subsequent parol agreement for \$150 a month. This was met by the claim that the reduction in the rent was conditional only, and that the condition had not been fulfilled. There was evidence upon both sides of the controversy. *Held*, that the question of a rescission of the written lease was for the jury.

2. SAME—BURDEN OF PROOF.

In a suit for rent under a written lease, where the defense set up is a rescission of the lease by reason of a subsequent parol agreement for less rent than the lease called for, the burden of proof as to the rescission is on defendant, and that as to the right of recovery according to the terms of the written lease upon plaintiff.

Appeal from district court, Bernalillo county.

Suit by Jefferson and J. S. Raynolds, trading as Raynolds & Co., appellees, for rent alleged to be due under a written lease from Abraham Staab and Edward Spitz, as surviving partners of the firm of Staab & Co., appellants.

*N. B. Field*, for appellants. *W. H. Whitman* and *Childers & Ferguson*, for appellees.

REEVES, J. The suit was brought by the appellees, Raynolds & Co., composed of Jefferson Raynolds and J. S. Raynolds, to recover rents claimed of the defendants, Abraham Staab and Edward Spitz, as surviving partners of the firm of Staab & Co., under the written lease of the premises described in the declaration for the months of December, 1884, and January, February, and March, 1885, at the stipulated rate of \$200 per month. The jury returned a verdict in favor of the appellees, plaintiffs in the district court, for the sum of \$800. The appellants (defendants) made a motion in the district court for a new trial, which was overruled by the court, and they prayed for and obtained an appeal to this court. The grounds of the motion for a new trial are: (1) The verdict is against the law; (2) the verdict is against the evidence; (3) the verdict is against the law and the evidence; (4) because the court admitted improper and illegal evidence offered by the plaintiffs, which was objected to by the defendants at the time; (5) because the court refused to admit proper and legal evidence offered by the defendants; (6) because the court misdirected the jury, at the instance of the plaintiffs, and of its own motion; (7) because the court refused properly to instruct the jury, on the request of the defendants; (8) because for divers other reasons occurring at the trial the defendants were prevented from having a fair and impartial trial. The grounds of the motion are too general, and the court might well refuse to act upon them; but aided by the brief of counsel, this objection to some extent is re-

Upon the trial, the plaintiffs introduced in evidence their written lease and proved occupancy of the premises by the defendants for the four months in controversy, and their failure to pay rent during that period, and rested. It appears that the evidence offered by the defendants was to show that the written contract was rescinded, and that a new contract was made, by which the rent was reduced from \$200 per month to \$150 per month, beginning from the 1st day of December, 1884. For the month of November the defendants paid to the plaintiffs rent at the reduced rate of \$150 per month. Here the trouble between the parties commenced; the plaintiffs demanding the payment of rent at \$200 per month, and the defendants refusing to pay it. In avoidance of the new agreement to pay rent, the plaintiffs introduced evidence for the purpose of showing that the rent was reduced from \$200 per month to \$150 per month, in consideration of defendants' promise to do all their business at plaintiffs' bank, and use their influence in behalf of plaintiffs' banking business, but that they failed to comply. The witnesses who testified in the trial differ in stating the terms upon which the rents should be reduced. Edward Spitz, one of the defendants, testified that, "when Mr. Raynolds was in Albuquerque, I remarked to him that times in Albuquerque were awful hard now, and requested him, as he had done the same for other parties in the house, that he should reduce my rent also. Mr. Raynolds replied that he would think the matter over. He was on his way to Las Vegas, and on his return would let me know. Well, some time elapsed, and I think it was about the middle of October,—I do not know exactly when,—Mr. Raynolds came to my place, and came into the house, and said that he had thought the matter over, and that he would reduce my rent to the amount I requested him,—\$150 per month." On cross-examination, the witness admitted that Raynolds stated to him that he would reduce the rent provided he (Spitz) should procure from Staab & Co. their account for Raynolds' bank, but he refused that proposition, but proceeds to say that, as Mr. Raynolds was doing him a favor, he would probably expect a favor from the witness, and that he was willing to assist the bank in its business. The result was the witness kept the accounts of Staab & Co. at the bank for a couple of months, and then changed his accounts, because Raynolds insulted him. Again, witness says he thought Mr. Raynolds would hurt his business by having a certain individual as director in the bank. After this,—he thinks in December,—Mr. Raynolds met him in the street, and said: "Spitz, your brother left my bank; I will have to charge you again \$200 a month rent." He says: "I tried to show Mr. Raynolds that he was not doing right in having a certain individual there as director in the bank, and that some of his customers had already left it, and the substance of Raynolds' answer was that he was conducting the bank to suit himself;" and after some further remarks, the witness says he left the house, and took his account to another bank. Jefferson Raynolds, one of the plaintiffs in the district court, testified that defendant Spitz spoke to him about the rents in April, 1884, when witness told him that he would take the reduction of rent under consideration, and that he never had any further conversation with Mr. Spitz on the subject till October, and says: "I was passing his store one day, and he called me in, and the question of the reduction of rent came up, and I told him that as he had a large acquaintance among the native population, and stood very high with his Israelite friends, that perhaps he could indirectly benefit us by using his influence in soliciting business for the bank, and if he would agree to do that, I would reduce the rent to \$150 per month. The defendant said I would see how faithfully he would perform his part of the proposition; that he had a large acquaintance, and that he was prepared to work for the bank, if I would reduce the rent. I then said to Mr. Spitz, as he was keeping part of his account at the Albuquerque National Bank he would have to agree to do all his business with us, which he agreed to do." The defendants paid the rent

over for the month of October, and on the 1st day of December the plaintiff accepted the \$150 per month as the rent of November. The witness, N. C. Raff, testified that Spitz said to him that he (Spitz) "did not propose to pay \$200 a month, and there was no use in presenting the bill."

The first point made by the defendants upon the evidence is that the court erred in refusing to instruct the jury as requested by the defendants in their first, second, and third requests. These requests were to the effect that the agreement to reduce the rent of the premises rescinded the existing contract between the parties, and created an entirely new agreement, under which rent could only be recovered from the defendants at the rate of \$150 per month, and that no action could be maintained for the rent reserved in the old agreement. In the case of *Kirchner v. Laughlin*, ante, 132, (decided at the present term of court,) the plaintiff declared on the written contract, as an inducement to the subsequent parol contract which he sought to enforce, and the action was sustained. There was evidence before the court and jury in that case that the written contract was rescinded. In the case at bar the plaintiffs declared upon the written contract as their cause of action, and not upon any subsequent agreement to reduce the rent. Whether there was a parol contract or not was a question of evidence, and not of pleading, as the case was presented. We find no error in the refusal of the court to instruct the jury as above requested.

The second point relied upon by defendants to reverse the judgment is that the court refused to charge the fifth request made by the defendants. This request was to the effect that the burden of proof was upon the plaintiffs, and that they must establish their case by a preponderance of evidence. The instructions asked by the plaintiffs and given by the court, and the further instructions given by the court, were, in substance, that the burden of proof as to the modified agreement was upon the defendants, and if they failed to perform the agreement, to find for the plaintiffs the rent due on the lease. 1 Greenl. Ev. §§ 74, 76; *Spann v. Baltzell*, 46 Amer. Dec. 354. The burden of proving that the contract was changed was on the defendants, but the burden of proof on the whole case was upon the plaintiffs, and it was necessary for them to satisfy the jury from the evidence that they were entitled to recover rent according to the written lease. *Powers v. Russell*, 13 Pick. 76; *Burnham v. Allen*, 1 Gray, 500; *Eaton v. Alger*, 47 N. Y. 351.

The case appears to have been fairly submitted to the jury under the instructions of the court, and it being their province to weigh the evidence, and to reconcile any conflicting statements of the witness, it was not, under the circumstances, required of the court to inform the jury more fully than was done by the instructions given on which side the burden of proof belonged. The jury found, on the plaintiffs' theory of the case, that the agreement to reduce the rent to \$150 per month was conditional. On that theory, no other change was made in the written contract. It differed only in the mode of paying the rent. The patronage of the defendants and their friends in their dealings with the plaintiffs' bank seems to have been regarded by the parties as the equivalent of the payment in money, and which the plaintiffs were willing to accept as a substitute. So long as the defendants complied, they were entitled to the benefit of the agreement to reduce the rent to \$150. *Spann v. Baltzell*, 46 Amer. Dec. 347; *Bailey v. Johnson*, 9 Cow. 115; *Cummings v. Arnold*, 8 Metc. 492.

Judgment affirmed.

LONG, C. J., and HENDERSON, J., concur.



(1 Idaho [Hast.] 425)

## TERRITORY v. EVANS.

*(Supreme Court of Idaho. February 27, 1888.)*

## 1. INDICTMENT AND INFORMATION—DESCRIPTION OF OFFENSE—CONSTRUCTION.

In determining the offense charged in an indictment, all parts of the instrument will be considered together, and if, from the whole, it appears that a crime is sufficiently alleged, it will be sustained.

## 2. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

In criminal prosecutions, as in other actions, instructions to the jury must be based upon some evidence in the case. If they do not, when requested they should be refused.

## 3. HOMICIDE—MURDER IN SECOND DEGREE—TRIAL—INSTRUCTIONS.

An instruction to the jury upon which defendant is convicted of murder in the second degree, though objectionable, as defining murder in the first degree, is sufficient to sustain the verdict as found.

## 4. SAME—APPEAL—REVIEW—OBJECTIONS TO INSTRUCTIONS.

In reviewing alleged errors on appeal from a judgment in a criminal case, where objection is made to specific instructions, the entire charge will be considered together, and, if it fairly and correctly presents the law bearing upon the issues tried, the appellate court will not disturb the judgment.

## 5. SAME—PRESUMPTIONS.

Presumptions are in favor of the decision of the court, and, where a reversal of a judgment is sought on the ground of error, the rulings of the court will be sustained, unless sufficient facts appear in the record to show that error was committed.

*(Syllabus by the Court.)*

Appeal from district court, Lemhi county; before Chief Justice HAYS.

Indictment for murder, against Charles Evans. The defendant was convicted, and he appeals.

Charles A. Wood, for appellant. R. Z. Johnson, Atty. Gen., for respondent.

BUCK, J. The defendant was indicted, tried, and convicted of murder in the second degree, at the April term, 1888, of the district court, Third judicial district, in the county of Lemhi, and comes into this court on an appeal from the judgment.

The first point made by appellant in his brief is that the indictment does not allege the crime of murder. The charging part of the indictment is as follows: "That the said Charles Evans, on the 11th day of November, A. D. 1886, did unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, in and upon one Jas. McKee, make an assault, and that the said Chas. Evans a certain pistol then and there loaded with powder and leaden bullets, which said pistol he, the said Chas. Evans, in his hands then and there had and held at and against the said Jas. McKee, then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought did shoot off and discharge, and that the said Charles Evans, with the leaden bullets aforesaid, by means of shooting off and discharging the said pistol so loaded, to, at, and against the said Jas. McKee, as aforesaid, did then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, strike, penetrate, and wound the said Jas. McKee, giving him, the said Jas. McKee, as aforesaid, one mortal wound, of which mortal wound the said Jas. McKee did die. And so the jurors aforesaid, upon their oaths aforesaid, do charge and say that the said Chas. Evans the said Jas. McKee, in manner and form aforesaid, then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought did kill and murder," etc. The felonious and malicious intent herein charged in terms qualifies and characterizes the striking, penetrating, and wounding of the deceased, McKee, and does not in terms charge that the wound was intentionally and feloniously mortal.

The appellant in his brief urges the proposition that "under our statute

there must be an intention to kill, or the crime will not be murder." Under our Penal Code, as it existed in April, 1887, the time when the indictment was found, (section 15, Rev. Laws, 323,) murder was the unlawful killing of a human being with malice aforethought, either express or implied. Section 21 of the same statute, page 324, provides also: "That involuntary manslaughter shall consist in the killing of a human being without any intent to do so," etc., "provided, that when such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." The indictment in the case at bar charges the wounding, striking, and penetrating of James McKee with leaden bullets, and with malice aforethought, of which wound the said McKee died. The wounding is charged to be with felonious intent, and, if so, the killing, under the statute referred to, is murder, even without the intent to kill. It is, however, urged by appellant that the indictment does not charge murder. The books contain various statements as to how an indictment should be drawn, and different authors divide it into different parts. Our statute (section 7632) defines it to be: "An accusation in writing presented by a grand jury to a competent court, charging a person with a public offense," and provides that it must contain: "*First*, the title of the action,—specifying the name of the court and the names of the parties; and, *second*, a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." If this is done, the defendant cannot complain. The order in which it is done is not one of the essential elements of the indictment. It is claimed by appellant that the averments in what is often designated as the "conclusions" of the indictment cannot be construed in connection with the allegations in the charging part. That portion of the indictment known as the "conclusions" is not necessary, and is placed there or not, as the taste of the pleader may dictate. We think when it is used it may reasonably be construed with the other portions of the indictment. This, we think, is the general understanding of grand juries. The indictment, construed together, charges the crime of murder in the second degree, under the adjudications of this court in *People v. O'Callahan*, 9 Pac. Rep. 414; and we see no reason for changing that decision.

The other specifications of error urged by appellant are to the instructions of the court given, and to those requested and refused. There were seven instructions asked by defendant and refused, to which refusal exceptions were taken. Of these the fourth is disposed of by our ruling on the sufficiency of the indictment. The third, sixth, and seventh are based upon threats claimed to have been known to defendant, and to knowledge of the character of the parties Lyon and McKee, and to a certain assault alleged to have been made upon the witness Lyon upon a trial not connected with the assault and homicide set out in the indictment. The bill of exceptions contains no evidence whatever as to these threats, or the character of the parties Lyon or McKee, or the assault on the trial. It does, however, state that it contains so much of the evidence as is necessary to explain the rulings and decisions of the court in the trial of the case. It is well established that the instructions should be based upon the evidence in the case, and the presumption is in favor of the ruling of the court. There appears in the record no evidence to justify these instructions, and we do not consider it necessary to consider them, for, if correct as abstract principles of law, they do not appear by the record to be founded on any evidence in the case. *People v. Cochran*, 61 Cal. 548; *People v. Smith*, 59 Cal. 365; *People v. Dick*, 32 Cal. 213.

The first instruction asked by appellant is as follows: "If the jury believe from the evidence that on the occasion that James McKee received his mortal wound the defendant had reason to believe, and did believe, that McKee and

Lyon were about to take the life of Caleb Davis, or to do him some great bodily harm, and that there was no other means to prevent it, he would be justified in killing McKee, even if it should be shown that he was mistaken in his belief." The second instruction asked by defendant and refused is as follows: "If the jury believe from the evidence that on the occasion that Jas. McKee received his mortal wound, the defendant had reason to believe, and did believe, that McKee and Lyon were about to take the life of Caleb Davis, or to do him some great bodily harm, and that he, the said defendant, was present and had the means and ability to prevent the same, he would have been criminally liable if he had not used every necessary means in his power to protect the life and person of the said Caleb Davis." These two instructions may properly be considered together. There is no pretense that the defendant was a peace officer in the discharge of his official duty at the time of the homicide. While it is stated in some authorities that a private citizen may, under some circumstances, interfere to prevent a felony, and if, in so doing, he kill the wrong-doer, the law will justify the homicide, (1 Archb. 805; Whart. Hom. § 533; 2 Whart. Crim. Law, 1039; 1 Russ. Crimes. \*670; 1 East, P. C. 58; 1 Hale, P. C. 484,) yet it is argued that the one whom he seeks to protect must be an innocent party. A private citizen cannot thus interfere between two persons both of whom are in the wrong, and slay one to save the other. The instructions should have been so drawn as to submit to the jury not merely the question of the necessity of killing McKee, but also as to whether Davis himself was an innocent party in the affray, and whether he had done all he could to avoid the encounter. As submitted to the court, the instructions were likely to limit the inquiry of the jury simply to the necessity of killing McKee to save Davis, while, had the other questions been submitted to the jury, they might have found that Davis was the wrong-doer, and that McKee should have been protected instead of Davis. We think these instructions rightly refused.

Appellant excepts to the first, fourth, and seventh instructions requested by the prosecution. The first is a quotation from our statute defining murder and manslaughter, with instruction to the jury to find the defendant guilty of one of those two offenses, or not guilty. We think it justified by the evidence. The fourth instruction is as follows: "The jury are instructed that, while the law requires, in order to constitute murder, that the killing shall be willful, deliberate, and premeditated, still it does not require that the willful intent, deliberation, or premeditation shall exist for any length of time before the crime is committed. It is sufficient if there was a design or determination to kill distinctly formed in the mind at any moment before or at the time the pistol was fired; and in this case, if the jury believe from the evidence beyond a reasonable doubt that the defendant feloniously shot and killed the deceased, as charged in the indictment, and that before or at the time the pistol shot was fired, the defendant had formed in his mind a willful, deliberate, and premeditated design or purpose to take the life of deceased, and that the shot was fired in pursuance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then the jury should find the defendant guilty of murder in the second degree." The seventh instruction is as follows: "The jury are further instructed that if, without such provocation as is apparently sufficient to excite irresistible passion, a person shoots another, and by such shooting occasions death, although he had no previous malice or ill will towards the person shot, yet he is presumed to have had such malice at the time of shooting, and the person shooting will be guilty of murder." The seventh instruction quoted is supported by instructions to jurors, by Sackett, and by *Johnson v. Com.*, 24 Pa. St. 387. It has been criticized as not containing the proper definition of deliberation and premeditation. In this case, however, the court instructed the jury to find only for murder in the second degree. The instruction undoubtedly at least defines malice afore-

thought, and would sustain a verdict of murder in the second degree. We are therefore of the opinion that, as applied to the case at bar, the defendant has no cause of complaint. *Gardenheir v. State*, 6 Tex. 348; *People v. Nichol*, 34 Cal. 211; *People v. Ah Kong*, 49 Cal. 6; *People v. Siloera*, 59 Cal. 592; *People v. Messersmith*, 61 Cal. 246. The seventh instruction is sustained by Instructions to Juries, by Sackett. It is criticised by appellant on the ground that it does not except justifiable or excusable homicide. This instruction must be taken in connection with the others given, and although it might not contain the precise accuracy which the most critical pleader might desire, yet, if taken as a whole, the charge is substantially correct, and could not mislead the jury. The judgment will not be disturbed. *People v. Cleveland*, 49 Cal. 577; *People v. Clementshaw*, 59 Cal. 385; *People v. Salorse*, 62 Cal. 139; *People v. Ye Park*, Id. 204.

The instructions carefully explain to the jury the statute affecting the rights of defendant, and the court sees no reasonable ground of complaint. Judgment affirmed.

(2 Idaho [Hasb.] 439)

WASHINGTON & I. R. CO. v. CŒUR D' ALENE RY. & NAV. CO. *et al.*

(*Supreme Court of Idaho. March 6, 1888.*)

INJUNCTION—PRELIMINARY—GRANTING—REVIEW ON APPEAL.

The granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same, where there is no abuse of discretion.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; before Justice BUCK.

Application by the Washington and Idaho Railroad Company for an injunction against the Cœur d' Alene Railway & Navigation Company and George P. Jones. The application for the preliminary injunction was refused, from which order plaintiff appeals.

*W. B. Heyburn* and *J. T. Morgan*, for appellant. *Richard Z. Johnson*, for respondents.

HAYS, C. J. This action was brought to obtain a temporary and also a perpetual injunction. At the hearing of the application for a preliminary injunction the court refused to grant the writ upon the showing then made, or at that time, but postponed the hearing of such application to a future time. From such order an appeal has been taken to this court.

The granting or refusing of a temporary injunction rests in the sound discretion of the court. *Hicks v. Michael*, 15 Cal. 108; *Slade v. Sullivan*, 17 Cal. 103; *Goldstein v. Kelly*, 51 Cal. 301. This court will not disturb the action of the trial court unless there has been a clear abuse of such discretion. 2 High, Inj. § 1696; *Payne v. McKinley*, 54 Cal. 532; *Parrot v. Floyd*, Id. 534; *Patterson v. Board, etc.*, 50 Cal. 344; *White v. Nunan*, 60 Cal. 406. After a careful examination of this case, we think the rights of the appellant may be fully protected upon the final hearing; or, if deemed necessary, upon a future hearing of the application for a temporary injunction, as provided for in the order herein appealed from. We are therefore not prepared to say that there has been such an abuse of discretion as would warrant us in interfering.

The order of the court below is affirmed and the case remanded for further proceedings according to law.

BUCK and BRODERICK, JJ., concur.

(15 Or. 447)

GREGORY *et al.* v. NORTH PAC. LUMBERING CO.

(Supreme Court of Oregon. November 28, 1887.)

## 1. TROVER AND CONVERSION—TITLE TO MAINTAIN ACTION—CHATTEL MORTGAGE—DESCRIPTION.

A mortgage describing the property conveyed as "lumber piled on said premises known as block 113," without extrinsic evidence showing that the mortgagor, at the time of the execution of such mortgage, had lumber answering such description, is inadmissible to show title in the mortgagee, to enable him to maintain an action of conversion.

## 2. SAME—POSSESSION.

The mere formal taking of possession of property by a sheriff, for the purposes of selling it, either under a mortgage or otherwise, is not sufficient possession to sustain an action for conversion, brought by a plaintiff who claimed under a mortgage describing the property conveyed as "lumber piled on said premises;" there being no evidence that the lumber converted was the same as that described in the mortgage.

## 3. APPEAL—REQUISITES—SPECIFICATION OF ERRORS—HARMLESS ERROR.

Under Hill's Ann. Laws Or. 1887, § 106, providing that no defect in the proceedings, which does not affect the substantial rights of the parties, shall be regarded by the court at any time, the court will not dismiss an appeal because the specifications of error in the notice are loose and general; it not appearing that the respondents were misled or prejudiced thereby.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

Action by H. P. Gregory & Co. against North Pacific Lumbering Company, for the conversion of certain lumber claimed by plaintiffs under a mortgage. From the judgment on a verdict for plaintiffs defendant appeals.

*Strong & Strong*, for appellant. *G. G. Gammons* and *A. F. Sears, Jr.*, for respondents.

THAYER, J. This appeal comes here from a judgment of the circuit court for the county of Multnomah. The respondents commenced an action in said court against the appellant, a private corporation, for the conversion of lumber. A jury trial was had therein, which resulted in a verdict in favor of the respondents and against the appellant, and upon which the judgment appealed from was entered. The proceedings had in the case, as shown by the transcript filed in this court, are as unsatisfactory as any I have met with. It is difficult to learn therefrom what the respondents sued for, or what their right of action, if they had any, was. They counted, in their complaint, upon a wrongful conversion of lumber; but for what kind or amount, or what the value of it was, does not appear. The allegation is simply that on or about March 12, 1884, their firm "were the owners of, and in possession of, a certain quantity of lumber on the premises occupied by F. W. Lewis for mill purposes, on South First street, in Portland, Oregon; that on March 12, 1884, the said defendant (appellant) unlawfully converted and disposed of said lumber to its own use, to the damage of said H. P. Gregory & Co. in the sum of \$300.00." Then follows an allegation that H. P. Gregory & Co. sold and assigned their claims against the defendant to plaintiffs. This is all that is disclosed in the complaint respecting the quality, amount, kind, or value of the lumber. And the respondents' claim of title is still more ambiguous. It appears that on the 17th day of November, 1883, one F. W. Lewis executed to the firm of H. P. Gregory & Co. a chattel mortgage to secure the payment of a promissory note bearing date of that day, and whereby Lewis promised to pay to the order of said firm \$1,991.10 three days from such date, with interest. The property included in the mortgage consisted in the main of the machinery and fixtures in and about the mill on the premises referred to in the complaint, which property was particularly described in the mortgage, and in the description of the property therein. After the description of said machinery and fixtures occur the following words: "Also lumber piled on said

premises, being more particularly described as block 113, city of Portland." Subsequently some effort was made by the firm of Gregory & Co. to foreclose the mortgage, but what it was can only be gathered from the testimony given by the late Alfred S. Frank, who was a witness on a former trial of the case. It appears from the testimony of G. G. Gammans, Esq., a witness on behalf of the respondents, that Mr. Frank testified on the former occasion that he was present at the sale had under said chattel mortgage upon the foreclosure thereof, March 12, 1884; that L. Therkluson, at the time of the sale, admitted that some of the lumber then on the premises was there November 17, 1883,—the date of the execution of the chattel mortgage; that Frank also testified that the mortgage had been foreclosed, as provided by the terms contained in said mortgage, by authority given the sheriff of Multnomah county; that the sheriff so acted at the written request of the plaintiffs; that he testified that the lumber described in the chattel mortgage, or so much of it as remained on the premises March 12, 1884, was sold by George C. Sears, sheriff, by authority of plaintiffs, and the same was purchased by plaintiffs; that possession was taken by George C. Sears, at the request of plaintiffs, under said mortgage prior to the said sale. This testimony was elicited by questions to the witness Gammans, all of which were objected to by the appellant's counsel as incompetent, and on various other grounds.

W. R. Crump, another witness on the part of the respondents, testified that he was foreman of a planing-mill for some six years; that he was in the employ of F. W. Lewis from June 1, 1883, until March, 1884, as foreman of his mill; that he was at F. W. Lewis' mill on South First street, Portland, Or., about March 1, 1884, at the time of a sale under a chattel mortgage given by Lewis to H. P. Gregory & Co.; that there was at that time on the premises used by F. W. Lewis, adjoining said mill, lumber that was there on November 17, 1883. In answer to a question to describe it as well as he could, and to state where, on said premises, it was, the witness answered: "Under the mill, in the basement, and under the dry-house, about 3 M. feet of ash, maple, and alder,—mostly ash; in the second story of the mill, about 300 feet of black walnut; in the mill, on the first floor, from 1,500 to 2-M. feet of clear fir; in the yard, above the mill, from 4 M. to 5 M. feet of second quality of cedar." The witness further testified that rough cedar was worth about \$20 per M.; clear cedar, about \$40 per M.; and other lumber in proportion; and that in his opinion all of said lumber was worth in market on March 12, 1884, about \$200. The witness was asked what became of the lumber, and answered that "he did not know; that it was on the premises when he left there." On cross-examination the witness was asked, in substance, to state his reasons why he knew that part of the same lumber on the mill-yard was on there November 17, 1883, and by and through what marks, brands, or peculiarities he could or did identify the lumber on the yard on March 1, 1884, to be the same lumber that was there November 17, 1883. In answer thereto, he stated "that he was there in charge as foreman; that he had the lumber stored in the different locations, and none of it was likely to be moved, or taken away, except under his directions; that he knew the lumber by its general appearance." The witness was also asked if, between November 17, 1883, and March 1, 1884, Lewis sold and disposed of any of the lumber on said mill-yard; and if, during the time, he did not put or deposit lumber thereon; to which the witness answered as follows: "The ordinary use and replenishing of stock went on during the time; that it would be impossible to give an accurate statement as to the amount; that lumber was used as required, regardless of the time it was brought into the mill."

Said Therkluson was called as witness on the part of the respondents, and testified that he was manager of the appellant's corporation on March 12, 1884, and still was, and was authorized to superintend and manage all its business; and during all the time above referred to was so recognized. This

testimony was elicited by the respondents, in order, I suppose, to bind the appellant as to the admission of said witness, testified to by Mr. Frank. The witness Mr. Therkleson, was, however, called on the part of the appellant, and testified that, at the date of the foreclosure of the mortgage,—March 12, 1884,—the respondents claimed an interest in or to the lumber in and about the mill and mill-yard, and attempted to sell the same, or their interest therein; that witness objected to said sale, and that no sale of said lumber, or any lumber, was made under said mortgage on March 12, 1884.

The testimony I have here set out is, according to the bill of exceptions, "all the testimony concerning the sale of said lumber, and the purchase thereof by the respondents."

It is provided in the mortgage, that in case default shall be made in the payment of the note, or the property is attempted to be removed, or be attached or attempted to be assigned, then said note shall at once become due, and it shall and may be lawful for, and said Lewis thereby authorized and empowered, the said Gregory & Co., executors, etc., with the aid and assistance of any person or persons, to take and carry away the mortgaged property, and sell and dispose of the same at public auction upon giving one week's notice of the same in a newspaper of general circulation published in said county and state; and if there were no newspapers published in said county, then in any such newspaper published in said state; and out of the money arising thereupon to retain sufficient to pay the debt, etc. There is also a further provision in said mortgage, to the effect that Lewis, his executors, etc., might retain and continue in the quiet possession of said property, and in the full and free enjoyment of it, except as thereinbefore provided.

The mortgage and alleged foreclosure, before referred to, constitute the respondents' title to the property in suit. The difficulty in the case is to ascertain—*First*, what property was mortgaged; and, *second*, was the same property sold upon the alleged foreclosure, or taken possession of by the respondents in any manner, for such purpose? To solve these questions, we have only the mortgage and the said testimony to look to. I do not think it necessary that there should have been a regular foreclosure of the mortgage in order to entitle the respondents to recover for a conversion of the lumber, if identified as that referred to in the mortgage. The taking possession of it by the respondents, and subsequent conversion by the appellant, without any claim of title to it, would have been sufficient; but how could the jury have known that the lumber "under the mill, in the basement, the lumber under the dry-house, or in the second story of the mill, or on the first floor in the mill, or in the yard above the mill," was the "lumber piled on the premises described as block 113, city of Portland?" Conceding that the respondents, by George C. Sears, sheriff, etc., took possession of the lumber referred to by the witness Crump, and that some of said lumber was on the yard on March 1 or March 12, 1883; still that does not prove that any part of it was part of the lumber included in the mortgage, or that the parties intended should be so included. I cannot understand how the respondents had any right to claim the lumber at the mill by virtue of the mortgage, without first proving that it was the lumber referred to in the mortgage, or some distinct portion or part of it. This question was raised in the outset of the trial. When the mortgage was offered in evidence by the respondents' counsel, the appellant's counsel objected to its introduction, upon the grounds, among others, that the description in the mortgage of the lumber was void for uncertainty. "Lumber piled on said premises" was evidently intended to mean lumber stacked in the usual way upon the mill premises. I do not think it was sufficiently certain to render the mortgage operative and effectual to bind any lumber, unless it were shown by extrinsic proof that Lewis, at the time the mortgage was executed, had lumber answering to such description. The description, standing alone, means nothing definite. It could,

however, be rendered good by the aid of parol evidence, if the fact existed. Section 64, Jones, Mortg. It seems to me that the court should have sustained the objection to the admission of the mortgage, unless the respondents' counsel offered, at the time it was made, to prove by evidence *aliunde* the lumber intended by the description. Without such proof, the mortgage was inoperative and void. *Fish v. Hubbard's Adm'rs*, 21 Wend. 651. No such offer seems to have been made. If it had been, the bill of exceptions ought to show it, in order to rebut the presumptions of error which the ruling, by itself, created. Had the proof identifying the lumber that the parties intended the mortgage to cover been made at the time of its introduction, and the lumber referred to by Frank and Crump been shown to be the same lumber, or some distinct part of it, the action could have been maintained, no doubt; the other evidence in the case being what the court, in the absence of it, will presume it to have been.

It was contended upon the argument that the court must presume that the respondents had possession of the lumber upon the premises, because it was so alleged in the complaint. The allegation in the complaint is that the respondents were the owners and in possession of a certain quantity of lumber. They undertook to prove it, by proving that they had a mortgage upon the lumber piled on the premises known as block 113; that the proceedings before referred to, were taken to foreclose the mortgage. This proof simply throws us into a maze. What lumber was intended to be included in the mortgage, we have no means of ascertaining; and whether that in and about the mill was the same lumber, cannot be shown. How can it be shown, when it is not known, what lumber was intended by the description or reference to lumber in the mortgage? The admission of the truth of the allegation referred to would not, as I can see, aid the respondents. It would be an admission that they were in possession of some lumber; but it would not necessarily follow that it was the lumber in and about the mill. Said counsel may have intended to claim, and perhaps did claim, that the evidence showed that the respondents were in possession of the lumber last referred to,—the cedar, fir, ash, alder, maple, and black walnut,—and that such possession was sufficient to enable them to maintain the action against the appellant for the conversion of it, as the latter set up no title to the lumber in its favor. Possession alone is sufficient, no doubt, to maintain such an action against a mere trespasser. But did the respondents have possession of the lumber last referred to? The controversy between the parties seems to have arisen, in regard to it, at the time the sale took place. Prior to that time, according to the testimony of Mr. Frank, the respondents had undertaken to foreclose the mortgage, by having the sheriff sell the property, or the part of it that was on the premises at the date of the execution of the mortgage, as provided in section 2, c. 39, Misc. Laws Or. Mr. Frank testified that "so much of it as remained on the premises March 12, 1884, (referring to the lumber mentioned in the mortgage,) was sold by Geo. C. Sears, sheriff, by authority of plaintiffs, and the same was purchased by plaintiffs." He had before testified "that possession was taken by Geo. C. Sears, at the request of plaintiffs, prior to the said sale." It appears, however, that the lumber was where it had been deposited long before, at the time of the sale, and at the time the appellant is charged with having converted it; that, evidently, it had not been removed, or taken out of Lewis' possession. Sears, therefore, could only have taken formal possession of it; and as preliminary to, and for the purpose of, selling it, by virtue of the power conferred upon him by the statute, or, possibly that contained in the mortgage. In either case, however, the respondents did not obtain such a possession of the lumber as would enable them to maintain the action; at most, it was no more than a constructive possession, which would not be sufficient without establishing a further right, and which they could only establish, under their



pleadings, by identifying the lumber with that referred to in the mortgage. That, in my opinion, they did not do. A possession of personal property, in order to be sufficient to enable a party to maintain an action for its conversion, should be absolute and complete. I do not think that the respondents had any such possession in this case.

The counsel for the respondents contended at the hearing, and claim in their brief, that the notice of appeal herein does not specify the grounds of error upon which the appellant intended to rely on the appeal with sufficient certainty. The specification is very general and loose, and probably would not stand the test of a number of the decisions of this court heretofore made upon that question. The court latterly, however, has been inclined to pursue a more liberal course in such matters. It has been more disposed to retain an appeal, and consider the merits of it, where the error or defect does not affect the substantial rights of the adverse party. The spirit of the Code is opposed to the application of stringent rules in the matters of form. It favors more the course and policy of considering and adjudicating upon the matters of substance, and of disregarding mere technicalities. A notice of appeal must specify the grounds of error relied on with reasonable certainty. The statute requires that it do so; but at the same time it requires "that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party." If the respondents had been misled in consequence of the loose and general mode adopted in pointing out the errors alleged, the court would feel compelled to refuse to hear the appeal, but they have not been prejudiced, evidently, in this case, in consequence of any such practice. They were represented here by an able counsel, who was well prepared, and has ably discussed every question presented in the record; and if the court should fail to consider a material point involved in the matter, or adopt some view inconsistent with the facts connected therewith, its attention can be called to it by a petition for a rehearing, which secures a further consideration of the subject.

It is obvious that the contention of the parties was in regard to lumber Lewis had on hand when the attempt was made to foreclose the mortgage. The burden of proving that it was included in that instrument devolved upon the respondents, and should have been made when they sought to establish their rights to it by virtue thereof. The mortgage, upon its face, secured to them no right to any lumber, without proof identifying the lumber intended, and was confined to lumber "piled" on the premises referred to. I think it was error to allow the mortgage to be introduced in evidence, when objected to upon the grounds mentioned, without requiring such proof to be made. In no other way could the mortgage be rendered effectual for any purpose; and its competency depended upon the production of such proof to accompany it, and locate and apply the description contained therein. In *Fish v. Hubbard's Adm'rs*, *supra*, Judge COWEN used the following language: "The learned judge at the circuit thought the description of the property in the covenant so entirely uncertain that the instrument was inoperative and void; and it is clearly so, if we are bound to stop with reading it, and cannot go beyond the contract in search of its meaning." To "go beyond the contract in search of its meaning," is to ascertain the subject-matter to which it refers through the means of extrinsic evidence which, in connection with the instrument, establishes the right. The extrinsic evidence is essential to the completion of the meaning of the instrument, and the latter can be admitted in proof only on condition that the former is introduced. If the circuit court had allowed the introduction of the mortgage upon condition of the introduction of the character of evidence referred to, we might have presumed that it had been introduced; but the ruling was absolute. The effect of it was that the mortgage was competent proof in itself,

and required no extraneous evidence to ascertain the lumber to which the description applied. The ruling could not have failed to mislead the jury.

Under this view the judgment appealed from should be reversed, and the case remanded for a new trial.

Petition for rehearing denied in the above cause, February 20, 1888.

(15 Or. 610)

**HENKLE *et al.* v. DILLON *et al.***

(*Supreme Court of Oregon. January 16, 1888.*)

**1. FIXTURES—WHAT CONSTITUTES—PORTABLE ENGINES.**

A chattel mortgage was given for the purchase price of a portable engine and saw-mill, it being agreed and understood that the property was to continue to be personal property. Afterwards it was placed (on land owned by only one of the mortgagors) in a mill building in such a manner that, when the supply of lumber was exhausted in that locality, it could be easily removed to another, which was done several times, and the engine was also frequently taken out and used for threshing. *Held*, that the property did not become a part of the realty, so as to pass to the mortgagee of the realty.<sup>1</sup>

**2. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.**

Defendants, claiming a right to property by virtue of certain chattel mortgages, attached to their answer copies of the mortgages certified by the county clerk in whose custody they were. *Held*, that plaintiffs could not question their existence for the first time in this court on appeal.

Appeal from circuit court, Benton county

Action by plaintiffs, Henkle & Davis, to foreclose a mortgage on real estate. Plaintiffs appeal from a decree refusing to order sale of an engine and saw-mill, placed on the land covered by the mortgage.

*J. W. Rayburn*, for appellants. *John Kelsay*, *S. T. Jeffreys*, and *W. S. McFadden*, for respondents.

STRAHAN, J. Plaintiffs commenced this suit to foreclose a mortgage on certain real property in Benton county, given by the defendants George W. Dillon and Olive, his wife, to the plaintiffs, to secure the payment of a certain promissory note to them for the sum of \$1,002.20, with interest after April 26, 1886. The mortgage was executed on the same day. The note was signed by Dillon Bros., a firm composed of G. W. Dillon, D. M. Dillon, and J. W. Dillon, all of whom were made defendants in the suit. After the suit was commenced, and before final decree, the defendants Staver & Walker, appeared, and made such representations to the court as to their interest in some part of the litigation, that the court ordered them to be made parties defendant, and gave them leave to file an answer. They allege in their answer in substance that, on the 26th day of March, 1884, Dillon Bros. executed to the J. I. Case Threshing Machine Company a chattel mortgage, to secure the payment of various promissory notes therein described, amounting to \$1,130 and interest, which chattel mortgage included the 12 horse-power traction self-steering engine in controversy in this suit, and that said chattel mortgage was duly filed with the county clerk of Benton county, Or., on the 28th day of March, 1884, and entered in the book of chattel mortgages, No. 1, page 168, all before said engine was in any manner attached to the land described in complaint. That said engine stood on wheels; and, at the time said chattel mortgage was made, it was agreed and understood that the same should continue to be personal property, and that said J. I. Case Threshing Machine Company, or its grantees or assigns, should hold and continue its lien upon

<sup>1</sup>In general, as to when machinery is regarded as a fixture, and the tests applied, see *Schmitz v. Scheifele*, (N. J.) 1 Atl. Rep. 698, and note; affirmed 11 Atl. Rep. 257; *McNally v. Connolly*, (Cal.) 11 Pac. Rep. 820, and note; *Cooper v. Johnson*, (Mass.) 9 N. E. Rep. 33, and note; *Harkey v. Cain*, (Tex.) 6 S. W. Rep. 637; *Sword v. Low*, (Ill.) 18 N. E. Rep. 826; *Walker v. Mill Co.*, (Wis.) 35 N. W. Rep. 393.

said engine until fully paid, and that said engine is and always remained personal property. That said engine was attached to said premises in such a manner that it could be easily removed without any material injury to the premises or said engine. That \$800 of said indebtedness still remains due and unpaid. For a separate defense, Staver & Walker allege that Dillon Bros. and Joseph Staver made their certain other chattel mortgage to secure the payment of \$300 to Staver & Walker, which mortgage was dated December 20, 1884, and was duly filed with the county clerk on the 31st day of December, 1884, and entered in the book of chattel mortgages, and that said last-mentioned mortgage included one J. I. Case Threshing Machine Company's double saw-mill. No. 165, together with all saws, tools, belts, or appurtenances in anywise connected therewith, and that it was stipulated in said chattel mortgage that said mill was to be located on 40 acres of land being N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  section 5, township 11 S., range 5 W. That plaintiffs had notice of an agreement that said saw-mill should remain personal property, and was subject to Staver & Walker's lien until they were fully paid, and that the same has always remained personal property. That said saw-mill and appurtenances were so attached to the premises mentioned in the complaint that they could be easily removed without any material injury to said saw-mill or appurtenances. And that said note and interest remain due and unpaid. Properly certified copies of said chattel mortgages are annexed to the answer. It is also alleged in the answer that Staver & Walker had, before the suit was commenced, succeeded to the interest of the J. I. Case Threshing Machine Company in the note and mortgage made to that company, by assignment. There were some affidavits annexed to said chattel mortgages, for the purpose of renewing same, but the view we have taken of the case renders their consideration unnecessary. The evidence was taken in writing, and accompanies the transcript. The court below rendered a decree foreclosing the plaintiff's mortgage on the real property described in the complaint, but refused to include in the decree an order for the sale of the engine and portable saw-mill described in the chattel mortgages, from which decree the plaintiffs have appealed to this court. An examination of the positions relied upon by the appellants' counsel is therefore necessary.

1. The main position relied upon by him is that, before the date of the plaintiffs' mortgage, Dillon Bros. and Staver had so annexed the 12 horse-power traction self-steering engine and the portable saw-mill, in controversy, to the real estate described in the mortgage, as to make the same a part of the land, and subject to the mortgage. From the evidence taken it appears that, at the time the engine and mill were placed upon the premises, the legal title to said land was in the state; but G. W. Dillon was in possession thereof under a contract of purchase, and that, before the plaintiff's mortgage was executed, he made full payment to the state for said land, and received a deed therefor. It further appears that Dillon Bros. occupied this land for the purposes of their milling business. The engine was held in place by three blocks that were sitting on the sills. The floor was laid right around them so that they couldn't move on the floor. Two of these blocks had grooves cut in the top so that they could fit the hind axle of the engine, and the front block was cut in a circle to fit the front end of the boiler, and the engine was sitting on those blocks. The boiler was let down on the blocks above mentioned, and a brick ash-pan was put underneath the fire-box of the boiler. The ash-pan was in no way fastened to the engine or boiler. The engine was connected to a J. I. Case portable, double circular saw-mill, by means of a 10-inch rubber belt, running from the fly-wheel of the engine to a pulley on the mandrel of the mill. The engine was in no way attached to the premises on which it stood. The saw-mill machinery was all connected to a square frame, known as the "buck-frame," which was about 7 feet long by 4 feet wide, which was made of timbers 3 by 12 or 14 inches. The mandrels, pulleys, levers,

arbors, and belts were all connected to the square frame, except the carriage. This frame was set on the floor of the building, and four bolts came up from the floor at each corner of the frame, and went through a block which was laid across the corner of the frame, and screwed down in such a manner as to clamp the frame so it would not move around. The object of locating said engine and mill on said premises was to saw there until timber became scarce and unhandy, and then move to where it was more convenient to timber. This machinery is the same described in the chattel mortgages mentioned in the answer of Staver & Walker. It further appears that, after Dillon Bros. purchased the engine in question, the first work they did with it was in sawing wood around Corvallis, and, when threshing season commenced, they took it and went out threshing; after the threshing season was over, they continued to saw wood around town until late in the fall. The following spring they moved out on Soap Creek, and sawed lumber until harvest, and during the threshing season they ran a thresher with the engine until the season was through, and then moved back to Soap Creek and continued to saw until fall; then they moved the engine to another place, and continued to saw till the first of June, and then they took the engine and again went out threshing. In the fore part of July, 1886, the engine was taken out of the building where it had been used to run the saw-mill, for the purpose of again engaging in threshing, and on the highway, in said county, Staver & Walker took possession of the same, and also about the same time they took actual possession of the saw-mill in controversy. In removing the engine from the building, where it had been placed by Dillon Bros., it was necessary to saw off a girt. The object was to put in a door at that place so that the engine could be taken in and out at pleasure. The mill had remained there in that manner from the latter part of January, 1885, to January, 1886. In September, 1886, the mill was taken to Souver's Station, in Polk county, and left in the freight office. Staver & Walker had possession at the time of its removal. It also appears that Staver & Walker accepted the chattel mortgage in question on the mill as security for the purchase price thereof, and with the understanding that it would be placed on the land described.

Do the undisputed facts subject the portable saw-mill and the traction self-steering engine, in controversy, to the plaintiff's mortgage? The plaintiffs' sole reliance to accomplish this result is that they were affixed to the soil, and became part of the realty, and are subject to the same rules of law as the soil itself. When, and under what circumstances, a chattel becomes so annexed to land as to subject it to the same conditions in every respect is frequently difficult to determine. There can be no doubt that, with the growth and development of trade and manufactures, much of the strictness of the common law on this subject has been relaxed. According to the more recent authorities, to give a chattel the character of a fixture, and to render it immovable, three things are necessary: "(1) Actual annexation to the realty or some appurtenant thereto; (2) application to the purpose or use to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties making the annexation to make a permanent accession to the freehold." *Herm. Chat. Mortg.* 6; *Ewell, Fixt.* 21, 22; *Tyler, Fixt.* 114; *Manufacturing Co. v. Garver*, 13 N. E. Rep. 493. So, when things personal in their character are about to be annexed to the realty, and, before such annexation, the parties by express agreement provide that such chattels shall retain their character as personalty, or retain their character as chattels, although attached to the realty in such manner that, without such agreement, they would lose that character, they will continue to be chattels, if they can be removed without material injury to the articles themselves or of the freehold. The agreement will govern, if the article is so attached that it can be removed without material injury to it or to the realty; or if, from the circumstances attending, it is evident or may be presumed that such was the intention of the

parties, and in every such case the thing which would otherwise have become a fixture retains its personal character. *Ford v. Cobb*, 20 N. Y. 344, involved this principle. In that case certain salt-kettles were set in arches upon the salt-block in such manner that they could not be removed, except by tearing off a portion of the upper bricks of the arch, and prying the kettles out by a plank and bars. A chattel mortgage had been executed on the kettles, and it was held that they continued to be chattels, and subject to said chattel mortgage. In reaching this conclusion, the court said: "Assuming, then, that these kettles would be parcel of the real estate, if the owner of the land was the unqualified owner of them when they were put up in the arch, we are to determine as to the effect of the arrangement in this case by which the owner of the land and the owner of the kettles agreed that, notwithstanding their annexation to the freehold in the manner which was contemplated, they should continue to be personal property so far as should be necessary to give effect to the personal mortgage. It will be readily conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot in general be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed. Rights, by way of license, might be created in such a subject, but it could not be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction or material injury to things real with which they are connected, though this connection with the land or other real estate is such that, in the absence of an agreement or of any special relation between the parties in interest, they would be part of the real estate." So, in *Eaves v. Estes*, 10 Kan. 314, it is said: "But when we consider the purpose of the parties, as evinced by the mortgage, to make the engine retain the character of a chattel, regardless of the manner of its attachment to the mill, and as the mortgage violated no principle of law, wrought no injury to the rights of any, and was in the interest of trade, we have no doubt the engine continued to be personal property." And to the same effect is *Sisson v. Hibbard*, 10 Hun, 420, which case was affirmed by the court of appeals, 75 N. Y. 542; *Kinsey v. Bailey*, 9 Hun, 452; 1 Jones, Mortg. § 125; *Tift v. Horton*, 53 N. Y. 377; *Godard v. Gould*, 14 Barb. 662; *Mott v. Palmer*, 1 N. Y. 564; Herm. Chat. Mortg. § 138; *Gorman v. Dodge*, 14 N. E. Rep. 44. Considering the portable character of these chattels, the purposes and manner of their use, the way they were annexed, and the fact that the equitable title to the land was in one of the defendants only, while the ownership of the chattels was in the firm of Dillon Bros., and I would have no doubt whatever that, without considering the chattel mortgages at all, or allowing their execution to have any influence on the question, this machinery in question never lost its character as chattels, and remained unaffected by the plaintiffs' mortgage; but when is added to this the agreement between the parties that the same should continue to be personally, and the execution of the chattel mortgages, with power to take possession and sell in case of default, the correctness of that conclusion I think is placed beyond controversy.

2. Counsel for appellants insisted that there was no proof of the existence of the chattel mortgages in the record. He overlooks the effect of the pleading. Copies of said mortgages certified by the clerk, so as to make them evidence, are attached to the answer of Staver & Walker, and have come here without objection. In addition to this, throughout the whole case their existence is constantly assumed. Besides, it does not appear that there was any objection in the court below to the copies attached to the answer, and so far as appears

this objection is made in this court for the first time, and it could not for that reason be allowed to prevail.

3. Objection is also made that there is no proof that the mortgage to the J. I. Case Company had been assigned to Staver & Walker. The conclusion reached renders that question immaterial. The existence of the mortgage, and the actual possession of the mortgaged property after default, are enough. The plaintiffs, showing no interest in the property, are not in a condition to question the rights of Staver & Walker. Mere possession must prevail in the absence of a superior title. There was some question made at the argument as to the effect of the filing of these chattel mortgages, in giving notice to subsequent purchasers or incumbrancers, and of the failure of the mortgagee to renew the same under the statute, but, there being no subsequent purchaser or incumbrancer in the case, the consideration of these questions is unnecessary. The mortgages were good and effectual between the original parties, and that is as far as we need inquire.

The decree of the court below will be affirmed.

Petition for rehearing denied in this case, February 29, 1888.

(38 Kan. 440)

GRAHAM v. GRAHAM *et al.*

(*Supreme Court of Kansas.* February 11, 1888.)

EXECUTORS AND ADMINISTRATORS—PRESENTMENT OF CLAIM IN PROBATE COURT—SUBSEQUENT ACTION ON—COSTS.

Where the holder of a note secured by a mortgage presents it and secures its allowance in the probate court, as a demand against the estate of the maker, and upon his application the land described in the mortgage is sold by order of said court, and out of the proceeds of the sale the administrator pays him the note in full, with interest, he cannot recover his costs in an action in the district court upon the note and mortgage commenced after he had made application in the probate court to sell the land.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Linn county; C. O. FRENCH, Judge.

Action by Elisha M. Graham against Amanda Graham and others, as heirs at law, and M. F. Leasure, as administrator of Robert Ewing, deceased, for foreclosure of a mortgage executed by decedent. Judgment for costs against plaintiff, who brings error.

*Ware, Biddle & Cory*, for plaintiff in error. *J. D. Snoddy*, for defendants in error.

HOLT, C. Robert Ewing, a widower, died on the 8th day of January, 1883, leaving his children as his sole heirs, being all of the defendants in this action except M. F. Leasure. The plaintiff held his note for \$365.60, secured by mortgage on some property in Linn county. On the 24th of June, 1884, said plaintiff, for the purpose of collecting said note, co-operated with the heirs of said Ewing, and caused M. F. Leasure to be appointed administrator of said estate. When said Leasure was qualified and acting as administrator, the plaintiff filed his note in the probate court, and secured an allowance and judgment for the full amount thereof against said estate. On the 2d of February, 1885, said administrator, by direction of the plaintiff, began proceedings in the probate court of Linn county, to sell the premises named in the mortgage for the purpose of paying off plaintiff's debt and other debts of Ewing's estate, and obtained in said court an order to sell said real estate on the 10th day of March, 1885. The land was sold in April. In July the administrator, out of the proceeds of the sale of the land, paid to plaintiff \$492.21, being the amount of the note at that time. On the 4th day of March of the same year, the plaintiff began this action in the district court of Linn county.

The only question before us is concerning the payment of the costs of this action in the district court, which defendants refused to pay. The court held that the defendant could not recover his costs of the defendants. We believe that was correct. He had elected his forum; won all he sought. His claim was paid in full, and the estate had been compelled to pay the costs of the proceeding in the probate court. The plaintiff had the undoubted right to seek relief in either the probate or district court. Perhaps in both at the same time, if he had simply asked for the allowance of his note in the probate court, and only for a judgment in the district court establishing the mortgage lien as a judgment lien, and an order to sell the real estate in question; but it is specially found by the court that he had obtained the allowance of his note as a debt against the estate, and had instituted proceedings in the probate court to sell the identical land to pay this and other debts of the estate, and had caused the same to be sold, and received from the proceeds of such sale payment in full of his claim. He asked for the same relief substantially in the district court, including the order to sell the land which had been sold under an order of the probate court. The estate had paid the costs of the proceedings in the probate court. The plaintiff should pay in the district court the costs he unnecessarily incurred. There were other questions suggested in the briefs of the parties; but as this disposes of the case, we think it unnecessary to decide them. We recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 424)

ATCHISON, T. & S. F. R. CO. v. DENNIS.

(*Supreme Court of Kansas. February 11, 1888.*)

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—FIRES—INEVITABLE ACCIDENT.

Section 2, c. 118, Comp. Laws 1885, does not authorize a recovery against a railroad company for a fire caused by burning dry grass and weeds on its right of way, in the performance of its duty to prevent an accumulation thereof, when there is no negligence or carelessness on the part of the company, and when the damages claimed are the result of unavoidable accident only.

(*Syllabus by the Court.*)

Error to district court, Sumner county; J. T. HERRICK, Judge.

*Geo. R. Peck, A. A. Hurd, and W. P. Hackney, for plaintiff in error. J. L. Grider, for defendant in error.*

HORTON, C. J. J. M. Dennis brought his action against the Atchison, Topeka & Santa Fe Railroad Company, before a justice of the peace of Sumner county, claiming \$45 for damages sustained by him for hay burned by the fire put out by the section hands while working for the railroad company, about the 8th of November, 1884, on the S. W.  $\frac{1}{4}$  of section 8, township 24 S., of range 2 W., in Sumner county and state of Kansas. Subsequently the case was taken by appeal to the district court. Upon the trial the jury returned a verdict for Dennis for \$35.20. The railroad company complains and brings the case here.

There was no allegation in the bill of particulars that the land upon which the hay was stacked and burned was "woods, marsh, or prairie." Comp. Laws 1885, § 2, c. 118. It appears from the evidence that Dennis owned a quantity of hay upon land adjoining the right of way of the railroad company in Sumner county; that the hay had been cut and stacked up; and that during the month of November, 1884, the section hands of the railroad company were at work along the line of the railroad, burning off the right of way. While engaged in this work, the fire escaped and set fire to and destroyed six or seven tons of hay. The hay was about 125 yards from the right of way.

The company had plowed fire-guards on its right of way, but no fire-guard had been plowed by Dennis around his hay, nor anything done to protect it against fire. The railroad fire-guards were plowed for the purpose of preventing the spread of fire from the right of way. The fire, by accident, jumped the fire-guard, while the section men were engaged in burning dry grass on the right of way. It also appeared that the company plowed its fire-guards, and burned grass on its right of way to prevent the catching and spreading of fire which might be set out in the operation of its trains; that the section men started to burn off the stubble, or grass, at the fire-guards; and there was some evidence that the fire escaped where grass had been dragged over the fire-guard by Dennis, or the men working for him, who had cut the grass upon the right of way, and stacked it in one of these stacks. The section men tried to stop the fire, but could not do it before it had burned one of plaintiff's stacks. The case seems to have been prosecuted and tried upon a wrong theory. It has been decided that while it is not negligence *per se* for a railroad company to permit dry grass and stubble to accumulate on its right of way, yet the accumulation may be to such an extent and in such proximity to the track as justly to subject it to the imputation of negligence. *Railway v. Butts*, 7 Kan. 314; *White v. Railway*, 31 Kan. 280, 1 Pac. Rep. 611. Therefore the company was in the performance of its duty in burning the grass and dry weeds on its right of way. The fire was the result of unavoidable accident. No carelessness or negligence was alleged or shown. Mr. Dennis, in writing to the claim agent of the company a few days after the burning of his hay, used this language: "While the section hands, under Mr. John Rockhold, were burning a fire-guard, the fire, by accident, jumped across the guard and burnt a rick of hay for me." Under the bill of particulars and evidence in this case, we do not think the statute relating to firing woods, marshes, or prairies applicable. The object of the statute was to prevent those prairie fires so disastrous in this state and make those who set the prairies on fire responsible for all damages done thereby; and such are the terms of the act. Comp. Laws 1885, § 2, c. 118; *Railway v. Davidson*, 14 Kan. 349; *Emerson v. Gardiner*, 8 Kan. 452; *Sweeney v. Merrill*, 16 Pac. Rep. 454, (just decided.)

Again, the court, although requested so to do, refused to charge the jury that if they found that Dennis was guilty of negligence in not using ordinary precautions to protect his hay, he could not recover. The instructions, as a whole, were not a correct guide to the jury, as they not only excluded the elements of negligence or carelessness from its consideration, but also excluded the contributory negligence, if any, of the owner of the hay. *Railroad v. McHenry*, 24 Kan. 501; *Railway v. Haley*, 25 Kan. 35; *Patee v. Adams*, 37 Kan. 133, 14 Pac. Rep. 505.

The judgment of the district court will be reversed and cause remanded for a new trial.

All the justices concurring.

(38 Kan. 427)

#### WICHITA & W. R. Co. v. BEEBE *et al.*

(Supreme Court of Kansas. February 11, 1888.)

#### COSTS—RIGHT TO COSTS—OFFER TO CONFESS JUDGMENT—RECOVERY OF LESS AMOUNT.

The defendant, in an action to recover damages for obstructing an alleged natural water-course, filed in the case with the clerk of the district court an offer, in writing, to confess judgment for \$213.01, and for costs of suit up to that date, and immediately thereafter presented the offer to the plaintiff's attorneys, who, in writing and for the plaintiff, declined the offer; and afterwards, on the trial, which was more than five days after the offer was presented to the plaintiff's attorneys, the plaintiff recovered a judgment for only \$180, and costs. *Held*, that all costs accruing after the offer was presented to the plaintiff's attorneys, should be assessed and taxed against the plaintiff.

(Syllabus by the Court.)



Error to district court, Sedgwick county; H. C. SLUSS, Judge.

Action to recover damages for obstructing an alleged natural water-course, brought by W. L. Beebe & Bros. against the Wichita & Western Railroad Company. Offer to confess judgment was made by defendant and refused by plaintiff. On the trial, which occurred more than five days after the offer, judgment in favor of plaintiff was rendered for a less sum than offered and for all costs of the suit. Defendant's motion to reverse this judgment, to the extent of the costs accruing after the offer of judgment, was overruled, and defendant brings error.

*Geo. R. Peck, A. A. Hurd, and Houston & Bentley, for plaintiff in error. Hatton & Ruggles, for defendants in error.*

VALENTINE, J. This was an action brought in the district court of Sedgwick county on August 17, 1885, by William L. Beebe, James W. Beebe, and Lawrence O. Beebe, partners as W. L. Beebe & Bros., against the Wichita & Western Railroad Company to recover damages for obstructing an alleged natural water-course. Before the trial and on November 21, 1885, the railroad company offered, in writing, to allow judgment to be taken against it for the sum of \$213.01, and for costs of suit up to that date. This offer was first filed with the clerk of the district court, and immediately thereafter was presented to the attorneys of the plaintiffs below, and was declined by them in writing. The following (omitting caption) is a copy of the offer and refusal, and the file-marks:

"Now comes the defendant railroad company, by Houston & Bentley, its attorneys, and offers in court to confess judgment in the above cause for the sum of two hundred and thirteen dollars and 1-100, and for the costs of this action to date.

HOUSTON & BENTLEY, Defendant's Attorneys."

Indorsed: "The above plaintiffs refuse to accept the confession of judgment in the above cause.

E. C. RUGGLES, Attorney for Plaintiff."

Indorsed: "Filed November 21, 1885.

C. A. VAN NESS, Clerk."

The foregoing offer was made under section 523, Civil Code, which reads as follows: "The defendant, in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer, in writing, to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer verified by affidavit; and, in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer." Afterwards, and on November 30, 1885, the case was tried before the court and a jury, and a verdict was rendered in favor of the plaintiffs below and against the defendant below, for \$180. After this verdict was rendered, and before judgment, the railroad company moved that judgment be taken against it for \$180, and costs of suit, up to and including November 21, 1885, and that judgment be rendered against the plaintiffs for all costs which accrued after that date, for the reason that the railroad company had made the above-recited offer, and that it was not accepted by the plaintiffs below. The court overruled this motion and rendered judgment in favor of the plaintiffs below, and against the defendant below, for \$180 and all the costs of suit, and to reverse this judgment to the extent of the costs which accrued after November 21, 1885, and up to the time when the judgment was rendered, the defendant, as plaintiff in error, brings the case to this court.

It is difficult to understand why the defendant's motion was not sustained, and why the costs of suit after November 21, 1885, and before the time of the rendering of the judgment, were not assessed against the plaintiffs below. *Clippenger v. Ingram*, 17 Kan. 586; *Masterson v. Homberg*, 29 Kan. 106. All the above-stated facts were admitted by the parties in open court at the time the motion was heard. It is true that the offer to confess judgment or to allow judgment to be rendered against the railroad company was not made in open court, nor was it necessary; and it is also true that the offer was first filed with the clerk, and then presented to the plaintiffs' attorneys, while the statute contemplates that it shall be first presented to the attorneys and then filed, but the whole thing was done on the same day and substantially at the same time, and the variance was not substantial. Neither was the trial court's attention called to the offer until after the verdict was rendered, but that is immaterial. Indeed, the defendant, through its attorneys, substantially complied with the law.

The judgment of the court below will be reversed, and cause remanded, with the order that judgment be rendered in accordance with the views herein expressed.

All the justices concurring.

(38 Kan. 450)

CAKLEY v. SMITH.

(Supreme Court of Kansas. February 11, 1888.)

ATTACHMENT—PROCEDURE—NOTICE BY PUBLICATION—DESCRIPTION OF PROPERTY.

In an action by attachment against a non-resident defendant whose land is levied upon, a publication notice which fails to describe the land attached is defective, and the motion to vacate a judgment based on such a notice should be allowed. *Cohen v. Trowbridge*, 6 Kan. 385.

(Syllabus by the Court.)

Error to district court, Rice county; A. M. LASLEY, Judge.

Action upon a promissory note brought by Samuel J. Smith against William Cackley. Judgment for plaintiff. Defendant moved to vacate the judgment and proceedings, principally for the insufficiency of the published notice for constructive service of attachment. The motion was overruled, and defendant brings error.

*M. A. Thompson*, for plaintiff in error. *Brinkerhoff, White & Brinkerhoff*, for defendant in error.

JOHNSTON, J. Samuel J. Smith brought an action in the district court of Rice county against William Cackley, to recover upon a promissory note given for \$915.95. He filed an affidavit stating that Cackley was a non-resident of Kansas, and procured the issuance of an order of attachment. An affidavit was also filed as a basis for service by publication, following which a service by publication was attempted. Real estate of Cackley, appraised at \$1,500, was attached, and at the September term, 1885, of the court a judgment was rendered in favor of Smith for the amount claimed. The attachment was confirmed, and the property seized was ordered to be sold. Within a year Cackley appeared for the first time, and moved the court to vacate the judgment and proceedings for several reasons, the principal ground being the insufficiency of the published notice for constructive service. The motion was not allowed, and on this ruling error is assigned.

The case turns upon the sufficiency of the notice, which, omitting the caption, title, and signatures, is as follows: "Said defendant, William Cackley, will take notice that he has been sued in the above-named court upon one promissory note, the demand being for \$915.95, and interest thereon at 8 per cent. per annum from April 20, 1885, and must answer the petition filed therein by the said plaintiff on or before the 25th day of July, A. D. 1885, or said petition will be taken as true, and judgment for plaintiff in said action

for said sum, and the attachment therein granted will be rendered accordingly." Within the decisions already made by this court the notice must be held to be defective. The publication fails to describe the land that was attached. While it states that an attachment has been granted in the case, it does not in fact show that any property had been levied upon. There being no personal service, jurisdiction could be acquired only through attachment and publication. In such a case, if no property was levied on, no effectual order or judgment could be rendered; and where a levy is made the amount of property attached fixes the limit of recovery. A judgment in an action by attachment, resting only on constructive service, reaches no property except that which is subject to the lien of attachment; and this lien is fixed and determined by the judgment. As the Code requires that the nature of the judgment should be stated in the notice, it has been held that a description of the land attached should be stated. In the early case of *Cohen v. Trowbridge*, 6 Kan. 385, this precise question was examined and determined. In that case the notice of publication showed that the land of the non-resident defendant had been attached, but it described the land as the N. E.  $\frac{1}{4}$  of section 9, township 5, range 18, without stating whether it was the range east or west of the sixth principal meridian, either of which would be within the state, and the court decided that the nature of the judgment claimed was not stated with sufficient certainty, and sustained the district court in holding the notice of publication to be defective. In *Rapp v. Kyle*, 26 Kan. 89, the same question was under consideration, and the court remarked that it had no disposition to limit the scope or authority of the decision in *Cohen v. Trowbridge*, *supra*. In that case, the notice in question was challenged because it did not state that an order would be entered for the sale of the attached property. The notice, however, did state that an attachment had been issued and levied upon certain described real estate. Although the court there held that a notice which omitted the statement that an order of sale would be entered for the sale of the attached property was not fatally defective, it remarked: "We do not wish to be understood that where real estate is taken under attachment, it is unnecessary to describe the property in the notice of publication, or that an error or uncertainty in the description will not vitiate the notice." The rule thus early established and subsequently approved requires us to hold that the publication notice in the present case is insufficient.

The motion to vacate the judgment based upon the defective notice should have been allowed; and for that purpose the order overruling the same will be reversed and the cause remanded.

All the justices concurring.

(38 Kan. 442)

COOPER v. BRINKMAN *et al.*

(*Supreme Court of Kansas*. February 11, 1888.)

1. RECEIVERS—DISTRIBUTION OF FUNDS—WHO MAY COMPLAIN OF.

Where a trial court orders the money in the hands of a receiver, appointed in the action, to be distributed according to the facts as stated and admitted in the petition, and no answer is filed in the case raising any new issues, the plaintiff cannot complain of the distribution made.

2. NEGOTIABLE INSTRUMENTS—ACTION ON—DEFAULT—JUDGMENT WITHOUT EVIDENCE.

In an action to recover an amount due on a promissory note executed by the defendant, and the defendant fails to file any answer, but makes default, the plaintiff is entitled to judgment in his favor for the amount claimed, without the introduction of any evidence. Civil Code, §§ 108, 128; *Cole v. Hoeburg*, 86 Kan. 263, 13 Pac. Rep. 275.

(*Syllabus by the Court*.)

Error to district court, Butler county; T. B. WALL, Judge.

*E. N. Smith*, for plaintiff in error. *Hamilton & Cubbison*, *H. W. Schumacher*, and *E. C. Carr*, for defendant in error.

HORTON, C. J. This action was commenced December 21, 1885, by R. H. Cooper against M. F. Brinkman and J. E. Clark, partners as Brinkman & Clark, to recover \$457.37 upon certain promissory notes executed by them to Cooper. The notes were secured by a chattel mortgage. Several other parties were made defendants in the action, because of their interest in the property mortgaged. At the commencement of the action Jacob De Con was appointed receiver to take possession of the goods and chattels described in the mortgages, and also of all of the book-accounts and other property of Brinkman & Clark. He was directed to sell the goods at retail in the usual course of trade, and to apply the proceeds thereof, after the payment of all expenses and costs, upon the indebtedness of Brinkman & Clark, in accordance with the priorities of the chattel mortgages, viz.: (1) To M. Pettingill & Co.; (2) to Tootle, Hanna & Co.; (3) to Tootle, Hosea & Co.; (4) to Tootle, Sherman & Co.; (5) to Grabfield, Sickels & Co.; to Claflin, Allen & Co.; (7) to J. H. Boogers; (8) to Lieberman & Manheimer; (9) to R. S. McDonald & Co.; (10) to R. H. Cooper. At the time this order was granted, A. L. Redden appeared as attorney of R. H. Cooper; E. N. Smith and M. E. Gilgore appeared as attorneys of M. F. Brinkman; and the other creditors appeared by their attorneys A. L. L. Hamilton, C. A. Leland, H. W. Schumacher, and E. C. Carr. No exception seems to have been taken to the appointment of the receiver nor to the direction to the receiver as to the distribution of the proceeds of the mortgaged property. No answers were filed by any of the defendants. On May 8, 1886, M. Pettingill & Co., Tootle, Hanna & Co., Tootle, Hosea & Co., and J. H. Wear, Boogher & Co. filed their motion to require the receiver to file his report and pay from the proceeds in his hands according to the alleged priority of the chattel mortgages the following sums: *First*, \$924.37, with interest, to Pettingill & Co.; \$2,227, with interest, to Tootle, Hanna & Co.; and the balance, if any, to Tootle, Hosea & Co., Tootle, Sherman & Co., Grabfield, Sickels & Co., and Claflin, Allen & Co. On May 13, 1886, R. H. Cooper filed his motion requesting the court to direct the receiver to apply the money in his hands from the proceeds of the mortgaged property as follows:

(1) To the payment of the costs of this action; (2) to the payment of said plaintiff's claim and the judgment of said plaintiff; (3) that the balance, if any, be paid as ordered by the court. All the matters came up for hearing and decision on May 28, 1886.

The court found that after paying the compensation and expenses allowed the receiver there was in his hands to be applied upon the chattel mortgages, according to their priorities, \$2,026.65. It directed \$924.37 to be paid to Pettingill & Co.; next, that all the costs of the action be paid and the balance turned over to Messrs. Tootle, Hanna & Co., the court finding that there was \$2,227.09, bearing interest from May 8, 1886, at 8 per cent. per annum, due to the latter firm from Brinkman & Clark. A verbal motion for a new trial was filed, but upon what grounds is not stated in the record; therefore, as this motion was not filed, or in writing, and as we cannot know what it contained, it cannot be considered. *Douglass v. Insley*, 34 Kan. 604, 9 Pac. Rep. 475; *Clark v. Imbrie*, 25 Kan. 424; *Ervin v. Morris*, 26 Kan. 664; *Decker v. House*, 30 Kan. 614, 1 Pac. Rep. 584. In the condition of the record all questions arising upon the trial alone must be excluded. The only error appearing was the failure of the trial court upon default of Brinkman & Clark to render judgment in favor of Cooper against them for the amount claimed in the petition. Civil Code, §§ 108, 128; *Cole v. Hoeburg*, 36 Kan. 263, 13 Pac. Rep. 275. We perceive no error as to the distribution of the proceeds in the hands of the receiver. The petition alleges that the chattel mortgage to secure the debt of Cooper was executed December 19, 1885, and filed the same day at 11:50 A. M. This mortgage recited that it was given subject to the chattel mortgages of Pettingill & Co., and the omnibus mortgage given to secure Tootle, Hanna & Co. and several other creditors, executed thereto. The

petition also expressly states that the chattel mortgage to Pettingill & Co. was for \$1,600 less about \$800 paid thereon; and the omnibus mortgage to Tootle, Hanna & Co. and other creditors was for \$4,776.84. The petition also admits that these mortgages were prior to the mortgage of Cooper; and that Brinkman & Clark owed \$6,500 upon their several mortgages. There was no allegation in the petition that any of the prior mortgages were fraudulent, invalid, or worthless; but, on the other hand, the prayer of the petition was that the proceeds of the property of Brinkman & Clark be distributed to their creditors, as their interests and rights might appear. The order of distribution was in accordance with the facts stated and admitted by the petition.

The orders and judgments of the district court will be affirmed as to all of the parties except M. F. Brinkman and J. E. Clark; and the cause is remanded, with direction to the court below to enter judgment in favor of Cooper against Brinkman & Clark upon the promissory notes set forth in the petition. The costs in this court will be taxed against Brinkman & Clark; but if they are unable to pay the same, the plaintiff in error will be liable therefor. All the other defendants in error will recover their costs from the plaintiff in error.

All the justices concurring.

(38 Kan. 480)

HARLOW *et ux.* v. WARREN.

(Supreme Court of Kansas. February 11, 1888.)

CONTINUANCE—SICKNESS OF PARTY—AFFIDAVITS.

Where an application is made for the continuance of the trial of a case to another term, upon the ground that the party applying therefor is prevented from attending the court on account of his sickness, and the application is supported, as to the sickness of the party, only by the certificate of a physician, and no affidavit is filed by the physician, or any other person having personal knowledge that the party is unable to attend court, *held*, that the ruling of the district court in refusing a continuance of the case will not be reversed.

(Syllabus by the Court.)

Error to district court, Greenwood county; CHARLES B. GRAVES, Judge.

*T. L. Davis* and *R. C. Summers*, for plaintiffs in error. *D. B. Fuller*, for defendant in error.

HORTON, C. J. This was an action brought by S. L. Warren against Lewis and Carrie Harlow to recover certain land situated in Greenwood county, in this state, which was alleged to have been purchased by Lewis Harlow, with cattle intrusted to him by Warren. Judgment was rendered in favor of Warren and against Lewis and Carrie Harlow, as prayed for in the petition.

The only question presented for our consideration is the alleged error of the trial court in refusing a continuance asked for by Lewis Harlow. Continuances are, to some extent, within the discretion of the trial court; and, unless it is shown that the court abused its discretion in granting or refusing a continuance, this court will not declare the ruling of the trial court, in such a case, erroneous. *Hottenstein v. Conrad*, 9 Kan. 436; *Davis v. Wilson*, 11 Kan. 74; *Swenson v. Aultman*, 14 Kan. 273. The issues in the case were made up on June 6, 1885. At the August term of the court for 1885 the cause was continued upon the application of Lewis Harlow, who then resided within a few miles of the court-house, on account of his alleged sudden illness. His application was made after the case had been assigned for trial, witnesses subpoenaed and Warren had come all the way from the state of Vermont to be present at the trial. On the 16th day of December, 1885, at the regular term of the court for that month, and long after the cause had been assigned for trial, and after Warren had come again all the way from the state of Vermont to attend the trial, the counsel for Lewis Harlow filed his application for a continuance. This was supported by the following certificate:

"ORWELL, HODGEMAN Co., Kas., Dec. 12, 1885.

"This is to certify that Lewis Harlow, on account of physical disability, is unable to travel, and is under treatment by me. J. B. WEST, M. D."

Counsel also filed his affidavit that he received a letter from Lewis Harlow on the evening of December 15, 1885, informing him he was sick, and that, because of his sickness, he was unable to be present at the trial of the case. The affidavit further stated that the testimony of Lewis Harlow was material and essential to a proper defense of the action, and that counsel could not try the cause without his presence. Affidavits were also filed from two parties that they knew J. B. West, and that he was a reputable citizen and physician, residing at Orwell in Hodgeman county, in this state. No affidavit was filed, or any oral testimony presented from any person having personal knowledge that Lewis Harlow was sick and unable to attend the trial. In this condition of the case we perceive no error in the ruling of the trial court. We cannot treat the certificate of the physician as an affidavit. The counsel making the affidavit for continuance does not claim that he had any personal knowledge of the sickness of his client, and the other affidavits do not show that Harlow was sick or unable to travel. An affidavit should have been presented from Harlow, or from his physician, or from some other person having personal knowledge that Harlow was prevented from attending court by sickness, if he was in fact sick. We do not think the certificate of the physician can be accepted as an affidavit. The affidavits do not establish, from personal knowledge, the sickness or inability of Harlow to attend court.

The judgment of the district court will be affirmed; all the justices concurring.

(38 Kan. 420)

#### DOCKING v. FRAZELL.<sup>1</sup>

(Supreme Court of Kansas. February 11, 1888.)

##### 1. PERSONAL PROPERTY—HOTEL BUILDING MOVED ONTO LEASED PREMISES.

A building occupied for a hotel, and moved by a tenant upon a vacant city lot which is held under a lease for a term of years, in which it is provided that at its expiration the lot shall be surrendered in the same condition it was in at the date of the lease, is personal property.

##### 2. CHATTEL MORTGAGES—ON HOTEL BUILDING STANDING ON LEASED LOT.

A chattel mortgage given upon such hotel building would be valid, and a foreclosure and sale thereunder would convey the property to the purchaser at such sale.

(Syllabus by Holt, C.)

Commissioners' decision. Error to district court, Clay county; E. HUTCHINSON, Judge.

Action of forcible detainer brought by Robert Docking against J. A. D. Frazell, before a justice of the peace of Clay county. Judgment was rendered in favor of plaintiff, and defendant appealed to the district court. Judgment for the defendant was rendered in the district court, but was reversed by the supreme court, and the action remanded for a new trial, which resulted in another judgment for the defendant, and plaintiff again brings error.

J. S. Walker, for plaintiff in error. C. M. Anthony, for defendant in error.

HOLT, C. This case has been in this court before, (*Docking v. Frazell*, 34 Kan. 29, 7 Pac. Rep. 618,) when it was decided, upon the testimony brought here then, that the building in question, used as a hotel, was presumed to be real estate. Upon the retrial of the cause, after reversal here, the same question was again presented to the district court, but the testimony offered to establish whether it was real estate or personal property was much more voluminous in this trial than in the former one, and many of the doubts ex-

<sup>1</sup>For opinion on first appeal, see 7 Pac. Rep. 618.

pressed in the opinion of Mr. Justice VALENTINE were solved by the testimony presented. The plaintiff in error, plaintiff below, complains of the judgment rendered against him for costs in his action for forcible entry and detainer, and claims that the court erred in several matters on the trial. We shall not notice his assignments of error specifically, but will simply determine whether the findings of fact were sufficient to authorize the conclusions of law and the judgment. The statement of this case in 34 Kan. is referred to as a part of the statement in this opinion. It is found by the court: (1) On the 27th of April, 1880, H. A. Keeler, being then the owner of lots 1 and 2 in block 43 of the Clay Center town-site in Clay county, Kansas, executed, acknowledged, and delivered to one A. S. Pierce, a lease of said lots for a term of five years, beginning May 1, 1880, and ending May 1, 1885. The premises were at that time vacant and unoccupied. In this lease it was agreed, among other things, that the lots should be occupied by buildings for business purposes, and that the buildings should be removed by the lessee at the end of the term. This lease was duly filed for record April 27, 1880, and recorded among the real estate records of Clay county. Immediately afterwards said Pierce placed upon lot 1 the building which was afterwards known as the "Eagle Hotel." The building was moved on the lot from another lot in the same city. Afterwards, on August 14, 1880, H. S. Pierce executed, acknowledged, and delivered to Frank Piquerez a written instrument embodying an assignment of said lease as to a part of lot 1, 40 feet by 143 feet in size, on which the Eagle House stood. In this instrument it was stipulated that, at the end of the term of the lease from Keeler to Pierce, Piquerez should surrender the ground in the same condition it was in at the date of said lease. This instrument was, on the day of its date, duly recorded in the office of the register of deeds. Piquerez thereupon took possession of the premises and occupied the house, either alone or with his family, until about November, 1882, when he abandoned his family and left with the intention of going to California, and has never returned. (2) July 1, 1881, Frank Piquerez executed a chattel mortgage to Joseph Ruot, on said house and the furniture therein, to secure the payment of certain notes, described in the chattel mortgage, amounting to \$2,000. This chattel mortgage was recorded in the office of the register of deeds of said county, July 27, 1881. On the 26th of May or July, 1882, Frank Piquerez executed another chattel mortgage to Joseph Ruot, on the same property, to secure the payment on certain notes therein described, amounting to \$1,800. This chattel mortgage was duly recorded in the office of the register of deeds of said county, July 27, 1882. At the time said chattel mortgages were given Joseph Ruot was, and has ever since been, a resident of Pennsylvania. He knew of the existence of said chattel mortgages, but did not know their contents. Piquerez was indebted to him about \$140, with interest; but he never had any of the notes described in either of the chattel mortgages, and did not know that such notes were described in the mortgages until his deposition was taken in this action. (4) On October 26, 1882, Frank Piquerez became indebted to J. Christmas. On June 5, 1883, an action was commenced in the district court of Clay county by Christmas against Piquerez, to recover the amount of said indebtedness; an attachment was issued in the action and levied upon the house and lease interest in the lot as the property of Frank Piquerez. Christmas obtained judgment in that action against Piquerez for his said debt and costs; an order of sale was issued, the property advertised for sale, and sold as real estate on November 8, 1883, by the sheriff of Clay county to the plaintiff, Robert Docking. The sale was confirmed by the court, and on January 19, 1884, the sheriff's deed to Docking was duly executed, acknowledged, and recorded in the office of the register of deeds of said county.

These findings are supported by the evidence. The decision of whether this building, occupied as a hotel, was real or personal property, determines

the rights of the parties to this action. The court, as a conclusion of law from the facts specially found, held it to be personal property. It is, and has been for several years, occupied as a residence, and used as an hotel; from that alone the presumption would be that it is real estate; but it is further found that the lot upon which it is situated is owned by one person and the building by another. The owner of the building, to be sure, has a leasehold estate in the land, but in the lease under which he held it is expressly stipulated that at its expiration any buildings that might be erected upon the lot should be removed. The plaintiff does not pretend to claim through any interest derived from the owner of the land upon which the hotel is situated. It is no question between the landlord and the tenant. He claims by virtue of a sheriff's sale upon an execution issued against defendant's vendor. If the hotel is personal property, the title had passed to defendant under the chattel mortgage of Piquerez, and plaintiff obtained no interest in it by the sale of the sheriff. We think it is personal property. There is no direct evidence tending to show in what manner the building was fixed to the freehold, unless it might be inferred that it was not very firmly and solidly attached from the fact that it was moved onto the lot, and was to be moved off when the lease expired. It is evident that the owner of the land, and those who had owned the building, treated it as personal property. One of the tests of whether a building is a fixture is, Did or did not the party placing the building upon the land intend to make it a permanent accession to the freehold? Perhaps this is as important as any criterion offered by the law. There can be no possible question in this action how the owners of the land, and those who had held under the lease, regarded this building; to them it was at all times personal property. "The clear tendency of modern authority seems to be to give preeminence to the question of intention to make the article a permanent accession to the freehold, and other tests seem to derive their chief value as evidence of such intentions." *Ewell*, *Fixt.* 22; *McDonald v. Shephard*, 25 Kan. 112; *Eaves v. Estes*, 10 Kan. 314; *Iron Co. v. Black*, 70 Me. 473; *Morris v. French*, 106 Mass. 326; *Yater v. Mullen*, 24 Ind. 277. If it was personal property, Piquerez had the right to mortgage it to his brother-in-law, Ruot, or to give it to him outright, so far as the plaintiff in this action is concerned. These mortgages were given a long time before the debt of Piquerez to plaintiff was contracted, and he, as a subsequent creditor, certainly has no claim to this property. There is no testimony that would justify even an inference that these mortgages were given for the purpose of defrauding his creditors; the inference, if any, would be the reverse, as he placed it on record as notice to all with whom he might deal, that the property was incumbered. From the testimony brought here, we think the judgment of the court below was correct, and should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 641)

#### MARTIN, Governor, v. INGHAM.

STATE *ex rel.* GETTY, County Attorney, v. MARTIN, Governor.

(*Supreme Court of Kansas*. February 11, 1888.)

#### 1. GOVERNOR—MINISTERIAL DUTIES—CONTROL BY MANDAMUS.

Where purely ministerial duties are by statute imposed upon the governor, and such duties are only such as might be devolved upon any other officer or agent, the performance of such duties may be controlled by *mandamus* or injunction.

#### 2. SAME—DUTIES IN ORGANIZATION OF NEW COUNTIES.

The duties imposed upon the governor by the statutes, relating to the organization of new counties, are partially ministerial and partially not.

#### 3. SAME—FRAUD IN CENSUS RETURNS—INJUNCTION.

Where a petition for an injunction to restrain the governor from acting upon the return and report of the census taker, in proceedings instituted for the organization of a new county, alleges great fraud on the part of the census taker and others, but



does not allege that the fraud was ever brought to the attention of the governor, or that he refused an investigation of the same under the statutes, such petition does not state facts sufficient to authorize an injunction.

4. SAME—MANDAMUS—ALTERNATIVE WRIT—AVERMENTS.

Where an alternative writ of *mandamus* alleges that the governor refuses to act upon the return and report of the census taker, but does not allege that no complaint of fraud or illegality was ever brought to the attention of the governor, or that the delay was not for the purpose of an investigation, such writ does not allege sufficient grounds for a *mandamus*.

(*Syllabus by the Court.*)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

Original proceeding in *mandamus*. Action brought by Charles K. Ingham, a tax-payer and elector of the unorganized county of Grant, against John A. Martin, governor, to enjoin him from the performance of certain acts in the organization of such county. At the hearing before the judge at chambers, a temporary injunction was granted, and the defendant brings error. Also an application by George Getty, county attorney of Hamilton county, for an original writ in *mandamus* to compel the governor to act upon the return and report of Thomas J. Jackson, census taker for the unorganized county of Grant.

*S. B. Bradford*, Atty. Gen., *L. J. Webb*, and *E. A. Austin*, for the governor. *Waters, Chase & Tillotson*, for Ingham, defendant in error. *Geo. Getty*, Co. Atty., *E. A. Austin*, and *L. J. Webb*, for County Attorney Getty.

VALENTINE, J. This was an action brought in the district court of Shawnee county, by Charles K. Ingham, a citizen, resident tax-payer, and elector of the unorganized county of Grant, against John A. Martin, governor of the state of Kansas, to perpetually enjoin the defendant from the performance of certain acts in the organization of such county. The facts, as set forth in the plaintiff's petition, are sworn to by him, and a large number of affidavits of other persons in support of such facts are filed with the petition as exhibits thereto. The petition and the exhibits show substantially, and in detail, the following facts: On or about May 9, 1887, in pursuance of the statutes for the organization of new counties, (Gen. St. 1868, c. 24, p. 249 *et seq.*; Laws 1872, c. 106; Comp. Laws 1885, c. 24, par. 1400-1412; Laws 1886, c. 90; Laws 1887, c. 128,) and upon proper preliminary proceedings had, the defendant, as governor, appointed Thomas J. Jackson as the census taker, the register of the votes of the electors for the temporary location of the county seat, and the assessor for the said unorganized county of Grant. Immediately afterwards Jackson qualified by taking the prescribed oath of office, and proceeded to Grant county, where he did certain work, and afterwards, and about August 25, 1887, made his report to the governor. He went into the county of Grant in a state of intoxication, and remained there in a maudlin condition for two weeks, during which time he was incapable of doing any kind of business properly. Upon his entering into the county, he fraudulently, corruptly, and for pay entered into an arrangement and conspiracy with certain parties to speculate upon the temporary organization of the county by the use of their influence and office. Pursuant to said arrangement the overture was first made to persons interested in the town of Cincinnati, and, it being refused, it was then made to persons interested in the town of Ulysses, and accepted. After this arrangement had been made, Jackson began work. He then moved to Ulysses. He enumerated the names of 60 fictitious persons, and counted them in favor of Ulysses for county-seat. He excluded a large number of qualified voters from having their preferences recorded for county-seat. This number was sufficiently large to materially affect the result. A large number of voters did vote for Cincinnati for county-seat, and he corruptly changed their votes, and reported them as voting for Ulysses. He announced the voting closed by proclamation of the sheriff, and then took votes by night for Ulysses. He took

and recorded a large number of votes for Ulysses of persons who pretended to live upon certain-described lands, who did not reside there, and whose names and habitations were unknown. He took the votes of a large number of other persons, and recorded them for Ulysses, who were not voters. A large number of voters voting in favor of Ulysses were procured by bribery. Frauds of various kinds were perpetrated during the enumeration, with his knowledge and consent. He was, and continued to be, drunk, indecent, and disgusting. His examinations were carried on in a lascivious and disgraceful manner. He travestied the oath to persons enrolled, and performed many other acts of like nature and character as the above. The petition of the plaintiff also alleges as follows: "The plaintiff further states that the defendant, John A. Martin, governor, threatens to, and will at once, consider and act upon the said report of the census taker, and will find therefrom that there are at least two thousand and five hundred actual *bona fide* inhabitants in the said unorganized county of Grant; that five hundred of them are householders; and that there is at least \$150,000 worth of property in excess of legal exemptions, exclusive of railroad property, of which not less than \$75,000 worth is real estate; and will appoint three persons commissioners of said county, one to act as county clerk, and one to act as sheriff; and will designate and declare the town of Ulysses, as the place chosen by the greater number of legal voters, to be the temporary county-seat of said county of Grant, unless he shall be restrained and prohibited from so doing by the order and injunction of this court." The plaintiff also asked for a temporary injunction. Before any hearing was had, however, the governor signed the following stipulation: "(1) I desire that the court shall thoroughly examine into all questions of fraud, partiality, drunkenness, bribery, or unfair dealings on the part of the enumerator. (2) I expressly waive any objection as to the capacity of the present plaintiff to bring suit, and at no stage in the proceedings shall this question be suggested by myself. (3) I do not waive, however, my right to dispute the authority of the court to inquire into these matters. JOHN A. MARTIN, defendant." Afterwards, and upon the foregoing petition and affidavits, and upon the plaintiff's application for a temporary injunction, a hearing was had before the judge of the district court at chambers, and upon such hearing the judge granted the temporary injunction, and to reverse this order, granting the temporary injunction, the defendant, as plaintiff in error, brings the case to this court.

It is claimed in this court, and was also claimed in the court below, that the courts of Kansas have no jurisdiction to hear and determine any case like the one at bar. Indeed, it is claimed that the courts of Kansas have no jurisdiction to hear and determine any controversy that brings into question any act or acts of any member of the executive department of the state, and in Kansas all the state officers are members of the executive department. In Kansas, as elsewhere, there are three great branches or divisions of civil power, which, with some exceptions, are to be exercised by three separate departments: the legislative or the law-making power, the judicial or the law-construing power, and the executive or the law-enforcing power. With some exceptions the legislative power is vested in the legislature, the judicial power is vested in the courts, and the executive power is vested in an executive department. In Kansas, under the constitution, the executive department is constituted as follows: "Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction." Const. art. 1, § 1. The governor, however, is at the head of the executive department, for section 3, of the same article of the constitution, also provides as follows: "Sec. 3. The supreme executive power of the state shall be vested in a governor, who shall see that the laws are faithfully executed." It is generally supposed that in a republican government all men are subject to the laws, and to the due admin-

istration of them, and that no man, nor any class of men, is exempt. There is no express provision in the constitution, nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any of the courts of Kansas, or in any action coming within the jurisdiction of any particular court, civil or criminal, upon contract or upon tort, in *quo warranto*, *habeas corpus*, *mandamus*, or injunction; or from being liable to any process or writ properly issued by any court, as subpoenas, summonses, attachments, and other writs or process; and, if any one of such officers is exempt from all kinds of suits in the courts, and from all kinds of process issued by the courts, it must be because of some hidden or occult implications of the constitution or the statutes, or from some inherent and insuperable barriers founded in the structure of the government itself, and not from the express provisions of the constitution or the statutes. So far as the present case is concerned, however, which is injunction, and another case which is also before us, and which we are also considering, which is *mandamus*, it is only necessary for us to consider whether the governor, without reference to the other members of the executive department, is subject to the action of *mandamus* and injunction, or not. But, in order to properly consider these questions, it is necessary that we should consider many other questions. It might be proper here to state that, so far as the express terms of the constitution and the statutes are concerned, the governor is no more exempt from *mandamus* or injunction than he is from any other action or proceeding in any of the courts, or than he is from any process, civil or criminal, issued by the courts. We believe that only four cases can be found in the reports of the supreme court of Kansas in which it has been sought by a judicial determination to control any of the acts of the governor. The first was the case of *State v. Robinson*, 1 Kan. 18. That was an application for a writ of *mandamus* to compel the board of state canvassers to canvass certain election returns. It does not appear that any question of jurisdiction was raised or thought of in that case, but the court decided the case upon its merits, and refused the writ. The second was the case of *In re Cunningham*, 14 Kan. 416, in which an application was made for a writ of *mandamus* to compel the governor, Thomas A. Osborn, to issue a patent for certain lands. It was understood at the time that the governor was willing to issue the patent if the supreme court said that it was his duty to do so, and the only question presented to the court, or decided by it, was whether such was his duty or not. The court held that it was not his duty, and refused the application. The third case was that of *State v. St. John*, 21 Kan. 591. In that case an alternative writ of *mandamus* was allowed. At first the defendant's counsel filed an answer disputing the jurisdiction of the court, but afterwards, the governor, by his counsel, expressly waived all question of jurisdiction, and the governor himself also personally desired that the court should hear and determine the case without reference to any question of jurisdiction, stating that he would obey the decision of the court, whatever it might be. The court heard and determined the case, and awarded a peremptory writ of *mandamus*; but no such writ was ever issued, as the governor immediately proceeded to act in accordance with the decision of the court, which rendered the writ unnecessary. The fourth case was the case of *Wilson v. Price-Raid Aud. Com.*, 31 Kan. 257, 1 Pac. Rep. 587. That case was a supposed appeal from the auditing commission to the supreme court. No question of jurisdiction was raised, but the court itself, for inherent defects and want of merits in the case, dismissed the same. There are a number of cases in which other state officers than the governor have been sued in the courts of Kansas. Two of such cases are the cases of *State v. Robinson*, above cited, and *Wilson v. Price-Raid Aud. Com.*, above cited. The other cases are as follows: In the case of *State v. Lawrence*, 3 Kan. 95, an application for a writ of *mandamus* was made to compel the defendant, as secretary of state, to issue a certificate of election to the relator. The question of the ju-

jurisdiction of the court to grant the same was raised, but the court decided in favor of its jurisdiction, and awarded a peremptory writ of *mandamus*. In the case of *State v. Board, etc.*, 4 Kan. 261, which board consisted of the state superintendent of public instruction, the secretary of state, and the attorney general, no question of jurisdiction was raised, and the court decided the case upon its merits, and refused to grant the writ of *mandamus* prayed for. In the case of *State v. Barker*, 4 Kan. 379, no question of jurisdiction was raised, and the court decided the case upon its merits, and awarded a peremptory writ of *mandamus* to compel the secretary of state to deliver to the relator copies of the recently enacted laws for the purpose that he might publish the same for the state. The case of *State v. Barker*, 4 Kan. 435, is similar to the case last cited, except that in this case it was held that the relator was not entitled to copies of the laws, and the writ of *mandamus* was refused. In the case of *State v. Anderson*, 5 Kan. 90, an injunction was prayed for against the state treasurer, and the case was decided upon its merits, and it was held that upon the facts the plaintiff was not entitled to the injunction. In the case of *Graham v. Horton*, 6 Kan. 343, an injunction was allowed in favor of Horton and against the state treasurer. In the case of *State v. Thoman*, 10 Kan. 191, a peremptory writ of *mandamus* was allowed against the auditor. The case of *Prouty v. Stover*, 11 Kan. 235, was tried upon its merits without any question of jurisdiction being raised, and the writ of *mandamus* prayed for was refused. The case of *Martin v. Francis*, 13 Kan. 220, was decided upon its merits without any question being raised with respect to the jurisdiction of the court, and the writ of *mandamus* prayed for was refused. In the case of *Francis v. Railroad Co.*, 19 Kan. 303, an injunction was allowed by the district court against the state treasurer, and the supreme court heard the case upon its merits, without reference to any question of jurisdiction, and decided that upon the facts of the case the railroad company, which was the plaintiff below, was not entitled to such injunction. In the case of *State v. Francis*, 23 Kan. 495, a peremptory writ of *mandamus* was allowed against the treasurer. In the case of *Crans v. Francis*, 24 Kan. 750, *mandamus* against the treasurer was in effect sustained. In the case of *State v. Francis*, 26 Kan. 724, injunction against the state treasurer was sustained. In the case of *Railroad Co. v. Howe*, 32 Kan. 737, 5 Pac. Rep. 397, injunction against the state treasurer was also sustained.

It would seem that the question as to whether the courts of Kansas may control any of the acts of the governor or not is still an open one. The question, however, whether the courts of Kansas may control any of the acts of the other members of the executive department or not, would seem, from the general practice of the bench and bar, and from the actual decisions of the courts, to have been settled in the affirmative. Of course this general practice and these decisions, with relation to the other members of the executive department, do not necessarily control with reference to the governor, for there is some room, under sections 1 and 3 of article 1 of the constitution above quoted, for a distinction to be made between the acts of the governor and the acts of the other members of the executive department; for while the executive department consists of the governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction, yet the governor is the supreme head thereof. In the other states there is a great conflict of authority as to whether any of the acts of the governor may be subject to judicial control or not. Upon the affirmative of this question the following, among other cases, are cited: *Railroad Co. v. Moore*, (*Mandamus*,) 36 Ala. 371; *Middleton v. Low*, (*Mandamus*,) 30 Cal. 596; *Harpending v. Haight*, (*Mandamus*,) 39 Cal. 189; *Governor v. Nelson*, (*Mandamus*,) 6 Ind. 496; *Baker v. Kirk*, (*Mandamus*,) 33 Ind. 517; *Gray v. State*, (*Mandamus*,) 72 Ind. 567; *MaGruder v. Swann*, (*Mandamus*,) 25 Md. 173; *Groome v. Gwinn*, (*Mandamus*,) 43 Md. 572; *Chamberlain v. Sibley*, (*Mandamus*,) 4 Minn. 309, (Gil.

228;) *Chumaseero v. Potts*, (*Mandamus*,) 2 Mon. 242; *Wall v. Blasdel*, (*Mandamus*,) 4 Nev. 241; *Cotten v. Ellis*, (*Mandamus*,) 7 Jones, (N. C.) 545; *State v. Chase*, (*Mandamus*,) 5 Ohio St. 528. A vast number of cases might be cited where the courts have held that the official acts of the members of the executive department other than the governor may be controlled by judicial determination. Upon the negative of the above question, the following cases are cited: *Hawkins v. Governor*, (*Mandamus*,) 1 Ark. 570; *State v. Drew*, (*Mandamus*,) 17 Fla. 67; *Low v. Towns*, (*Mandamus*,) 8 Ga. 360; *People v. Bissell*, (*Mandamus*,) 19 Ill. 229; *People v. Yates*, (*Mandamus*,) 40 Ill. 126; *People v. Cullom*, (*Mandamus*,) 100 Ill. 472; *State v. Warmoth*, (*Mandamus*,) 22 La. Ann. 1; *Dennet v. Governor*, (*Mandamus*,) 32 Me. 508; *People v. Governor*, (*Mandamus*,) 29 Mich. 320; *Rice v. Austin*, (*Mandamus*,) 19 Minn. 103, (Gil. 74); *Railroad Co. v. De Graff*, (*Mandamus*,) 27 Minn. 1, 6 N. W. Rep. 341; *Railroad Co. v. Lowry*, (*Mandamus*,) 61 Miss. 102; *State v. Governor*, (*Mandamus*,) 39 Mo. 389; *State v. Governor*, (*Mandamus*,) 25 N. J. Law, 331; *Hartranft's Appeal*, (Contempt,) 85 Pa. St. 433; *Mauran v. Smith*, (*Mandamus*,) 8 R. I. 192; *Turnpike Co. v. Brown*, (*Mandamus*,) 8 Baxt. 490.

There are other cases cited which hold that none of the acts of any of the officers belonging to the executive department can be controlled by the courts, among which cases are the following: *People v. Hatch*, (*Mandamus*,) 33 Ill. 9; *State v. Deslonde*, (*Mandamus*,) 27 La. Ann. 71; *State v. Dike*, (*Mandamus*,) 20 Minn. 363, (Gil. 314); *State v. Whitcomb*, (*Mandamus*,) 28 Minn. 50, 8 N. W. Rep. 902; *Secombe v. Kittelson*, (Injunction,) 29 Minn. 555, 12 N. W. Rep. 519; *Railroad Co. v. Randolph*, (*Mandamus*,) 24 Tex. 317; *Bledsoe v. Railroad Co.*, (*Mandamus*,) 40 Tex. 537; *Railway Co. v. Gross*, (*Mandamus*,) 47 Tex. 428; *Chalk v. Darden*, (*Mandamus*,) Id. 438. The principal ground upon which these last-cited cases were decided is that the officers against whom the court was asked to entertain jurisdiction were members of the executive department, the same as the governor, though not at the head as he is, and therefore that as the acts of the governor, in their opinion, could not be controlled by the courts because he is a member of the executive department, neither can the acts of any other officer of the executive department be so controlled. This same kind of reasoning, however, is used by the supreme court of California to prove that the acts of the governor in some instances may be controlled by the courts. *Harpending v. Haight*, 39 Cal. 189. In this case it is said in substance that if it be conceded that the governor, because he is the chief of the executive department, may for that reason be allowed to enjoy an absolute immunity from all judicial process, even when his duty in the given instance is only ministerial, and in a case where a citizen has a vested right to have such duty performed, then the same exemption from judicial process may be set up by any one of the other officers of the executive department. But it is held in that case that the other members of the executive department could not effectively interpose any such exemption, and, therefore, that the governor could not. It would therefore seem from two classes of decisions that the courts must hold, either that the courts may control some of the official acts of all the members of the executive department, including the governor, or that they cannot control any of the official acts of any one of such officers. In this state it has already been held that some of the official acts of some of the members of the executive department may be controlled by the courts, and therefore, if the above reasoning is sound, it would follow that some of the official acts of the governor might also be controlled by the courts. It would be proper here to say that no court ever attempts, by either injunction or *mandamus*, or by any other action or proceeding, to control legislative, judicial, executive, or political discretion; and never indeed attempts to control any pure legislative, judicial, or executive act of any kind, nor pure discretion of any kind, except when a superior court, on appeal, reviews a decision

of an inferior court; and courts generally do not interfere by injunction or *mandamus* where another plain and adequate remedy exists. The only acts of public functionaries which the courts ever attempt to control by either injunction or *mandamus*, are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Hence many of the above-cited cases, wherein it is said that the acts of executive officers of the state could not, in the particular instance under consideration, be controlled by the courts, are not in conflict with those decisions which hold otherwise; for many of such cases were decided upon the theory that the court was asked to control executive or political action, or discretion of some kind. If we should deduct all the cases decided upon the theory that the court was asked to control executive, political, or discretionary action, and not consider any of the *dictum* of such cases, and thereby leave only such cases as necessarily included a decision, (not *dictum*,) and decided that the courts could not in any case control any act to be performed by the governor, the weight of judicial authority would probably be that the courts may control any mere ministerial act to be performed by the governor.

The decisions holding that the courts cannot control any of the acts of the governor are based upon many different kinds of reasons. Some of such decisions, like the one in the case of *Hawkins v. Governor*, 1 Ark. 570, and the one in the case of *State v. Governor*, 25 N. J. Law, 331, are based upon the theory that all duties imposed upon the governor by the constitution are strictly and exclusively executive or political, and not ministerial, and therefore that the courts cannot interfere with the performance or non-performance by the governor of such duties. There are other decisions, like the one in the case of *Turnpike Co. v. Brown*, 8 Baxt. 490, and the one in the case of *State v. Drew*, 17 Fla. 67, which extend this principle, and hold that all duties imposed upon the governor by either the constitution or the statutes must necessarily be executive or political, and not merely ministerial, and this upon the theory that the mere act of conferring duties upon the governor, whatever their inherent natures or essences may be, renders them executive or political. It is said that, when they are conferred upon the governor instead of upon some inferior officer, they are so conferred because, in the opinion of the law-making power, founded presumptively upon sufficient reasons, the duties themselves, properly and peculiarly, if not necessarily, belong to the executive department, and that they are conferred upon the governor because of his superior judgment, discretion, sense of responsibility, and fitness; and therefore it is claimed that these duties must necessarily be executive or political, and not merely ministerial, whatever they may be in their inherent and essential characteristics. If this were true when the duties are conferred upon the chief of the executive department, why would it not also be true when such duties are conferred upon any other member of the executive department? Is not any particular power substantially the same wherever it may be placed? Judicial power in the hands of a justice of the peace is substantially the same as it is when placed in the hands of a supreme court. It may be admitted, however, that, with respect to some duties, and even with respect to some ministerial duties, a transformation might take place if such duties were transferred from an inferior officer and placed in the hands of the highest executive officer; for some ministerial duties embody within their confines slight elements of judgment and discretion; but can this be true with respect to all ministerial duties? Suppose that such duties in their very natures and essences are nothing more than the purest of ministerial duties, with no elements of judgment or discretion in them, and not in any manner connected with any legislative, judicial, or executive duty, and

are such duties only as could be conferred upon any other citizen of the state of Kansas; then why should they be considered as being transformed into executive or political duties by being conferred upon the governor? Would they not still be ministerial duties? The conferring of pure ministerial duties, like the above mentioned, upon the courts or the judges of courts, never transforms them into judicial duties; and, although *mandamus* will not lie to review or control judicial determination or discretion, yet it will lie to control any pure ministerial act of the courts or the judges thereof. *Duffitt v. Crozier*, 30 Kan. 150, 1 Pac. Rep. 69; High, Extr. Rem. § 230 *et seq.* Many years ago Chief Justice MARSHALL, in the case of *Marbury v. Madison*, 1 Cranch, 137, said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined." And such is the rule in all cases, unless the courts are required to make an exception in favor of the governor. In all other cases it is not the rank or character of the individual officer, but the nature of the thing to be done, which governs. No other officer is above the law, and every other officer, to whatever department he may belong, may be compelled to perform a pure ministerial duty. The objection oftenest urged against the courts' exercising control over any of the acts of the governor is that the three departments of government, the legislative, the judicial, and the executive, are separate and distinct, and that each is equal to, coordinate with, and wholly independent of the other. Now it is true, with some exceptions, that the legislature cannot exercise judicial or executive power, that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other or independent of each other, or that one of them may not in some instances control one of the others. The most of the jurisdiction possessed by the courts depends entirely upon the acts of the legislature, and the entire procedure of the courts, civil and criminal, is prescribed by the legislature. Nearly all the duties of the governor are imposed upon him by the legislature. The legislature may also impeach the governor or any other state or judicial officer mentioned in the constitution. The courts may construe all the acts of the legislature, whether such acts have been signed by the governor or not, and may determine whether they are in contravention of the constitution or not, and, if believed to be in contravention of the constitution, may hold them void. The courts may also determine that a supposed member of the legislature is not a member at all, because he represents no district; and may also determine that the legislature cannot consist of more than a certain number of members. *Prouty v. Stover*, 11 Kan. 235; *State v. Tomlinson*, 20 Kan. 692; *State v. Francis*, 26 Kan. 724. The courts may also pass upon the validity of the acts of the governor. *State v. Ford Co.*, 12 Kan. 441. It is also believed that the courts have the power to require the governor to attend a trial as a witness, and, if so, then have they not the further power to imprison him for contempt if he disobeys? And, if so, would not the courts then interfere with his ability to perform his executive duties? In such a case the state might have to rely upon the lieutenant governor. No act of the legislature can become a law unless it is presented to the governor for his signature and approval. The governor may also convene the legislature whenever he chooses. Also the legislature and the courts are able to perform their respective duties unmolested, because of the known power of the governor to call out the militia to aid and protect them in doing so, if necessary. It will be seen from the foregoing that the different departments of the government are not independent of each other. The power last mentioned, however, is also invoked as an argument against the courts' attempting to control any act or acts of the governor. It is said that, if the governor opposes the order or judgment of the court, it cannot be enforced; for it is said that

he has the entire control of the militia. But are the courts to anticipate that the governor may not perform his duties? Should not the courts rather presume that, when a controversy is determined by the courts,—the only tribunals authorized by the constitution or the statutes to construe the laws, and to determine controversies by way of judicial determination,—the governor, as the chief executive officer of the state, would see that such determination should be carried into full effect. Such would be his duty, and no one should suppose that he would fail to perform his duty, when his duty is made manifest by a judicial determination of the courts. No department should ever cease to perform its functions for fear that some other department might render its acts nugatory, or for fear that its acts might in some manner affect the conduct or *status* of some other department. Each department ought to do what is right within its own sphere, and presume that the other departments would do the same. The legislature is not bound to refrain from passing laws affecting the duties of the executive department, whether the governor approves them or not. The legislature may pass laws over the governor's veto, and this for the government of the executive department, and the legislature is not bound to anticipate that the governor might refuse to enforce such laws. Each department should scrupulously perform the duties peculiarly intrusted to its own department, without reference to how the same might affect the other departments. Besides, if this argument from the governor's control of the militia were carried to its full extent, it would prevent any court from ever issuing any subpoena, or any other writ or process to the governor, or from ever arresting him or ordering his arrest for any assault and battery, or for anything else, because the governor might in any such case refuse to obey the writ or the order of the court, and might call on the militia to assist him in his resistance.

Perhaps we should say something further with respect to the claim that the three great branches of the government, the legislative, the judicial, and the executive, are co-equal and co-ordinate, and that one cannot control or direct the others. This may be true to some extent, and yet, as we have already seen, it is not true in many cases. For the purpose of passing laws the legislature is supreme, and the other departments must obey. For the purpose of construing the laws, and of determining controversies, the courts are supreme, and the other departments must obey. And for the purpose of ultimately enforcing the laws the executive department is supreme, and the other departments must obey. But the executive department can enforce the statutory laws only as the legislature has enacted them, and, where the courts have construed the laws, (statutory or constitutional,) in the determination of controversies, the executive department can enforce them only as thus construed, and is bound to see that the laws as thus construed, and the judgments and orders of the courts rendered or made in the determination of controversies, are respected and obeyed. And will not the executive department do it? Will it refuse in any instance? It will thus be seen that while each of the different departments of the government is superior to the others in some respects, yet that each is inferior to the others in other respects, and it is always difficult to compare things which are wholly unlike each other, or to call them equal. Each department in its own sphere is supreme. But each outside of its own sphere is weak and must obey. It will be readily admitted that the courts cannot control any executive act of the governor, or any executive power conferred upon him. But may they not control ministerial power wherever placed? Is not ministerial power always inferior to judicial power, and subject to judicial control? The recipient of ministerial power exercises no judgment, no discretion, but is simply bound to obey the law under a given state of facts, and to construe this law, and to ascertain these facts, are peculiarly within the province of the courts. If an applicant for relief on the ground of the refusal to exercise, or the wrongful exercise of



ministerial power by the governor, has no remedy in the courts, then he has no remedy at all. The remedy of impeachment, and the remedy of subsequent elections, suggested by some of the courts, may be a remedy to the public in general, but it cannot be a remedy to an individual sufferer, for injuries or loss in person or to his property. In the case of *Marbury v. Madison*, 1 Cranch, 137, Chief Justice MARSHALL uses the following language: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." And further on in the same case, page 61, after stating that the courts cannot control executive discretion, the great chief justice uses the following language: "But when the legislature proceeds to impose on that officer (the secretary of state of the United States) other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts,—he is, so far, the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others." In the case of *Railroad Co. v. Moore*, 36 Ala. 382, the following language is used: "All this is but the result of the just and wholesome principle that no public functionary, whatever his official rank, is above the law, or will be permitted to violate its express command with impunity. While, therefore, it is true that, in regard to many of the duties which belong to his office, the governor has, from the very nature of the authority, a discretion which the courts cannot control, yet, in reference to mere ministerial duties imposed upon him by statute, which might have been devolved on another officer if the legislature had seen fit, and on the performance of which some specific private right depends, he may be made amenable to the compulsory process of the proper court by *mandamus*." In the case of *Ferguson v. Earl of Kinnoull*, 9 Clark & F. 290, Lord BROUGHAM used the following language: "But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey." Of course we should always presume that the governor intends to do his duty, but he may be mistaken as to the law, or he may not be sufficiently advised as to the facts upon which the applicant for relief founds his right thereto, and there is no way prescribed by law by which issues can be made up and tried before the governor, as issues are made up and tried before the courts. The courts are created for the express purpose of trying controversies, while the other departments and ministerial officers are not. It is also claimed that if the courts may control the ministerial acts of the governor, and may also determine which are ministerial acts and which not, then that the courts may determine everything, and obtain complete control over the entire executive department, including the governor. It must be remembered, however, that all controversies must be determined somewhere, and that the courts are the only tribunals created by the constitution and the laws for the special purpose of construing the constitution and the laws, and of determining controversies between parties; and the power to determine whether a given power is a purely ministerial power or not, and whether an applicant for relief in any particular case has a right to such relief, under the law creating such power, or not, comes peculiarly within the province of the courts. And a determination in such a case is purely judicial, and is one of the things for which courts were created, and they could not refuse their aid in such cases without so far wholly abandoning their duties, and abdicating their jurisdiction. As to the question whether the courts may control the ministerial acts of the governor, many of the cases, cited for the purpose of showing that they cannot, are not applicable, for no such question was involved in the facts of such cases. For instance: In the case of *Railroad Co. v. Lowry*, 61 Miss. 102, a writ of *mandamus* was prayed for only as

against the state treasurer, and no relief of any kind was sought as against the governor. In the case of *Low v. Towns*, 8 Ga. 372, the following language is used: "If, as has already been remarked, it was competent for the legislature to impose this ministerial duty, of issuing a commission to a clerk, on the executive officer of the government, wholly independent of, and in addition to the other functions devolved upon, that officer by the constitution, why may he not, when the performance of this ministerial act, so required by law, is essential to the completion and enjoyment of individual rights, be considered, *quoad hoc*, not as an executive, but as a merely ministerial officer, and therefore liable to be directed and compelled to perform the act by *mandamus*? Viewed as strictly a legal question, we cannot offer any satisfactory reason why he should not, according to the general principles of the law." The writ of *mandamus* asked for in that case was refused because of the want of the necessary facts to entitle the relator to it. In the case of *Sutherland v. Governor*, 29 Mich. 320, 322, 324, an application was made for a writ of *mandamus* to compel the governor to issue a certain certificate when he should be satisfied that certain work had been done in conformity with the law. In that case the following language is used in the opinion of the court: "If we concede that cases may be pointed out in which it is manifest that the governor is left to no discretion, the present is certainly not among them, for here, by the law, he is required to judge on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer, or department." In the case of *Hartranft's Appeal*, 85 Pa. St. 433, it was sought to compel the governor to disclose state secrets belonging only to the political department of the government. In the case of *State v. Governor*, 25 N. J. Law, 331, 343, 344, 348, a writ of *mandamus* was asked for to compel the governor to issue a commission to the relator, but there was no showing made that the relator had ever demanded such commission, or that the governor had ever refused the same, and the court held "that the applicant, upon the facts disclosed, is not entitled to the relief sought for," and also held that the court was "asked to direct the commission to be issued in direct conflict with the plain requirements of the act," which, of course, could not be done. In the case of *Mauran v. Smith*, 8 R. I. 192, 222, it was rightly held that whether the court had jurisdiction over any act of the governor or not, still that, upon the facts of that case, the relator was not entitled to the relief sought. These cases are given merely as illustrations of the inapplicability of many of the cases cited to show that the courts have no jurisdiction to control a ministerial act to be performed by the governor. On the other side, what is said in the case of *Chamberlain v. Sibley*, 4 Minn. 309, (Gil. 228,) as to the power of the courts to control ministerial acts of the governor, is only *dictum*. Upon the whole, however, if all the cases cited, except such as necessarily included the question whether the courts may in any case control the ministerial acts of the governor, be excluded, and if only such cases as include the above question be considered, then not only reason, but the weight of authority, we think, will be found in favor of the affirmative of the question. And certainly, as to all the executive officers, except the governor, the great weight of authority, state and federal, is in favor of the theory that ministerial acts to be performed by an executive officer may be controlled by the judiciary. If we are correct in our conclusions, then we have jurisdiction to hear and determine the present case upon its merits. We have jurisdiction to determine whether the acts of the governor sought to be controlled in the present instance are ministerial acts, or acts of some other kind or character, and we have jurisdiction to determine whether the facts of the present case authorize the relief sought.

We are really, however, considering two cases. The first presents to us the question whether the judge of the district court at chambers erred or not in granting a preliminary or temporary injunction, an injunction *pendente lite*.

The other case is *mandamus*, brought originally in this court, and it is submitted to us upon a motion to quash the alternative writ, and the question presented is whether the alternative writ states facts sufficient to constitute a cause of action in *mandamus*, and within the jurisdiction of this court. It will therefore be seen that, after deciding that we have jurisdiction of such cases, any further decision in either case will only be a decision of a preliminary or interlocutory character. After deciding that we have jurisdiction, then the remaining questions to be determined are whether the acts of the governor, in the organization of new counties, are ministerial or not, and whether the facts stated in either case are sufficient to authorize the relief sought. In the case of *State v. Commissioners*, 12 Kan. 441, 445, decided at the January term of this court in 1874, it was held that the acts of the governor in the organization of new counties, under the statutes as they then existed, were ministerial. Since that time the statutes have been materially changed in several particulars. The following provisions are new, and they are now in force: "Sec 3. That whenever the governor may have any reason to believe that said memorial, affidavits in the census enumeration or petition, or any of the proceedings required in section one of this act, are incorrect, fraudulent, or untrue, he is authorized and required to delay or refuse to issue his proclamation, and to institute an investigation by sending three disinterested householders of this state into such unorganized county, to ascertain the truth or falsity of such petition, memorial, census, or affidavits, and to order the attorney general to commence proceedings in the name of the state against any person or persons who may be guilty of violating any of the provisions of this act, or of any and all persons who may conspire together to fraudulently organize any county under this act." Laws 1876, c. 63, § 3; Comp. Laws 1885, par. 1402. "The census taker shall register upon said duplicate schedules, opposite the name of each legal voter, his election for temporary location of county-seat, which shall be taken by the governor as the definite expression of said voter, unless there shall be evidence before him that said list has been tampered with and changed." Laws 1887, c. 128, § 1. Now, while many of the duties imposed upon the governors in the organization of new counties, and possibly all of them except certain ones prescribed by the new provisions above quoted, are still ministerial, yet some of those duties prescribed by these new provisions are certainly not ministerial. Some of them relate to the investigation of supposed frauds, and precisely that kind of frauds which we are now asked to investigate in the injunction case, and, clearly, such duties are not ministerial. Hence, as some of the duties imposed upon the governor in the organization of new counties are ministerial, and some of them not, and, as the courts will not by *mandamus* or injunction control any of the acts of officers except such as are purely ministerial, and will not control even those when any other plain and adequate remedy exists, it follows that it must be shown clearly and conclusively in the particular case, that the acts of the governor sought to be controlled are not only pure ministerial acts, but also that no other plain and adequate remedy exists. Also, as we have already stated, all presumptions are in favor of the good faith and honesty of the governor. It will not only be presumed that he has in the past performed honestly and faithfully all his duties, but it will also be presumed that he will in the future honestly and faithfully perform the same; and these presumptions will continue until it is clearly, conclusively, and affirmatively shown otherwise; and, in favor of the chief executive officer of the state, these presumptions should be considered as of the strongest character; indeed, much stronger than any kindred presumptions in favor of inferior officers. These new provisions will not only affect the action of the governor in many cases, but may also affect the action of the courts in particular cases. Whenever, in the organization of new counties, the governor delays to act upon the return or report of the census taker, it must be presumed that some complaint

or notice of fraud or illegality has been brought to the attention of the governor, and that he delays action for the purpose that an investigation may be had; and the courts should not, by *mandamus* or otherwise, require the governor to act until it is affirmatively alleged and shown that no sufficient reason exists for such delay. No allegation of this kind is to be found in the alternative writ of *mandamus* in the present *mandamus* case, and hence the alternative writ is defective and insufficient. Also, when the governor is about to act upon the return or report of the census taker, it must be presumed that no complaint or notice of fraud, or other illegality worthy of attention, has been brought to the attention of the governor; and before the courts should attempt to restrain the governor from acting upon such return or report it should be affirmatively alleged and shown that a complaint of fraud, or other illegality worthy of notice, had been actually brought to the attention of the governor, and that he then disregarded and ignored such complaint. Also, as a general rule, all persons in cases of fraud, or other illegality, in the organization of new counties, have a plain and adequate remedy by resorting to the investigation provided for in said section 3, above quoted. If complaints of fraud or illegality have been made, an investigation may be had at once under that section, and, in the investigation that ensues, all parties have a plain and adequate remedy. In the present *mandamus* case no allegation is made that no complaints of fraud or illegality were brought to the attention of the governor, or that the governor is not delaying for the purpose that an investigation may be had; hence, for this reason, the alternative writ is insufficient. In the injunction case no allegation is made that any fraud or illegality or even irregularity of any kind has ever been brought to the attention of the governor, or that he would fail to regard the same if it were brought to his attention; hence the petition for the injunction is insufficient for that reason. If the fraud, and other irregularities, alleged in the petition in the injunction case, had been brought to the attention of the governor, and he asked to inaugurate an investigation of the same under said section 3, he would undoubtedly have done so. At least, it must be so presumed in the absence of allegations and proof to the contrary. Before parties can resort to the courts for a *mandamus* or an injunction, they must exhaust their other remedies, provided their other remedies are plain and adequate. This the plaintiffs, in the two cases which we are now considering, have failed to do. They have wholly ignored a plain and adequate remedy.

The motion to quash the alternative writ of *mandamus* will be sustained, and the order of the judge of the court below, granting a temporary injunction, will be reversed.

All the justices concurring.

(38 Kan. 501)

PATTEN *et al.* v. FLORENCE *et al.*

(Supreme Court of Kansas. February 13, 1888.)

1. ELECTIONS—CANVASSING BOARD—DUTIES.

It is the duty of the county clerk and board of county commissioners, when convened to determine the result of an election, to canvass all the poll-books of such election returned to the office of the county clerk.

2. SAME—DUTY TO ASCERTAIN GENUINENESS OF POLL-BOOKS.

It is the duty of the clerk and county commissioners to satisfy themselves that the poll-books returned are genuine; and when the only irregularity in returning them is that they were brought to the clerk's office in a sealed envelope, with the ballots cast at the election, which was indorsed as containing all the ballots cast, they ought to receive other evidence than such indorsement that the poll-books are in the envelope, and should open it, take out the poll-books, and canvass the returns as shown by them.

(Syllabus by Holt, C.)

Commissioners' decision. Original proceeding in *mandamus*

At the general election of November 8, 1887, the plaintiffs, Patten and McCord, were candidates, respectively, for treasurer and county clerk of Kiowa county, Kansas. At that election Addison Watson was the opposing candidate for treasurer, and J. H. Morrison for county clerk, of said county. The defendants were county clerk and county commissioners, at that time, of said county. They met as a canvassing board on the 11th of November, 1887, to canvass the votes cast at said election, and canvassed the votes cast in eight of the ten municipal townships in said county, but neglected and refused to canvass the votes cast in Reeder and Lincoln, the other two townships. The canvass of the votes of the eight townships showed that H. H. Patten received 707 votes for county treasurer, and A. Watson 652; and for county clerk McCord received 678 votes, and J. H. Morrison 686 votes. The commissioners declared Patten elected county treasurer, and Morrison county clerk. The vote of the two townships of Reeder and Lincoln would not have changed the result for treasurer, only to increase the majority for Patten. If the votes of these townships had been canvassed, McCord would have received in the aggregate in the county 745, and J. H. Morrison 730, votes; thus reversing, so far as the office of county clerk was concerned, the result as determined by the county commissioners. The county clerk and the two county commissioners gave as their reason for not canvassing the votes of Reeder and Lincoln townships that they did not have before them proper and sufficient returns of the election held in those townships. Upon the day following the general election, the proper officers of the respective townships of Reeder and Lincoln brought in the returns of their townships, the poll-books and the ballots, inclosed in a single package, and upon the back of each package was an indorsement showing that it inclosed all the ballots received at the election held in the respective townships. It was established that the county clerk and both of the county commissioners had actual knowledge that these packages inclosed the poll-books of the respective townships, as well as all the ballots received at the election. It is further claimed that McCord was not at the time of the election an elector of Kiowa county; and testimony is offered which develops about this state of facts: McCord first came to Kiowa county in the autumn of 1884, and remained there until the 19th of May, 1887. Then he, with his wife and child, being all the family he had, went to Arkansas, returning on the 18th day of June following, and has ever since resided in the county. His household goods remained at his residence on his farm in Kiowa county. He had sold his cattle and mules before leaving for Arkansas. There was some testimony tending to show that he said he left Kiowa to make his home in Arkansas with his wife's father. He denied it, and stated that he simply went there on a visit, with no intention of abandoning his residence in Kansas. Plaintiffs brought this action to compel the board to canvass the votes cast. J. D. Shephard, in obedience to the alternative writ of *mandamus*, appeared on the 17th day of December, 1887, at Greensburg, the county-seat of Kiowa county, at the office of the county clerk, to canvass the votes cast at the general election in the two townships in question; but the county clerk, and Fullerton, the other county commissioner, failed to appear, and no canvass was made.

*H. H. Patten and S. L. Bullard*, for plaintiffs. *Johnson, Martin & Keeler and Geo. P. Rush*, for defendants.

HOLT, C., (*after stating the facts as above.*) It is urged that the county clerk is not a member of the board of canvassers, and for that reason the writ prayed for should not issue against him. It is also contended, because the election returns were not placed before the county commissioners by the county clerk, they have never had an opportunity to canvass them, and therefore have never refused or neglected to perform their duty required of them by law. Neither of these claims are tenable. The county clerk has his duty plainly prescribed

by law, and he cannot evade it by stating that he is not one of the board of canvassers; nor can the county commissioners excuse themselves from the discharge of the functions of their office by showing that the county clerk did not first take from his files and open and bring the returns before them. Our statute provides that the county clerk *and* the commissioners of the county shall meet at the office of the county clerk, and shall proceed to open the several returns which shall have been made to that office. The county clerk and the county commissioners knew, as a matter of fact, that the poll-books of both Reeder and Lincoln townships were in the county clerk's office. There was no question of their accuracy; no doubt of their authenticity. They were put under cover, sealed, and properly brought there, except they were inclosed in an envelope or package with the ballots. This was the irregularity; "only this, and nothing more." The defendants say, however, they had no competent evidence to show that the poll-books were inclosed in such packages, as they were indorsed simply as containing all the ballots cast at the election in the respective townships from whence they came, and contend that they were not authorized to hear oral evidence, receive affidavits, or otherwise assume judicial powers to determine the contents of said packages. Of course, the board of canvassers are ministerial officers, with limited powers; but then they may satisfy themselves whether the returns in the office of the clerk are genuine or not, and can do so by evidence other than the indorsements upon the sealed packages before them. In this instance, a part of the judges of election of Lincoln and Reeder townships were before them, and they were certainly competent to testify that the packages indorsed as containing the ballots contained the poll-books also. They could have opened the packages, and found the poll-books at once; but the defendants say that they were forbidden by section 8, c. 36, Comp. Laws 1879, to open the envelopes containing the ballots. The portion of said section to which they refer is as follows: "The ballots, after being counted, shall be sealed up in a package, and be delivered to the county clerk, who shall deposit them in his office, where they shall be safely kept for twelve months; and the county clerk shall not allow the same to be inspected, unless in case of contested elections, or unless the same become necessary to be used in evidence, and then only on the order of the proper court." The good faith of the contention of the defendant Florence would be more apparent to this court if his objections had been made as suggestions to the officers bringing the envelopes to him at that time, rather than waiting until the day for canvassing the vote. The defendants claim to be very particular in the observance of the strict letter of section 8, even at the expense of losing sight of the real object and purpose of the election law. They seemed to be solicitous and tenacious of the technical exactions of the statute, but easily and readily omitted the weightier matters of the law. It appears almost redundancy to call attention to the oft-repeated and well-known truth that it is of the utmost importance that all votes cast shall be honestly counted, and the result determined from all the returns. It is the object and aim of all the provisions concerning the returning and canvassing the poll-books, tally-sheets, and ballots to determine who has received the highest number of votes cast. Section 29 provides: "\* \* \* Whenever it shall satisfactorily appear that any person has received the highest number of votes for any office, such person shall receive the certificate of election, notwithstanding the provisions of law may not have been fully complied with in noticing and conducting the election, so that the real will of the people may not be defeated by any informality of any officer." It seems to us like trifling with the provisions of this section to interpose the defendants' construction of section 8, in order to declare one elected who did not apparently receive the highest number of votes. We are pleased to know and gratified to declare that the law has a broader and fairer construction than that given it by the defendants. If it were possible to give it the narrow interpretation contended for,

we should be constrained to say that the law should be "not of the letter, but of the spirit; for the letter killeth, but the spirit giveth life." But does section 8, fairly construed, prevent, in a case like the one we are now considering, the opening of the envelopes containing the ballots, sealed, and sent to the county clerk by the judges of election? It provides, merely, that they shall be safely kept; not with unbroken seals, necessarily, but kept so that their identity may be proven easily. *Dorey v. Lynn*, 31 Kan. 758, 3 Pac. Rep. 557. It further provides that the county clerk shall not allow them to be inspected. We do not think there would have been an inspection of the ballots as contemplated by law—a careful and critical examination, that would have detected anything wrong with them, if any wrong existed—by merely opening the envelopes, taking therefrom the poll-books, and again sealing the ballots in the same envelope, openly, in the light of day, in the presence of all the members of the board, and the judges of the townships in question, and other citizens who were standing by. We do not care to pursue this matter further. The county clerk and county commissioners refused to perform their plain duty.

We believe the plaintiff McCord was an elector of Kiowa county at the date of the election, his residence dating from the autumn of 1884. We would recommend that a peremptory writ of *mandamus* be awarded, at the cost of defendants Florence and Fullerton.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 578)

STATE *ex rel.* ATWOOD, Co. Atty., v. HUNTER.

(*Supreme Court of Kansas*. February 11, 1888.)

1. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—METROPOLITAN POLICE ACT.

The metropolitan police act (chapter 100, Laws 1887,) which provides that the executive council shall appoint a board of police commissioners, is not for that reason invalid, nor does it contravene the constitution by delegating legislative power to the executive council.<sup>1</sup>

2. SAME—SPECIAL LEGISLATION.

Neither is the act for that reason obnoxious to the constitutional limitation forbidding special legislation.

3. STATES AND STATE OFFICERS—EXECUTIVE COUNCIL—APPOINTMENT OF POLICE BOARD—PETITION.

Under section 1 of the act, the executive council is required to appoint a board of police commissioners for any city of the first class in the state whenever 200 *bona fide* householders of such city, having the qualifications of electors, petition therefor.<sup>2</sup>

(*Syllabus by the Court*.)

Original proceeding in *quo warranto*.

<sup>1</sup> A law of a state conferring authority upon a municipality to be exercised at its discretion, is not a delegation of legislative power, *City v. Hillis*, (Iowa,) 8 N. W. Rep. 688; nor a law left to the vote of the city to determine whether its provision should go into effect, *State v. District Court*, (Minn.) 22 N. W. Rep. 625; nor an act which provides that any county or town or city of a certain class may by a majority vote put such county, city, or town under its operation. *State v. Pond*, (Mo.) 6 S. W. Rep. 469.

<sup>2</sup> The classification of cities into classes on the basis of population, and the passage of laws applicable thereto, are not void as local or special legislation. *State v. Graham*, (Neb.) 19 N. W. Rep. 470. For a definition of a special act, see *City v. Gillett*, (Kan.) 4 Pac. Rep. 800. The fact that a law may be accepted in one county, and not in another, and in consequence of this a person might be punished in one county, and not in another, does not invalidate it. *State v. Pond*, (Mo.) 6 S. W. Rep. 469; *Marmet v. State*, (Ohio,) 12 N. E. Rep. 463. A law operating throughout a state upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation. *State v. Berka*, (Neb.) 80 N. W. Rep. 287.

This is an original action in the nature of *quo warranto*, brought in the name of the state by the county attorney of Leavenworth county, to remove J. H. Hunter from the office of police judge of the city of Leavenworth. The petition alleges that Leavenworth is a city of the first class, and that on or about the 1st day of April, 1887, J. H. Hunter unlawfully usurped and intruded himself into the office of police judge of that city, and ever since that time has unlawfully held and exercised the duties of the office, without any legal or constitutional right so to do; and it closes with a prayer that he be ousted therefrom. The defendant filed the following answer: "And now comes the defendant, J. H. Hunter, and for his answer to the petition herein says that he admits that J. H. Atwood is the county attorney of said county of Leavenworth; that the city of Leavenworth is a city of the first class, as alleged in said petition; and that the office of police judge of said city was an office existing by virtue of general laws of the state of Kansas applicable to cities of the first class. Defendant further avers, in pursuance of an act of the legislature of the state of Kansas entitled 'An act providing for the police government of cities of the first class through a board of police commissioners appointed by the executive council; also for a similar government for cities of the second class, in certain contingencies,' approved March 11, 1887, the executive council of this state duly appointed a board of police commissioners for the city of Leavenworth, consisting of three members, who thereupon qualified, and are still such commissioners: that said appointment was made in pursuance of a petition of two hundred *bona fide* householders of said city having the qualifications of electors, duly presented to said executive council, praying for the appointment of such police commissioners, which said petition duly represented to said executive council that the laws of the state of Kansas against the illegal sale of intoxicating liquors were not being enforced in said city of Leavenworth, and that the then police force of the said city of Leavenworth was making no effort to enforce said laws, which said representation was in fact true; that on the 11th day of March, A. D. 1887, said board of police commissioners duly appointed the defendant police judge of said city, as will more fully appear by the commission issued to him,—a copy of which is attached hereto as part hereof; that the defendant thereupon duly qualified as police judge under such appointment, and gave bond, which was approved by the mayor and council of said city; that the office and the records thereof were thereupon duly surrendered to defendant by James P. Stinson, who was at that time the police judge by virtue of an election in pursuance of the laws relating to cities of the first class, said laws being more commonly designated as the charter of such cities; that thereupon the defendant assumed the duties of his said office, and has ever since exercised the same; and that there is no other person who claims, or assumes to be entitled to, the powers of said office. And said defendant further avers that he holds said office of police judge only as above stated, and avers that he is lawfully entitled thereto, and denies that he usurped or intruded into the same. Wherefore he prays judgment that he go hence without day, and have and recover his costs herein." To this answer the plaintiff filed a demurrer, upon the ground that said answer did not state facts sufficient to constitute a defense, and which alleged that chapter 100, Sess. Laws 1887, under which the defendant justifies, is unconstitutional and void.

*J. H. Atwood*, Co. Atty., *Lucien Baker*, and *Thomas P. Fenlon*, for plaintiff. *S. B. Bradford*, Atty. Gen., *Wm. Dill*, and *W. C. Hook*, for defendant.

*JOHNSTON, J.*, (after stating the facts as above.) By this proceeding the plaintiff challenges the right of J. H. Hunter to hold the office of police judge in the city of Leavenworth, and to perform its duties. The obvious purpose of the action, however, is to obtain a determination of the constitutionality of the statutory enactment entitled "An act providing for the police govern-



ment of cities of the first class through a board of police commissioners appointed by the executive council, and also for a similar government for cities of the second class, in certain contingencies," approved March 2, 1887. The act provides that the executive council shall, upon the petition of 200 *bona fide* householders, or when the council shall deem it advisable for the better government of such cities, appoint a board of police commissioners. It also provides that the police commissioners so chosen shall immediately appoint a police judge, a marshal, chief of police, and other police officers, and it vests the board with the entire control of the police force of the city, its organization, government, and discipline, as well as the property of the city belonging to the police department. Sess. Laws 1887, c. 100. A petition signed by 200 *bona fide* householders of the city of Leavenworth was presented to the executive council, representing that the laws of the state of Kansas against the illegal sale of intoxicating liquors were not enforced in that city, and that the then police force was making no effort to enforce the laws; and asking for the appointment of police commissioners. The executive council granted the petition, and duly appointed a board of police commissioners, which board immediately qualified, and appointed the defendant as police judge. The right of the defendant to the office rests solely upon this appointment and the validity of the law under which it was made. It is asserted that the statute is repugnant to the constitution and invalid, for several reasons.

The point has been made, though not much contended for, that police government by commission is illegal. In effect, it is said to be opposed to the fundamental theory of self-government, and denies to the people of the district the right to select their own officers from among their own number. Whatever may be said regarding the policy of placing the police administration of cities in a board of police commissioners who are chosen by state officers rather than through the electors of the cities, there can be no doubt that the legislature has the power to do so. The constitution imposes no limitations upon the legislature in respect to the agencies through which the police power of the state shall be exercised. It may be conferred upon the officers of local municipalities chosen by the people resident therein, or, if deemed expedient, it may be vested in officers or persons otherwise selected. Cities are but agencies of the state, created to aid in the conduct of public affairs. The functions of cities and their officers are prescribed by the legislature, and it rests in the sovereign discretion of that body to say how much of the police power shall be exerted by the municipality. Although such power is usually exercised by the local authorities, police administration is not, in its nature, exclusively local. The people of the whole state are interested in preserving peace and good order, and preventing crime, in every city and district of the state, and in protecting the property, health, and lives of all its citizens. With reference to the duty of the state in this regard it has been well said that "no duty is more general and all-pervading than this. It extends alike to towns and cities as to the country. It looks to the preservation of order and security in the state, at elections, and at all public places; the protection of citizens, strangers, travelers at railway stations, at steam-boat landings; the enforcement of the laws against intemperance, gambling, lotteries, violations of the Sabbath; and, in fine, the suppression of all those disorders which affect the peace and dignity of the state, and the security of the citizen. The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the state, and not of the municipalities for which they are appointed or elected." *Burch v. Hardwicke*, 30 Grat. 38. A clear and well-recognized distinction exists between these matters, which concern the state at large, and those which are of a purely local and corporate character. In pointing out this distinction, Judge Dillon says that "the administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public

concern; while the enforcement of municipal by-laws proper, the establishment of gas-works, of water-works, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large." 1 Dill. Mun. Corp. § 58. The authorities which draw its distinction are numerous and uniform, only a few of which need be cited: *People v. Hurlbut*, 24 Mich. 81; *People v. Draper*, 15 N. Y. 532; *People v. Detroit*, 28 Mich. 228; *Chicago v. Wright*, 69 Ill. 326; *Britton v. Steber*, 62 Mo. 370; *Cobb v. City of Portland*, 55 Me. 381; *Buttrick v. City of Lowell*, 1 Allen, 172; *People v. Lynch*, 51 Cal. 15. The statute we are examining provides that the police commissioners shall be householders and electors of the city for which they are appointed, and shall have been for "at least three years next prior to their appointment, and one of whom shall be of opposite politics from the other two." So that the police government of the city is localized and placed in the control of its own people, and of those who are substantially interested in its welfare. It is true, the appointment of the police commissioners is made by the executive council, a body composed of state officers. These officers, however, are elected by the state at large, including the people of the cities who come within the operation of this statute; and in making the appointments of police commissioners such officers act as the agents of the people of these cities, as they do for the whole people of the state. We have seen, however, that the police is a matter of state, instead of local, concern, and, while the power may be intrusted to local municipal agencies and officers, it is nevertheless a matter of state policy, and subject to immediate state control. Acting upon this principle, the legislatures of several states have enacted laws somewhat similar to ours, and the police control of many of the large cities of the country is confided to boards of police commissioners, whose powers come directly from the state. Some of these laws have been assailed on the ground that they were inconsistent with the theory of self-government, and for other reasons; but they have generally been upheld, as ours must be, so far as that objection is concerned. *People v. Draper*, 15 N. Y. 532; *People v. Mahaney*, 13 Mich. 481; *Baltimore v. Board, etc.*, 15 Md. 376; *Commissioners v. City of Louisville*, 3 Bush, 597; *People v. Draper*, 25 Barb. 344; *Diamond v. Cain*, 21 La. Ann. 309; *Burch v. Hardwicke*, 30 Grat. 24.

It is further contended that the statute is unconstitutional, because it delegates legislative power to the executive council. It is argued that as the law does not go into operation in any city until the executive council act by making appointments of police commissioners, and its operation may afterwards be suspended by the council, the legislature has abdicated its functions, and has attempted to confer on the executive council law-making power, possessed only by the legislature. The constitution confers the law-making power upon the house of representatives and senate, and the power thus vested cannot be surrendered to any other body or person, except as to local administrative legislation, which all agree may be delegated to corporations and tribunals transacting the county business. The act in question, however, does not, in our opinion, confer any legislative power on the executive council. It came from the legislature, formal and finished. The executive council is not authorized, and cannot add to or take from the act a single provision or word. The expediency of the law, the classes of cities which may be brought within its provisions, the contingency upon which its operation depends, have all been determined and expressed by the legislature. The action of the executive council, taken upon the petition of the householders, is the contingency upon which the operation of the law depends. When this contingency arises, the law, positive and detailed in its provisions, takes effect. It provides in mandatory form the powers and duties to be exercised and performed by the police commissioners, the length of term which they shall serve, and the salary which they shall receive. It prescribes the subordinate

police officers to be appointed by the board, and the control and supervision to be exercised over them. It directs when the sessions of the board shall be held, vests them with the entire control and government of the police officers, and of the property connected with the police department, and authorizes them to audit all claims against that department, and certify them to the mayor and council for payment. It then provides that the mayor and council shall provide, at the expense of the city, all necessary accommodations for the sessions of the board, and to provide a police court-room, station-houses, and prisons; and it provides for the monthly payment of the police officers upon the certificate of the board, and also for such office expenses, record-books, stationery, telegraphing, badges, clubs, and the repair and cleaning of police buildings, as may be necessary. It further provides that neither the mayor nor council, nor any officer appointed by them, shall have any government of the police officers; and that any one who interrupts or interferes with the board or any of the officers appointed by them, while in the performance of their duty, shall be guilty of a misdemeanor, and subject to punishment. It provides that the officers to be appointed shall be qualified electors of the city; and limits within which salary may be allowed to these officers by the board are prescribed. Provisions are made that the fines and forfeitures collected by the police judge for violations of the laws of the state shall be paid into the county treasury, and that fines and forfeitures collected for violations of the city ordinances shall be paid into the city treasury. The condition on which the law is to go into operation in a city of the second class is then prescribed, which is a judgment of ouster in a *quo warranto* proceeding, brought by the state against the mayor and council of a city of the second class, based upon a finding of the court that the city has, by means of licenses, pretended to authorize, or by simulated fines and forfeitures attempted to foster and encourage, the illegal manufacture or sale of intoxicating liquors, or has shielded offenders against the laws of the state relating to the manufacture or sale of intoxicating liquors, or has refused or habitually neglected to require the police officers to perform their duties under such laws. When the governor receives a certified copy of the judgment, he is required forthwith to call a special session of the executive council, unless it shall be within two days' time of the regular session; and at such special or regular meeting the executive council is required to appoint a board of police commissioners for such city. It is provided that the police government administered under the act shall supersede all other acts or ordinances of the city so far as they are in conflict or inconsistent with it, and shall continue in force until suspended by the executive council in a manner which is provided for.

We will not undertake to name all the provisions of the act, but enough have been mentioned to show the character and completeness of the legislation. In the act it is specifically provided that it shall go into effect and be in force from and after its publication. It has been passed in constitutional form, approved by the governor, and officially published, and is, therefore, in effect throughout the state, and in all cities that are brought within its operation by the happening of the contingency provided for in the act. The validity of laws, the operation of which are made to depend upon the occurrence of some future event or contingency, certain or uncertain, cannot well be doubted. That contingency may be the vote or petition by a certain number of people to be affected by the law, or some expression or act of their representatives or agents, or it may arise upon the act or will of some third person. Indeed, an infinite variety and number of events or contingencies might be named that the legislature might adopt. Chief Justice REDFIELD, of the Vermont supreme court, in treating on this subject, said: "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and legal one, not opposed to

sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. \* \* \* One may find any number of cases in the legislation of congress where statutes have been dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or, it may be, by the people of these states, and, in other words, by the lords of the treasury, or the boards of trade, or by the proclamation of the sovereign; and in all these cases no question can be made of the perfect legality of our acts of congress being made dependent upon such contingencies." *State v. Parker*, 26 Vt. 365. But we need not look outside of our own state to find precedents for conditional legislation. Numerous instances may be found where the operation of our laws is made dependent upon the expressed will of the people or their representatives, the will or act of third persons, or some other anticipated contingency. An example of such legislation is the night herd law, (Gen. St. c. 105, § 1 *et seq.*), which provides that it shall be brought into operation in any one of the townships of the different counties of the state upon an order of the board of county commissioners, to be made whenever a majority of the qualified electors in any township shall petition the board to make such order. The order may require that all persons within the township owning domestic animals of any kind shall keep them confined in the night-time for certain portions of the year. Thus the board of county commissioners is authorized to put in operation a law which, in a certain sense, supersedes and suspends a general one; and it continues in force until it is modified or set aside by the same board. The validity of this act was questioned upon the ground that it delegated legislative discretion to the county commissioners, and the same arguments were urged against it as are made against the metropolitan police law. The court overruled the objection, and held the act to be constitutional. *Noffziger v. McAllister*, 12 Kan. 315. A similar law, providing for the regulation of the running at large of animals, was enacted. Laws 1872, c. 193. It provided that the board of county commissioners might determine and direct by an order what animals should not be allowed to run at large within the bounds of the county. It authorized the allowance of damages to any person injured by the running at large of any of the animals prohibited by the order, and gave a lien on such animals for the damage done. This act is put in operation in any county, at the will of the county board, without a vote, or even a petition, of the people; and yet, when its validity was challenged on the ground that it delegated legislative power to the board, it was sustained. *Keyes v. Snyder*, 15 Kan. 143. The same principle is found in the various acts that have been passed authorizing municipalities to issue their bonds in aid of the construction of railroads, and in exchange for the stock of the railroad companies. The operation of these acts are conditioned upon a vote of approval by the people, and can have no effect or operation in the municipality until an affirmative vote is had. The validity of these acts has frequently been considered and sustained. *Railroad Co. v. Commissioners*, 18 Kan. 184, and cases there cited. The dram-shop act of 1868, which authorized the granting of a license upon the petition of a majority of the male and female residents of the township, city, or town, involved the same principle, and was held to be constitutional. The hedge law, (Comp. Laws 1879, c. 40, § 36,) and the various acts providing for the location of the seat of county government, are of the same character,—that is, their operation depends upon a vote of the people; and they have been sustained. Then there are the acts of the legislature which provide that cities of the third class may be transferred to the second class, and those of the second class transferred to cities of the first class, upon proclamation of the governor. Laws 1881, c. 37, § 1; Laws 1872, c. 100, § 1. Under this legislation, the operation of laws which before that time had governed cities is suspended by the proclamation of the governor, and such cities

thus advanced to a higher class are by the same act made subject to a new code of laws; and yet no one has been bold enough to assert that this legislation was invalid for the reason that it delegated legislative power to the governor. A notable example of such legislation is found in the retaliatory provision of our insurance laws. Comp. Laws 1879, c. 50a, § 17. It provides, when the laws of any other state imposes upon the insurance companies of this state applying to transact business within its limits other and more onerous burdens and conditions than those prescribed by our own statute against foreign insurance companies, that the same burdens and conditions shall be imposed upon the insurance companies from that state applying to do business in this; thus making the operation of the law in this state dependent upon the action of the legislature of another state. The constitutionality of this provision was vigorously assailed, because it was made to depend upon a contingency, and was not, therefore, a complete expression of the legislative will. *Insurance Co. v. Welch*, 29 Kan. 672. In that case the question before us was carefully considered, and the validity of the act sustained. In pronouncing the judgment, Justice BREWER remarked that "our laws abound in cases in which a statute is made dependent upon the action of some tribunal or body, or upon some other contingency, and is therefore practically dormant until such action takes place, or contingency happens." And so we might refer to the laws for the establishment of highways, the erection of county buildings, the drainage of swamp or low lands, and many others; but sufficient have been mentioned to show that such legislation is not unusual in this state, nor the question before us a new one in this court. The courts of other states have frequently upheld similar laws; and of this class of legislation perhaps the local option laws, so called, have been the subject of more discussion and judicial decision than any other. At first, there was some diversity of opinion regarding the validity of these laws, but it may now be said that there is substantial unanimity among the courts in sustaining these and like legislation. *Locke's Appeal*, 72 Pa. St. 491; *State v. Wilcox*, 42 Conn. 364; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Weller*, 14 Bush, 218; *State v. Noyes*, 30 N. H. 279; *Bancroft v. Dumas*, 21 Vt. 456; *State v. County of Morris*, 36 N. J. Law, 72; *Caldwell v. Barrett*, 73 Ga. 604; *Fell v. State*, 42 Md. 71; *Railroad Co. v. Commissioners*, 1 Ohio St. 77; *Bull v. Read*, 13 Grat. 78. The same question has been recently examined by the supreme court of Missouri, and after a thorough and elaborate consideration it determines that a law which goes into operation and is made dependent on a discretionary contingency is not invalid. *State v. Pond*, 6 S. W. Rep. 469. The action of the executive council is but the contingency upon which the operation of this law depends. The officers composing the council are to a certain extent chosen by and for the people of the cities for whom they act. In a certain sense they are their representatives or agents in putting or continuing the law in operation. They do not enact or give efficacy to the law, but it rather gives power to them and vitality to their acts; and we conclude that it was within the power of the legislature to make the operation of the law depend on the contingency of the action of the executive council, and that it is not repugnant to the constitutional objection that legislative power is delegated to the executive council.

It is finally urged that the act is in contravention of the provision of the constitution which requires the enactment of general laws where they can be made applicable, and that they should have uniform operation throughout the state, (article 2, § 17,) and of those provisions in article 12 of the constitution providing that cities shall be organized by general laws, and forbidding the passage of any special act conferring corporate powers. The claim is presented with considerable plausibility and force that the operation of the law rests solely in the discretion of the executive council, and that, as they may put the law in operation in one city and not in another, it is special legisla-

tion. It will be observed that the law is general in form, and may be made applicable to all cities of the first class, and also to those of the second class when a certain condition of things exist. If it is assumed that the operation of the law depends solely upon the discretion of the executive council, it still is not clear that the act falls within what is known as special legislation. It is not necessary that a law should operate upon all cities of the state to be constitutional. If it is general and uniform throughout the state, operating upon all of a certain class, or upon all who are brought within the relations and circumstances provided in the act, it is not obnoxious to the limitation against special legislation. It belongs to the legislature to make the classification, and while it cannot so classify them as to make the law special in its application and results, yet many classes may properly be made. It need not be restricted to the population of the municipality, but it would seem that it might be based on the conduct or condition of the people resident therein. If it may be so made, and the council shall put the act in operation whenever it may be necessary to do so in order to secure good government and an orderly administration of law, can the act be said to be special? It is true, that the form or profession of an act does not control, and, although it is general in form and pretense, if it necessarily produces a special result it cannot be upheld. "If, on the other hand, the act has room within its terms to operate upon all of a class of things, present and prospective, and not merely upon one particular thing, or upon a particular class of things existing at the time of its passage, the act is general." *City of Topeka v. Gillett*, 32 Kan. 436, 4 Pac. Rep. 800. Upon the assumption that the executive council is given absolute discretion to enforce the act, has it not room within its terms to operate upon all of a class? There is room to apply it to every city of the first class; and is it less general or valid than those acts which go into force in a community upon the discretion or vote of a majority of the electors, or upon the mere will of the board of county commissioners? These laws are held to be valid, and yet the discretion of the voters, the petitioners, or the persons upon whom the operation of these laws depend, is as arbitrary and absolute as that claimed to be conferred upon the executive council by the terms of this law. Are the application and results any more special or wanting in uniformity in this law than in those referred to? We need not, however, determine the question upon this claim or assumption, or decide whether the act would be valid if arbitrary discretion was vested in the executive council. As we interpret the language employed authorizing the executive council to appoint police commissioners, the authority is not wholly discretionary, but they are required to appoint whenever 200 or more *bona fide* householders of the city having the qualifications of electors petition them to do so. The provision conferring the authority is involved and ambiguous, and requires interpretation. It reads: "The executive council shall appoint a board of police commissioners, to consist of three members, for each city of the first class in this state, if considered expedient, and upon the presentation of a petition of two hundred *bona fide* householders of such city having the qualifications of electors, or when said executive council shall deem it advisable or necessary for the better or more perfect government of such city." The difficulty arises from the use of the words "if considered expedient," preceding those concerning the presentation of the petition. To hold the authority of appointment to be wholly within the discretion of the executive council is, in effect, to disregard the language which authorizes the householders and electors to petition the council for the appointment of police commissioners. Not only that, but it discards the subsequent words in the same sentence, which provide that the executive council may appoint when they shall deem it advisable or necessary. It would involve an absurd repetition, and impute to the law-makers the supreme folly of substantially saying that "the executive council shall appoint a board of police commissioners when they deem it expedient, or when

said executive council shall deem it expedient they shall appoint a board of police commissioners." That view not only charges the legislature with foolishness, but it gives no effect to a considerable, and what was manifestly intended to be an important, part of the statute. Statutes are to be construed according to the intent of the legislature, and an important guide by which to ascertain the intention is the language used; but an equally sound rule of construction requires that every part and word of a statute shall, if possible, be given effect. This statute admits of the interpretation that, if the householders and electors deem it expedient, and 200 or more of them petition for the appointment of police commissioners, it shall be made; or the executive council may appoint on their own motion, if they deem it advisable or necessary for the better and more perfect government of the city. This construction is a reasonable one, which gives effect to all the words of the provision, and does not lead to an absurdity, as would the other. We conclude, then, that the council is required to appoint a board of police commissioners whenever a proper petition is presented; and therefore the most serious objection urged against the act is removed and taken out of the consideration. In the present case the appointment was made upon the requisite petition, and it will be time enough to determine the validity of the discretionary provisions of the act when the executive council assume to exercise discretionary power. Even if these provisions are invalid, the main body and remainder of the act is not so mutually connected and dependent on the discretionary provisions as to effect its validity, or to render it inoperative. Subsequent legislation may remedy defects in that respect, if any exist. In examining and in sustaining the validity of the act, we have kept in mind the well-established rule that whenever a statute can be so construed as to avoid conflict with the constitution, that construction should be given. In the language of Justice WASHINGTON: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat. 213. Although we are not free from doubts upon some of the points of invalidity presented, they are not of such a character as would warrant us in striking down and nullifying a formal act of legislation; and therefore the demurrer to the answer must be overruled, and judgment go in favor of the defendant.

All the justices concurring.

(88 Kan. 593)

STATE *ex rel.* BRADFORD, Atty. Gen., v. CITY OF KANSAS CITY.

(*Supreme Court of Kansas*. February 11, 1888.)

1. CONSTITUTIONAL LAW—METROPOLITAN POLICE ACT.

The metropolitan police law held valid. Following *State v. Hunter*, ante, 177.

2. MANDAMUS—TO COMPEL CITY TO PAY SALARIES OF POLICE OFFICERS.

*Mandamus* will not lie to compel the mayor and council of a city subject to the operation of the metropolitan police law to appropriate money and pay the salaries and claims of the officers and servants appointed and employed by the police commissioners of such city. Such salaries and claims are mere debts against the city, the collection of which may be enforced in an ordinary action.

(*Syllabus by the Court*.)

Original proceeding in *mandamus*.

This is an original proceeding in *mandamus*, brought by the attorney general, in the name of the state, to compel the mayor and council of the city of Kansas City, Kan., to appropriate the necessary amount, and to pay the persons employed by the police commissioners of that city as policemen, police officers, and servants of the police department for their services rendered to the city in the police government thereof. An alternative writ was allowed, which sets forth that Kansas City, Kan., is a city of the first class; that on or about the 6th day of April, 1887, the executive council of the state of Kan-

sas appointed W. A. Simpson, R. W. Hilliker, and G. W. Bishop, police commissioners of that city; that they immediately qualified and entered upon the discharge of their duties, and appointed a marshal and policemen for the purpose of administering the police affairs of the city; that on or about the 6th day of September, 1887, the police commissioners certified to the mayor and council the names of the persons appointed and employed, the salary and remuneration each was to receive for his services, and the amount due to each person for his services as policeman, police officer, or servant of the police department for the month of August, 1887; that said several sums aggregated \$1,128; that on or about the 4th day of October, 1887, the said police commissioners made, executed, and delivered to the mayor and council a statement showing the names of the persons employed, the compensation each was to receive, and the amount due and unpaid to each person for the month of September, 1887, and that the several sums aggregated \$1,160; that on or about the 6th day of November, 1887, the police commissioners made and delivered to the mayor and council a like statement for the month of October, 1887, and the amount stated to be due for services was \$1,180; that on or about December 6th, 1887, the police commissioners delivered another statement, duly certified to, showing the amount due for services in the police department for the month of November, 1887, to be \$1,265.67. It is then alleged that the mayor and council have neglected and refused, and still do, to pass an ordinance appropriating the amount necessary to pay the persons employed by the police commissioners for services rendered to the city in the police government thereof. It is also stated that there was in the city treasury at the time of the meeting, in September, 1887, and in the general fund thereof, the sum of \$4,287.67; that at the time of the meeting, in October, 1887, there was in the city treasury the sum of \$2,878.51; that at the time of the meeting, in December, 1887, there was in the general fund of the city treasury the sum of \$7,891.92; but that, notwithstanding the fact that there was sufficient money in the treasury with which to pay the police officers, policemen, and servants of the police department, the mayor and council had refused, and still neglect and refuse, to make any appropriation for their payment. It is also stated that the police force has been efficient, and by its effort and efficiency has placed in the city treasury the sum of \$8,257.70; that of the persons arrested by the police force and convicted of offenses charged against them, and confined in the city prison, there has been collected in the form of work upon the streets of the city the sum of \$1,895.60; that the revenue brought to the city by the efficiency of the police force is greater than the expenses necessary in maintaining the same. The defendants demurred to the alternative writ of *mandamus* upon the following grounds: "First. The said writ does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants. Second. The state of Kansas is not the real party in interest, and the attorney general has no power or authority to prosecute this action against the defendants. Third. The statute under which said police commissioners and policemen mentioned in said alternative writ pretended to act as such is unconstitutional and void."

S. B. Bradford, Atty. Gen., for plaintiff. W. S. Carroll and Hutchings & Keplinger, for defendants.

JOHNSTON, J., (*after stating the facts as above.*) Two principal questions are presented for decision by the defendant's demurrer: *First*, is the metropolitan police act, under which the police officers and servants of Kansas City, Kan., were appointed, employed, and acting, constitutional? and, *second*, will the remedy of *mandamus* lie to compel the mayor and council to pay the salaries of the officers and servants of that city? The first point has been determined adversely to the contention of the defendant, in the recent case of *State v. Hunter*, ante, 177, in which the constitutionality of the act was sug-



tained; and it is needless to repeat here the reasons for that ruling. The second point must be ruled in favor of the defendant. All that is sought by the proceedings is to enforce the payment of the salaries and claims of the officers and servants of the city. Their claims are not unlike those due from the city to any ordinary creditor, and hence there is no occasion to invoke the extraordinary aid of the courts by *mandamus*. *Mandamus* is one of the extraordinary writs, and is never issued where there is a plain and adequate remedy in the ordinary course of the law. An eminent author, in treating of this subject, says: "In conformity with the general rule, it is held that *mandamus* will not lie to municipal authorities requiring them to pay salaries which are due from the corporation to its officers, a salary being regarded as an indebtedness of the corporation, which may be enforced by action of *assumpsit*; and *mandamus* is not designed as a remedy for the collection of debts." High, Extr. Rem. § 341. The same doctrine was announced by this court in the case of the *State v. McCrillus*, 4 Kan. 250, and has been repeatedly declared since that time. *State v. Bridgman*, 8 Kan. 458; *Byington v. Hamilton*, 38 Kan. —, 16 Pac. Rep. 34. The salaries of the officers and persons for whose benefit this proceeding is brought are mere debts against the city, and may be recovered, in an ordinary action, like any other debt, and under the authorities cited *mandamus* cannot be maintained. It is unnecessary to discuss and determine the other questions raised by counsel on the demurrer, as the consideration of the second point disposes of the case.

The demurrer will be sustained and the proceedings dismissed.

All the justices concurring.

(38 Kan. 691)

ARTHUR *et al.* v. ARTHUR.

(Supreme Court of Kansas. March 10, 1888.)

1. EVIDENCE—SIGNATURE OF WRITTEN INSTRUMENT—PROOF OF.

Before a witness can be permitted to testify to the signature of a written instrument, when the execution thereof is denied under oath, it must be shown—*First*, that such witness was present, and saw the instrument executed; or, *second*, that he was acquainted with the writing and signature of the party; or, *third*, that such witness is competent to testify to the genuineness of such signature by a comparison with other writings or signatures admitted or proven to be genuine.<sup>1</sup>

2. SAME—DECLARATIONS—PROOF OF IDENTITY.

Where the declarations of a party to an action are sought to be shown by a witness who is known to be unacquainted with such person, and the only knowledge possessed by the witness of the identity of the person is the declaration of such person at the time of making the statement or declaration; and where no description of the person is given by the witness, whereby the identity of such person can be established: *held* error to admit such declarations or statements without other proof of identity.

3. TENDER—PAYMENT INTO COURT—JUDGE NOT REQUIRED TO PAY OVER TO COURT.

Where a tender of money is pleaded, which, upon an order, is paid into court, and the money so paid in is taken possession of by the judge of the court, *held*, that the refusal of such judge to pay such money over to the clerk of the court is not error.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Shawnee county; JOHN MARTIN, Judge.

This was an action brought by Clara E. Arthur, the defendant in error, against Adam Hagerman, but he having died, it was revived against the plaintiffs in error Anna Samuel, and Sarah Arthur as his heirs, and Samuel Arthur as administrator of the estate. The plaintiffs in error Samuel and Henry Bealls were joined as parties, against whom the defendant in error prayed incidental relief. The defendant in error sued as the widow and only

<sup>1</sup> Concerning the admissibility of writings for the purpose of instituting a comparison with a disputed handwriting, see *People v. Parker*, (Mich.) 34 N. W. 720, and note; *State v. Koontz*, (W. Va.) 5 S. E. Rep. 323

heir of Frank Arthur, who was a grandson of Adam Hagerman. The petition alleged that in November, 1878, Adam Hagerman entered into a written contract with her late husband, by which the former was to convey to the latter a certain farm near Rossville, upon the payment of \$1,100, which was to be paid in annual installments of \$100 each. It was also alleged that Frank Arthur died in August, 1880, and that previous to his death he had paid Hagerman \$700 on the contract, and that since his death plaintiff had tendered the remainder of said \$1,100, and had demanded a deed; that Hagerman had refused to accept the tender, and make the deed. She also alleged that she was ready to keep her tender good, and to pay the money into court whenever so ordered; that the reason no copy of said bond was attached to her petition was the fact that said bond was not in her possession, but was in the possession of the defendants; that the same had never been recorded; and she prayed for the specific performance of the contract. Defendants answered by a general denial, and a sworn specific denial of the alleged contract. The record further shows that, on the application of the defendants, the court ordered the plaintiff to pay the balance of said alleged purchase money, being \$400, into court; which order was complied with, and plaintiff paid to the judge of the district court \$400, which the court refused to pay over to the clerk of the court, at the request of the defendants. The case was tried by the court, and judgment rendered for the plaintiff, defendant in error, requiring the defendants to convey the land, and, in default of such conveyance, adjudged that the judgment itself should operate as a conveyance. The defendants now bring the case here for review.

*A. H. Vance* and *G. C. Clemens*, for plaintiffs in error. *W. P. Douthitt* and *Overmyer & Safford*, for defendant in error.

CLOGSTON, C., (*after stating the facts as above.*) This was an action to enforce the specific performance of a contract which the plaintiff alleged was made by and between Adam Hagerman and Frank Arthur, the husband of the plaintiff; which contract was claimed to have been in writing, signed by Hagerman and wife. The execution of the contract was denied under oath by the defendants, which raises the issue of its existence. After laying a sufficient foundation as to the loss of the bond, the plaintiff, to establish its contents and execution, offered in evidence the deposition of the plaintiff, which deposition was admitted in evidence, over the objection of the defendants. Plaintiff was asked, among other things, as follows: "*Interrogatory 7.* Are you acquainted with the handwriting of Adam Hagerman? How many times have you seen it? *Answer.* I have seen a great deal of the handwriting of Adam Hagerman; am perfectly familiar with it, and would know it anywhere I would see it. *Interrogatory 8.* Have you ever seen a bond for a deed for the premises in controversy? How many times have you seen it? *A.* Yes, sir; after we were married I saw it in Arthur's trunk. He handed it to me. He told me to read it, and it was written in the handwriting of Adam Hagerman, and signed by him and his wife, and was acknowledged by a notary public of Atchison county, Kansas, the acknowledgment being in his handwriting, but the body of the deed was written by Adam Hagerman. I had it a number of times; perhaps as many as twenty times." The answer to interrogatory 8 was objected to, on the ground that no sufficient foundation had been laid, and because it was incompetent. We think the witness showed herself to be competent to testify as to the handwriting of Adam Hagerman. Her evidence showed that she was familiar with his handwriting, and that she would know it wherever she saw it. This we think was sufficient; but as to the signature of Mrs. Hagerman no foundation was laid. The witness was not shown to have ever seen her handwriting, or to have had any knowledge whatever about it. The witness did not pretend that she was present, and saw the bond signed by Mrs. Hagerman, but testified that the first she

saw of the bond was after she was married to Frank Arthur, which the evidence showed to have been a long time after the bond was claimed to have been executed. The objection of the defendant was well taken, and that part of the answer relating to Mrs. Hagerman's name being attached to the bond ought to have been sustained. This evidence was material to the plaintiff; for unless it was shown that Mrs. Hagerman signed this contract, although executed by her husband, she having survived her husband, it would give to her heirs one-half of the land.

Plaintiff also produced the deposition of William Spalding, which deposition was admitted in evidence, over the objection of the defendants. Witness among other things was asked the following questions: "*Question 2.* Do you know any of the parties to this action or suit? *Answer.* I know one of the defendants, or at least an old man named Adam Hagerman, or who told me his name was Adam Hagerman. *Question 3.* Did you ever have any conversation anywhere with him about any land in the state of Kansas? and, if so, state what it was." Witness then gives a conversation purporting to be a history of this transaction between Adam Hagerman and Frank Arthur, in which he claimed that the old man told him about the execution of this bond for this land in controversy, and that he had received \$700 of the purchase money, and that Frank's widow was too poor to pay the balance. The witness then said: "We asked him his name, and he said it was Adam Hagerman, Farmington, Kansas. We took his name down on a leaf of a memorandum book, as well as the name of his grandson, and where the land was. We were to write to him about it as soon as we saw the land." To this testimony the defendants objected, for the reason that it was not shown that the person spoken of as making the statements alleged had been in any way identified as the Adam Hagerman through whom this plaintiff claimed title, and as being hearsay. This objection was overruled by the court. We think this ruling wrong. Before the declarations of a party can be given in evidence it must be shown that the declarations were made by that party. Here the witness was a stranger to Hagerman, and all the information or knowledge in relation to his identity was derived from that conversation with the person who claimed to be Adam Hagerman. No description was given of the man; nothing by which his identity could be ascertained. To admit such testimony would be to open the door to innumerable frauds. Adam Hagerman now being dead, it leaves the evidence in shape to be contradicted by no one. If this could be permitted, all that it would be necessary to do in this class of cases would be to find some stranger, have some one represent a party, and then make declarations that would be fatal to his interests, and then let that stranger go into court, and testify to this conversation, without any identification of the person from whom he obtained the information. This would lead to great evil, and cannot be tolerated.

The only remaining error that we deem it necessary to examine at this time is the complaint made by the defendants, plaintiffs in error, to the refusal of the court to pay the money, which had been paid into court to keep the tender good, over to the clerk of the court. Section 131, Code Civil Proc., is as follows: "When a tender of money is alleged in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at the trial, or when ordered by the court." Comp. Laws 1885, § 131, c. 80. This section is the only statute that we have been able to find referring to this question, and our attention has not been called to any other. This statute does not provide that it shall be paid to the clerk of the court. It says it shall be paid to the court. We see no good reason why the judge of the court might not receive and hold possession of the money, as well as the clerk. The plaintiff, at least, had done all that it was necessary for her to do in the premises. She had alleged her tender; and on the application of the defendants, and by the

order of the court, she had paid the money into court; and now, because one officer of the court is in possession of the money, instead of another, certainly ought not to be held to be the fault of the plaintiff. We recommend that the judgment of the court below be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 696)

STATE v. CROSS.

(*Supreme Court of Kansas. March 10, 1888.*)

1. CONSTITUTIONAL LAW—VALIDITY OF ACT—AMENDMENT.

Section 4, c. 179, Sess. Laws 1877, is a constitutional and legal enactment, and therefore not in conflict with section 16, art. 2, of the constitution of the state.

2. PUBLIC LANDS—SCHOOL LANDS—CONTRACT TO PURCHASE—BRIBERY.

Where a person obtains, by bribery of those having control over such contracts, a contract for the purchase of lands of the state normal school, the contract is a fraud upon the state, against public policy, and therefore void. The courts must leave the briber where he stands, and deny him any benefit from the contract; and the state, in a proper action therefor, may obtain a cancellation of the contract obtained by bribery, without returning or offering to return the money paid by the briber upon the contract.

(*Syllabus by the Court.*)

Error to district court, Lyon county; CHARLES B. GRAVES, Judge.

*S. B. Bradford*, Atty. Gen., and *Edwin A. Austin*, for plaintiff in error.  
*C. N. Sterry*, *W. W. Scott*, and *F. A. Brogan*, for defendant in error.

HORTON, C. J. This was an action brought by the state of Kansas upon the relation of the attorney general against H. C. Cross, on October 24, 1885, to cancel a certain contract for the sale of 7,520 acres of state normal school land, at \$3.50 per acre. The contract was executed July 19, 1884, between H. C. Cross and Van R. Holmes, the authorized agent for the sale of the lands. The written contract provided that it should not be in force or take effect until indorsed with the approval of the secretary of the board of regents of the state normal school, duly authenticated with its seal. Upon the date of the contract the same was approved and signed by H. D. Dickson, secretary of the board of regents, with the seal of the board thereto attached. The sum of \$2,632 was paid by Cross, and the balance of the money, \$23,688, with interest, was to be paid in installments. The state alleged that the land was sold without any authority of law; and further alleged that the land, at the time of the sale, was worth \$5 per acre, and that it could have been easily sold for that amount at that time; that the contract was induced by fraud and bribery upon the part of H. C. Cross. Cross filed his answer, which contained a general denial; and alleged, as a second count or defense, that "on July 19, 1884, in good faith, and with the sanction and approval of the board of regents and the land committee thereof, he purchased the land described in the petition, at the price fixed by the committee, to-wit, three dollars and fifty cents per acre; and that thereupon Van R. Holmes, as agent to sell the lands, executed and delivered to him a written contract, duly signed by him, and indorsed with the approval of the secretary of the board of regents, with the seal of the board thereto;" that he paid one-tenth of the purchase money in cash, and agreed to pay the balance at his option, with interest at 7 per cent. per annum, payable semi-annually; that the amount of the purchase price paid in cash at the date of the contract, less commissions of the agent, was returned by the agent to the treasury of the state, and the report of the sale and execution of the contract transmitted to the state auditor, and a copy of the same, also, delivered to the board of regents; that on January 1, 1885, in accordance with his contract, he paid into the treasury of the state interest amounting to \$741.58, and on July 1, 1885, he paid into the treasury of

the state the further sum of \$829.08, as interest on the contract; that the board of regents, with full knowledge of all the facts and circumstances connected with and surrounding the purchase of the land, and the execution and delivery of the contract, and the payment of the several sums of money into the state treasury, ratified and confirmed the purchase and sale, and also the contract. Cross also alleged that the state of Kansas had not returned or repaid, or offered to return or repay, the several sums of money paid by him upon his purchase and contract, or any part or portion thereof. The state demurred to the second count or defense of the answer, upon the ground that it did not state facts sufficient to constitute any defense whatever. The demurrer was overruled. The state excepted, and brings the case here.

The first claim made by the state is that the purchase and contract of July 19, 1884, are wholly void, because the sale of the lands at \$3.50 per acre is in contravention to chapter 189, Sess. Laws 1872, which gave the board of directors of the state normal school authority to sell the lands of the normal school at a price not less than \$5 per acre. In 1877 an act was passed by the legislature to reorganize the state normal school, and to provide for the sale of its land. Chapter 179, Sess. Laws 1877. Among other things, it was provided therein that the normal school should be governed by a board of regents, consisting of six persons. The fourth section of that act reads as follows: "It shall be the duty of the board of regents to sell, or cause to be sold, under the provisions of chapter one hundred and eighty-nine of the Session Laws of eighteen hundred and seventy-two, the lands belonging to said institution, at not less than three dollars per acre; and no appropriation shall be made for this school in the future." It is claimed upon the part of the state that this section is void, and in conflict with section 16, art. 2, Const. We do not think the act contains more than one subject; at least the objects of the act have relation and connection with each other; and therefore we think they are capable of being united in the same act. *Commissioners v. State*, 36 Kan. 337, 13 Pac. Rep. 558.

The principal contention, however, is that said section 4 is amendatory of chapter 189, Sess. Laws 1872, and thereby violates the provisions of section 16, art. 2, Const., which ordains that "no law shall be revived, or amended, unless the new act contains the entire act revived, or the section or sections amended; and the section or sections so amended shall be repealed." Several authorities are referred to, from Nebraska and other states, fully supporting this claim. On account, however, of the prior decisions of this court, we are unable to follow the authorities cited. At a very early day in the juridical history of the state,—in *Beach v. Leahy*, 11 Kan. 23,—it was held that a special law which was in conflict with a general law was not therefore necessarily void. Subsequently, this court, in *Board Com'rs v. Shoemaker*, 27 Kan. 77, following *Beach v. Leahy*, said that section 16 of article 2 was not intended to abolish the doctrine of repeals by implication. See, also, *Harvey v. Board Com'rs*, 32 Kan. 159, 4 Pac. Rep. 153. Said section 4 provides that lands belonging to the normal school shall not be sold for less than three dollars an acre; and while it permits the board of regents to sell the land at this price, under the provisions of chapter 189, it may be treated and regarded as a separate or complete act. Statutes which amend as by implication are not within the provisions of the section referred to. *Cooley*, Const. Lim. (1st Ed.) 152. Again, "the mischief designed to be remedied by the constitutional provisions cited was the enactment of amendatory statutes in terms so blind that the legislators themselves were sometimes deceived in regard to their effect; and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws." *People v. Mahaney*, 13 Mich. 496. Said section 4 clearly expresses its purpose, and it cannot be said to have been enacted blindly, nor so inserted in the statute as to deceive the legislators or the public. Further, chapter 179, Sess.

Laws 1877, has stood upon the statute book over 10 years unchallenged. Under its terms the state normal school has been reorganized; large amounts of school lands have been sold, and contracts executed. Under these circumstances, a very strong case indeed should be presented to authorize this court to strike down the act, or to hold void contracts executed in good faith within the exact terms of its provisions. If, therefore, Cross in good faith purchased the lands from the agent of the board of regents, duly authorized, in strict conformity with the statutes and regulations of the board, paid part of the purchase money in cash, received his contract, and has since continued to pay as therein required, the contract cannot be canceled or set aside.

The further question is presented, if it be true, as alleged in the petition, that the contract was procured and obtained by bribery, whether the consideration need to be returned or tendered by the state before the contract can be annulled. On the part of the defendant it is asserted that even if the contract for the sale of the land in controversy was obtained by bribery of those having control over the sale of the lands, that a court of equity will not rescind the contract, unless the state, seeking relief, shall do equity by paying back what it received on the contract, or at least until it tenders payment before commencing suit. A contract to induce public officers to act corruptly, or to bias them in discharge of their official duties, is against public policy; and such a contract is void. "It would be going but half the distance required for public security if the courts would but simply deny the aid of their machinery to the corrupt participants. A contract obtained by bribery of those having control over such contracts is obtained by fraud upon the principal; and it behooves the court to leave the briber where he stands, and deny him any benefit from the contract. It is immaterial how small or trifling the bribe was, as compared with the amount involved in the contract. Principle accommodates itself only to motives of parties, not to the sum gained by corrupt action." Greenh. Pub. Pol. 308, 309. In *Lindsey v. City of Philadelphia*, 2 Phila. 212, SHARSWOOD, J., said: "It is important that corrupt contracts with public officers should be sternly repudiated by courts of justice, and that men should understand that in assenting to an allowance to such an officer of part of what they may have a claim for on the public treasury,—be that allowance small or great,—they absolutely forfeit all their legal rights on the public." We think, therefore, upon principle and authority, that if the contract of July 19, 1884, was induced and obtained by bribery of the officials having control thereof, the courts must leave the briber where he stands, and deny him any benefit from his contract. Therefore, if the allegations of the petition be fully established, and bribery proved as therein charged, the state will not be required to return or tender the money paid by Cross, in order to have the contract canceled and wiped out. A party ought not to be permitted to induce public officers to act corruptly, and then, when the corruption is uncovered, be allowed to retire from the transaction, with his money returned to him, as if he had acted honestly and in good faith. Such conduct, if tolerated, would sap the condition on which official honesty rests, and legalize temptations which would lead from duty many an official, who, without such inducements, might perform his duty. The answer contained a general denial, which put in issue the allegations of fraud and bribery. The second defense alleged that Cross made the purchase in good faith and in accordance with the law. The answer, therefore, was sufficient, and the demurrer properly overruled. The judgment of the district court will, therefore, be affirmed.

All the justices concurring.

(75 Cal. 240)

## WARD v. DOUGHERTY. (No. 11,085.)

(Supreme Court of California. March 14, 1888.)

## 1. DEED—DELIVERY—PRESUMPTION.

In an action to quiet title, plaintiff produced at the trial a deed from defendant, executed and acknowledged by him, duly recorded, and forming part of the chain of title from defendant to plaintiff. *Held*, that such facts constitute *prima facie* evidence of delivery, and, under Civil Code Cal. § 1055, providing that "a grant duly executed is presumed to have been delivered at its date," such delivery will be presumed to have been at the date of the deed.

## 2. SAME—IDENTITY OF GRANTOR—PRESUMPTION.

Code Civil Proc. Cal. § 1983, provides that identity of person shall be presumed from identity of name. *Held* that, in an action to quiet title, where plaintiff claimed under a deed executed in the name of defendant, it will be presumed to be defendant's deed.

## 3. RES ADJUDICATA—LIEN FOR STREET ASSESSMENT—FORECLOSURE.

In an action to quiet title, plaintiff claimed under a sheriff's sale, made in pursuance of a decree of foreclosure of the lien of a street assessment. Such assessment was, in that decree, declared paramount to the lien of a mortgage, the mortgagee under whom defendant claimed having been made a party to such proceeding to foreclose. *Held*, that defendant, being in privity of estate with such mortgagee, and the court rendering such decree having jurisdiction of the subject-matter and of the person of the defendant in such proceeding, it cannot be attacked collaterally by defendant's showing that the assessment had been paid.

## 4. MORTGAGES—FORECLOSURE—SHERIFF'S DEED TO PURCHASER AFTER CONVEYANCE BY LATTEH.

Defendant held a certificate of purchase under a foreclosure sale. The time for redemption had passed, and he conveyed the premises by quitclaim deed to plaintiff's grantor before the sheriff's deed had been made to him. *Held*, that the sheriff's deed subsequently made to defendant is void as between him and plaintiff.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*John J. Coffey*, for appellant. *Wm. M. Pierson*, for respondent.

SEARLS, C. J. This is an action to quiet title to a lot of land at the corner of Van Ness avenue and Broadway, San Francisco. Plaintiff deraigned title through a quitclaim deed executed by the defendant, John Dougherty, on the 14th day of June, 1870, to one Patrick J. Tannian, and recorded June 18, 1870, at the request of one Julius George. Plaintiff, in further support of title in herself, introduced a deed from P. J. White, sheriff of the city and county of San Francisco, to James Gaffney, under whom plaintiff claims by sundry mesne conveyances, dated July 5, 1883, and executed pursuant to a decree, order of sale, and sale in the case of *James Gaffney v. Barnaby Dougherty*, in an action to foreclose the lien of a street assessment under a contract made the 9th day of September, 1866. It appears from the judgment roll that Denis Mahoney, one of the defendants in the action, set up in a cross-complaint the prior lien upon the property of a mortgage thereon executed May 26, 1864, by Barnaby Dougherty to David Mahoney, and assigned to him, the said Denis Mahoney, by the mortgagee, David Mahoney. The lien of the street assessment was declared to be paramount to that of the mortgage. Date of decree, December 14, 1867; date of sale thereunder, January 22, 1868. Defendant claims title to the premises under a sheriff's deed, dated July 3, 1883, and executed pursuant to a foreclosure and sale of the premises under the mortgage above mentioned, in an action in which Denis Mahoney was plaintiff and B. Dougherty defendant. Decree entered March 19, 1868; sale April 14, 1868, to Denis Mahoney, who received a certificate of sale, and assigned the same to the defendant on the 22d day of September, 1868, with all his right, title, and interest in the premises. James Gaffney was made a party defendant in this last-named action, but there was a dismissal as to him, and no decree was taken against him. Upon the closing of the testimony on the part of plaintiff, defendant moved for judgment as in case of nonsuit, upon the ground that there was no proof of delivery of the deed from defendant

Dougherty to P. J. Tannian. The motion was overruled, and this action is assigned as error.

We find in the record no specification of the particulars in which the evidence is alleged to be insufficient, but, waiving this point, we think there was sufficient evidence of the delivery of the deed by the defendant to the grantee therein named. It was regularly executed, acknowledged, and recorded as a conveyance of title to the premises in dispute. It formed a part of the regular chain of title from the defendant to plaintiff, and was produced and offered in evidence at the trial by the attorney of the latter. It is hardly necessary to say that a deed only takes effect upon delivery, and that without such delivery it has no validity. Possession of a deed of property, however, by the grantee therein named, and upon the same principle by one holding by conveyance of the same property under him, is *prima facie* evidence of its delivery. The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of non-delivery should prevail against the presumption. *Devl. Deeds*, § 294. In *Tunison v. Chamblin*, 88 Ill. 379, it was said: "When a deed duly executed is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise titles could be easily defeated, and no one could be regarded as being secure in the ownership of the land. It cannot be that a grantor may assail a conveyance fifteen or twenty years after a deed has been made, and recover the land by merely swearing that he never delivered the deed. The unsupported evidence of the grantor surely cannot be permitted to have such effect, especially when the evidence of such a grantor is in many material matters contradicted, and who seems to act on a low moral plane. To so hold would render all titles insecure, and would be disastrous in the extreme. Any system of jurisprudence adopting rules for the attainment of justice can never sanction a rule fraught with such unjust and iniquitous results." In *Branson v. Caruthers*, 49 Cal. 374, it was said: "The production of the deed of gift by the attorneys of the wife (the grantee) was sufficient evidence of its delivery and acceptance." *Barr v. Shroeder*, 32 Cal. 609. Section 1055 of the Civil Code provides that "a grant duly executed is presumed to have been delivered at its date." It may be inferred from the decision in *Boyd v. Slayback*, 63 Cal. 493, that this court was of opinion that this inference only applied to the time, and not to the fact, of delivery. In other words, that the fact of delivery must be proven by other and competent evidence, and that, when proven, the presumption of the Code as to the time of such delivery applies. In view of this interpretation the fact of delivery of the deed from defendant to Tannian having been sufficiently proven by its production by the attorneys of plaintiff, who held under him, the date of such delivery will, under the Code, be deemed to have been the date of the instrument, viz., June 14, 1870. So, too, John Dougherty, who executed the deed, is presumed, under section 1963 of our Code of Civil Procedure, to be the John Dougherty who is defendant in the cause, upon the theory that identity of person is presumed from identity of name. What is said here will apply with like effect to similar errors assigned upon the introduction of other deeds. The only other alleged error is predicated upon the refusal of the court to permit defendant to testify in answer to the following question: "Do you know of your own knowledge whether the assessment for that street work was paid by Denis Mahoney?" The proffered evidence involved an attempt to show by parol, in a collateral attack, that the decree of foreclosure of the lien of the street assessment, and the sale and deed thereunder, were void by reason of the payment of such assessment. Both plaintiff and defendant are in privity of es-



tate with Denis Mahoney, and the decree, being fair on its face, and rendered in a case where the court had jurisdiction of the subject-matter, and of the person of defendant, is not subject to collateral attack. Again, if we dismiss from view the title of plaintiff, based upon the sale under foreclosure of the lien for street assessment, which was found to be paramount to the lien of the mortgage, under which defendant claims title, and the case stands thus: Defendant held a certificate of purchase under the foreclosure sale. The time for redemption had expired. He had a perfect equitable title, which only lacked a sheriff's deed to turn it into a legal title. In this condition of things he conveyed by his quitclaim deed on the 14th day of June, 1870, to Tannian, from whom plaintiff derails title. In *Green v. Clark*, 81 Cal. 592, it was held that if one who has purchased land at sheriff's sale quitclaims his interest in the same, before a sheriff's deed is given, the quitclaim is equivalent to an assignment of the sheriff's certificate of sale, and if the sheriff afterwards give a deed to the purchaser, the deed is void as between the parties.

It follows that, were we to concede the error upon the exclusion of defendant's testimony to be well assigned, the conclusion rendered by the court below was correct. Judgment affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

(75 Cal. 253)

REAGAN v. JUSTICE'S COURT OF THE CITY AND COUNTY OF SAN FRANCISCO  
et al. (No. 11,228.)

(Supreme Court of California. March 15, 1888.)

1. REVIEW, WRIT OF—WHEN LIES—JUDGMENT BY DEFAULT.

A judgment rendered upon default by a court having jurisdiction of the parties and the subject-matter cannot be questioned upon a writ of review.

2. PLEADING—COMPLAINT—SUFFICIENCY.

A complaint upon contract, to which the plea of the statute of limitations or of frauds has not been properly interposed, will be presumed to state a good cause of action as to these defenses, unless the contract is one which must be in writing, to confer jurisdiction on the court.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Appeal from a judgment dismissing a writ of review in the case of Daniel Reagan, plaintiff and appellant, against the justice's court of the city and county of San Francisco, and William B. Smith, a justice of said court, and Bridget Fitzgerald, executrix of the last will and testament of Patrick Fitzgerald, deceased, defendants and respondents.

*John D. Whaley*, for appellant. *M. Cooney*, for respondents.

SEARLS, C. J. This is an appeal from a judgment of the superior court of the city and county of San Francisco dismissing a writ of review to the justice's court of said city and county. An action was commenced in the justice's court. The following is a copy of the complaint:

"IN THE JUSTICE'S COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,  
STATE OF CALIFORNIA.

"*Bridget Fitzgerald, Executrix of the Last Will of Patrick Fitzgerald, Deceased, Plaintiff*, vs. *Daniel Reagan and Ann Reagan, Defendants*.

"The above-named plaintiff complains of the above-named defendants, and alleges that the said Patrick Fitzgerald died in said city and county on or about the 28th day of July, 1884, leaving a will, which, after due proceedings had, was admitted to probate as his last will and testament on the 13th day of August, 1884, in and by the order and decree of the superior court of said city and county, duly made and given herein. And on or about the same day letters testamentary upon his estate issued to said plaintiff, Bridget Fitzgerald,

out of said court, and she then and there qualified as executrix of said will, and she ever since has been, and now is, such executrix. That at the time of the death of said Patrick Fitzgerald the said defendants were indebted to him in the sum of \$381, gold coin of the United States, for money loaned by said deceased to the defendants in his life-time, and legal interest on the same. That in about three months after the said death the defendants promised to pay said sum of \$381 to said executrix, but they have not paid the same, or any part thereof, except the sum of \$101, leaving a balance of \$280 still due and unpaid, which sum is now payable to said plaintiff as executrix. Wherefore the plaintiff prays for judgment against the defendants for the sum of \$280, with interest and costs. M. COONEY, Attorney for Plaintiff."

Indorsed: "Filed February 4, 1885. .

"FRANK MURPHY, Clerk.

"By M. T. DWYER, Deputy-Clerk."

Summons in due form was issued, returnable February 9, 1885, which was duly served, together with a copy of the complaint upon the defendant. He failed to appear to the action on the 9th, but on a day later, on the 10th, filed a demurrer to the complaint, which was stricken out, and judgment entered against him by default, as prayed for in the complaint. Before the expiration of 10 days he moved, on notice and affidavit under section 859, Code Civil Proc., to set aside the default, and for leave to answer. The motion was met by counter-affidavits, and was denied by the court, whereupon a writ of review was sued out from the superior court, which, upon the coming in of the return, was dismissed, as hereinbefore stated.

The complaint stated a cause of action against the defendant. The right to interpose the plea of the statute of limitations is waived, unless taken advantage of by demurrer or answer; and, had the complaint shown affirmatively on its face that the demand was so barred, it could have availed defendant nothing, in the absence of such demurrer or answer. So, too, where, under the statute, an agreement is required to be in writing, such agreement, if in other respects properly pleaded, will be presumed, for the purpose of testing the sufficiency of the pleading, to have been in writing. *Wakefield v. Greenhood*, 29 Cal. 598; *Miles v. Thorne*, 38 Cal. 335; *Vassault v. Edwards*, 43 Cal. 458; *Blennan v. Ford*, 46 Cal. 8. The exception to the rule arises in cases where the contract must necessarily be in writing, to confer jurisdiction on the court. *Cory v. Hyde*, 49 Cal. 469. In justices' courts, pleadings are not held to any great degree of strictness; but waiving this leniency to the pleading, and we are of opinion it was quite sufficient, in the absence of objection, to constitute a cause of action, under our Code, in any court. The court had jurisdiction of the subject-matter, and of the person of the defendant. We see nothing in the record to indicate that the court did not regularly pursue the authority conferred upon it by law. If, in so doing, it committed errors, it is not the province of the writ of review to correct them, as it only issues in case where the inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction, and there is no appeal or other plain, speedy, and adequate remedy. In *Clark v. Superior Court*, 55 Cal. 199, this court held that should the superior court, having jurisdiction, order judgment for one of the parties without a trial, the judgment, while erroneous, would not be in excess of jurisdiction, and the only remedy would be by appeal. The decision proceeds upon the theory that such action would not be without or in excess of the jurisdiction of the court. Applying the reasoning of that case to the question involved here, we are of opinion no proper foundation was laid for the issue of the writ, and that it was properly dismissed. Judgment affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

(75 Cal. 237)

*POWERS et al. v. BRALY et al.* (No. 9,994.)

(Supreme Court of California. March 14, 1888.)

1. **APPEARANCE—WHAT CONSTITUTES—BY ATTORNEY.**

An attorney having appeared for the purpose of striking out an amended complaint, and having asked for an extension of time in which to plead until the motion to strike out is decided, has not so appeared as to constitute a waiver of the service of summons by defendant, under Code Civil Proc. Cal. § 416, which provides that a defendant appears in an action when an attorney gives notice of appearance for him.

2. **PRACTICE—SERVICE OF AMENDED COMPLAINT—DEFENDANT NOT SUMMONED.**

The service of an amended complaint upon a defendant who was not a party to the suit in the first instance, and has never been served with summons, is void.

3. **SAME—SERVICE ON ATTORNEY.**

The service of an amended complaint upon an attorney, prior to his appearance in a cause for the defendant, does not constitute a valid service of such complaint upon the defendant.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by John Powers and Catherine Powers against Margaret J. Braly, executrix, and William R. Sloan, executor, to quiet title. Judgment was rendered by default in favor of plaintiff. Defendants appeal.

*W. R. Daingerfield*, for appellants. *J. B. Hart*, for respondents.

SEARLES, C. J. This is an appeal from a final judgment by default in favor of plaintiffs, and against all the defendants. The action was originally brought by John Powers against Margaret J. Braly to quiet title to a parcel of land, by filing a complaint. Some time afterwards, and without any order or leave of the court, plaintiff filed an amended complaint making Catherine Powers, a party plaintiff with himself, and adding William R. Sloan, executor, and Margaret J. Braly, executrix, of Marcus Braly, deceased, as parties defendant. *W. R. Daingerfield*, Esq., was the general attorney of the defendants, and of all of them. The amended complaint was served upon defendant Sloan, and upon Daingerfield as and for defendant Margaret J. Braly. Two extensions of time were granted by plaintiffs' attorney to Daingerfield to answer. On the 22d day of December, 1882, Daingerfield gave notice that on December 29, 1882, he would move the court to strike out the amended complaint, and dismiss the action as to Sloan. This notice specified that Daingerfield appeared specially. On the same day said Daingerfield applied to the court for extension of time for defendants to move and plead until it was determined which complaint he should plead to; and on the 23d day of December, 1882, the court made an order granting all the defendants until five days "after notice of decision of motion to strike out amended complaint in which to plead." The notice to strike out was denied on the 23d day of January, 1883, and notice thereof served upon Daingerfield the same day. The summons (if any there was) was never served upon any of the defendants, and never was amended to meet the changes of parties plaintiffs and defendants.

1. The service of the amended complaint was void as to the defendant Sloan, because no service of a summons upon him or his co-defendants was had, and equally void as to defendant Braly, because, at the date of such service, Daingerfield, upon whom it was served, had not appeared as an attorney in the cause.

2. Daingerfield never appeared as an attorney of record in the cause so as to waive service of summons and complaint under section 416, Code Civil Proc. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Code Civil Proc. § 1014. None of these things were done. The appearance of Daingerfield to strike out the amended complaint was special, for that particular purpose, and in no sense a general ap-

pearance in the cause, and his asking the court for an extension of time to move or plead, until the motion was disposed of, was an act ancillary to the motion, which neither in letter nor spirit complied with the provision of the Code as to an appearance as attorney of record for the defendants. It follows that there was no waiver of service, and the defaults of defendants were improperly entered.

The judgment appealed from is reversed, and the cause remanded.

We concur: MCKINSTRY, J.; PATERSON, J.

(75 Cal. 230)

REAGAN v. FITZGERALD. (No. 11,148.)

(*Supreme Court of California*. March 14, 1888.)

JUDGMENT—BY DEFAULT—ACTIONS TO SET ASIDE.

In an action brought to annul a judgment rendered in justice's court by default, regular on its face, and for an injunction restraining the collection of the same, where the complaint showed that a motion, made under Code Civil Proc. Cal. § 859, giving to justices of the peace the power to relieve from judgments by default in case of mistake, etc., on good cause being shown, was denied, it appearing that plaintiff had pursued an adequate remedy at law, a demurrer to the complaint is properly sustained, and, on refusal to amend, the injunction should be dismissed.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN J. FINN, Judge.

Action brought by Daniel Reagan to annul a judgment against him by default in a justice's court, and for an injunction restraining the collection or assignment thereof, against Bridget Fitzgerald, executrix of the will of Patrick Fitzgerald, deceased. Plaintiff appeals from a final judgment for defendant and from an order dissolving an injunction.

*John D. Whaley*, for appellant. *M. Cooney*, for respondent.

SEARLS, C. J. This is an appeal from a final judgment rendered in favor of defendant on sustaining a demurrer to plaintiff's complaint, and refusal by the latter to amend, and from an order dissolving an injunction. The action was brought to annul a judgment rendered in favor of the plaintiff by default in a justice's court, and for an injunction restraining the collection or assignment thereof. It appears from the complaint that the defendant, as executrix of the last will of Patrick Fitzgerald, deceased, brought suit against the plaintiff herein in a justice's court to recover \$280, as for money loaned to the latter by defendant's testator. Summons was regularly served upon plaintiff, but the latter, being unable to read, made a mistake as to the return-day, which was February 9, 1885, and did not appear in the cause until the following day, when he caused a demurrer to be filed to the complaint. This demurrer was on the 18th of February stricken out, on motion of plaintiff's counsel therein, and judgment entered against the defendant. On the 21st day of February, 1885, defendant in that case moved the court to vacate the judgment and permit him to file an answer, basing his motion on the ground of mistake, inadvertence, and excusable neglect, and averring that he had a good and meritorious defense to the action on the merits. What particular facts were set out in the justice's court, to show a meritorious defense to the action, beyond a statement of non-indebtedness, does not appear. The motion to set aside the default was denied March 5, 1885, and thereupon this action was instituted. Section 859, Code Civil Proc., gives to justices' courts power, "on such terms as may be just, and on payment of costs, [to] relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment and upon affidavit showing good cause therefor." The application to set aside the default was in due time. Injunctions to restrain proceedings at law are granted

in instances where the facts show it to be against conscience to enforce such proceedings, and at the same time show that the injured party could not have availed himself of such facts in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence on his part. In such cases it mattered not whether the application was made before or after judgment or execution, and upon a proper showing a court of equity would interfere by injunction to restrain the adverse party. Bills of this sort are frequently termed bills for a new trial. Story, Eq. Jur. § 887. Not that a new trial was in fact ordered in the court of law, for this could not be done, but that the result reached was tantamount thereto. As above stated, a case for relief by way of injunction against a judgment at law must present facts not only showing the equitable rights of the complainant, but also showing that he could not have availed himself of such facts in the legal forum. The tendency of modern legislation and practice has been to greatly abridge the necessity for this class of bills by providing remedies in the courts of law for many of the exigencies which called them into existence.

Thus, in the present case, we may assume that default was taken against the plaintiff herein by his inadvertence and excusable neglect, and that he had a perfect defense to the action; a case in which he would formerly have been entitled to relief in equity. But we cannot say he was powerless to take advantage of this mistake at law, for the reason that section 859, quoted above, is expressly designed to give relief in such cases, and thus, by a short and adequate process, to secure the ends formerly attained by the long and cumbersome process of a bill in equity. He not only could, but did, move under this section in the justice's court. The contention of plaintiff is that the justice improperly decided against him, and that he has no appeal. The answer is that a court of equity does not sit as a court for the correction of errors in actions at law, and it never grants relief upon the ground of error or mistake in the judgment of the court of law, or because the court of equity, in deciding the same questions, passed upon by the law court, would have reached a different conclusion. Story, Eq. Jur. (3d Ed.) § 1575. We are, of course, speaking of judgments fair upon their face, and not of void judgments, which may be impugned anywhere, and by direct or collateral attack. Even were we authorized to examine into the propriety of the action of the court in refusing to set aside the default of plaintiff, which we are not, we have not the record before us upon which he acted; *non constat*, but there may have been good reasons appearing for the refusal complained of. It follows that, as it appears affirmatively from the law and the complaint, not only that plaintiff had an adequate remedy in the action at law, but that he pursued it, the complaint is insufficient to warrant the relief asked, and the demurrer was properly sustained; and, as he declined to amend, and final judgment was rendered against him, the injunction was properly dismissed.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

(75 Cal. 261)

DAVIS v. HEIMBACH *et al.* (No. 12,383.)

(Supreme Court of California. March 20, 1888.)

1. PRINCIPAL AND SURETY—CONTRIBUTION BETWEEN SURETIES—NOTICE OF CLAIM.

Code Civil Proc. Cal. § 709, provides that, in an action against a principal and sureties, a surety is entitled to the benefit of the judgment to compel contribution from his co-sureties, provided he file with the clerk notice of his payment and claim to contribution. *Held*, in view of such provision requiring the filing of notice, an execution by a surety against his co-sureties will be quashed when obtained without serving notice upon them.

2. SAME—AGREEMENT BETWEEN SURETY AND PRINCIPAL—EFFECT ON REMEDY AGAINST CO-SURETIES.

A surety who agrees with his principal, in a written contract entered into before judgment recovered against them, to pay the whole of his principal's debt, is not entitled to execution against his co-sureties, nor to show in such summary proceeding that the contract was entered into by him through mistake, and should be set aside.

Commissioners' decision Department 1. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

*H. M. Albery*, for appellant. *Richard Bayne*, for respondent.

HAYNE, C. This is an appeal by defendants McDaniel and Miller from an order quashing an execution issued at their instance against their co-defendants Wiles and Ludy. It appears that these four parties were sureties upon a note of defendant Heimbach to the plaintiff, Davis, and were all defendants in the action, which was upon the note. Judgment having been entered against them, McDaniel and Miller paid the whole amount, and then, under section 709, Code Civil Proc., took out a writ of execution against their co-defendants, Wiles and Ludy, for their proportion. This execution was quashed by order of the court, and from this order the appeal is taken. The section referred to provides that contribution may be enforced in this summary manner "if, within ten days after his payment," the party files a notice, etc. The whole sum paid was \$5,600.58. Of this \$3,354.30 was paid on May 18th, and the remainder not until June 24th. The notice and claim were filed on June 27th. It is open to doubt whether such filing was "within ten days after his payment;" for, the proceeding being statutory, the course pointed out by the statute must be strictly pursued. *Hansen v. Martin*, 63 Cal. 282. But, without expressing an opinion upon this point, we think there are other grounds upon which the order should be affirmed.

1. The order directing the issuance of the execution was obtained without notice to the parties to be affected by it. We have not been referred to any decision in relation to the section under which the proceedings were taken. But there are several decisions in relation to section 942, which provides for the entry of judgment against sureties on appeal-bonds. In *Ladd v. Parnell*, 57 Cal. 232, the court said that it saw nothing in the point that that section was unconstitutional. But in that case it appears from the opinion that notice had been given, and from the argument of counsel it would seem that the point in which the court could see nothing was that the sureties were entitled to a trial by jury. In the subsequent case of *Meredith v. Mining Ass'n*, 60 Cal. 617, it was held that the sureties on an appeal-bond were not entitled to notice of an application for judgment against them. The ground of the decision seems to have been that the section did not provide for notice, and that it must be presumed that the sureties contracted with reference to existing law, which therefore entered into and formed a part of their contract. It is to be observed of this case that the statute construed does not in terms dispense with notice. It is simply silent upon the subject. And if it be true that, when taken in connection with other provisions of the same Code, (sections 1005 and 1011,) it does not provide for notice, yet it is deserving of consideration whether, in view of the importance of an opportunity to be heard,—a right which almost always exists,—it ought not to be presumed that the parties contracted with reference to it, and that it formed a part of their contract. To say otherwise is to dispense with a fundamental and important right by a somewhat strained application of an artificial rule of construction of a contract. But, however this may be as to the section in relation to appeal-bonds, the doctrine of the case has no application to the section involved here. This section provides that the party seeking the entry of judgment shall "file with the clerk of the court where the judgment is rendered notice of his payment, and claim to contribution or repayment." It is true that it does not specify

the person to whom the notice is to be given, or its period, or the manner in which it is to be given. But the natural meaning of the word "notice" is a notice to some one, and, if the person be not indicated, the plain inference is that the party intended is the person who is interested,—the one who is to be proceeded against. Even if this were not the natural meaning of the word, we should hesitate long before concluding that the legislature intended to provide for judgment against a man in a court of justice without giving him an opportunity to be heard in his defense. But, as above stated, it is not straining the language to hold that some notice to the parties interested is necessary, and, if this is so, the period and manner of giving it are provided in other parts of the Code. Code Civil Proc. §§ 1005–1011, *et seq.* The order directing the execution having been without notice, the proceedings were properly vacated.

2. The showing made by the respondents upon the motion to quash was sufficient to sustain the order made. The respondents produced a written contract, made before the judgment, by which the appellant McDaniel, in consideration of the assignment to him of the principal's interest in a certain firm, and the conveyance by the principal's wife of a piece of real estate, (which transfers were duly made,) agreed to pay the whole debt himself. McDaniel admitted that he signed the agreement, but urged that he did so "without first having read it, and without knowing what it contained," and that it did not truly express what was in fact the understanding of the parties. Without expressing any opinion as to whether the showing made would entitle McDaniel to maintain a suit in equity to have the contract set aside, it is sufficient to say that as long as it stands it is a good answer to an application for contribution, whether by motion or action. *John v. Jones*, 16 Ala. 464; and compare *Taylor v. Reynolds*, 53 Cal. 687, and *Logan v. Talbot*, 59 Cal. 658. And we think it clear that he cannot have the contract set aside, and all the equities adjusted, in this summary proceeding, based upon affidavits. Still less can he ignore the contract entirely, and calmly proceed to take out his execution in defiance of it, and without so much as notice to those interested.

The other points made do not seem to require special notice. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(75 Cal. 277)

BYRNE v. REED *et al.* (No. 11,714.)

(Supreme Court of California. March 20, 1888.)

1. FRAUDULENT CONVEYANCES—EVIDENCE—DECLARATIONS AGAINST INTEREST.

In an action by plaintiff claiming for his testator that defendant conveyed property in fraud of creditors, the defendant claiming that she conveyed in good faith to discharge an indebtedness to her grantee, testimony that plaintiff's testator had spoken about such indebtedness was competent, being a declaration against interest.

2. SAME.

And in such action, where the grantee, being asked by plaintiff how the indebtedness arose, replied that her mother had given \$500 to the defendant, and being asked how she knew that, answered that defendant told her so, the evidence was responsive to the question and admissible.

3. SAME—GOOD FAITH OF GRANTOR.

In an action to set aside a deed for fraud on the part of both grantor and grantee, a question to the grantee as to whether she took the deed for the purpose of preventing any one else from getting the property, was relevant to the question in issue whether witness took the deed in good faith.

4. SAME—GOOD FAITH OF GRANTOR.

Whether defendant conveyed property in fraud of creditors being in issue, testimony as to what plaintiff said about the value of other property, which defendant had mortgaged to him, was admissible to show that she might honestly have believed, when she made the conveyance in controversy, that the mortgaged property was sufficient to pay all incumbrances on it.

5. SAME.

And her petition to set aside the sale of such mortgaged land was also admissible for the same reason.

6. SAME.

And where it appeared that the grantee had asked plaintiff if he could hold liable the rest of defendant's property if the mortgaged property should be insufficient to satisfy the mortgage, and plaintiff had answered "No," testimony as to plaintiff's motive in so answering was inadmissible.

7. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—SUFFICIENCY.

An application for a new trial on the ground of newly-discovered evidence, which would probably not produce any different result, is properly denied.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; B. F. MYERS, Judge.

*C. A. & F. P. Tuttle*, for appellant. *J. M. Fulweiler* and *Hale & Craig*, for respondents.

BELCHER, C. C. This is an appeal by the plaintiff from a judgment, and order denying him a new trial. The action was brought to remove an alleged cloud on the plaintiff's title to certain mining claims, situate near Iowa Hill, in Placer county. The mining claims in controversy were formerly owned by the defendant Adelia Hill, and the plaintiff asserts title to them under a sale on execution, issued upon a judgment against her, made to him as executor of the last will of Matthew Reed, deceased, on the 24th day of September, 1883, and under a sheriff's deed made to him, in pursuance of the sale, on the 26th day of March, 1884. The defendant Julia S. Reed asserts title to the claims under a deed made to her by her co-defendant Adelia Hill, on the 18th day of May, 1883. It is alleged in the complaint that this deed to the defendant Reed was made without any consideration, and with the intent, on the part of both grantor and grantee, to hinder, delay, and defraud the creditors of the grantor, of whom the plaintiff was and is one; and that it consequently is a cloud on his title, which he asks to have removed. The answer denies that the deed in question was made without consideration, or with any intent to hinder, delay, or defraud the creditors of defendant Hill, or any of them, and alleges that on the 18th of May, 1883, defendant Reed, for a full, sufficient, and valuable consideration, purchased the claims, and ever since has been and now is the *bona fide* and lawful owner and holder of the same, and of every part and parcel thereof. The court below found that on the 18th day of May, 1883, the aggregate value of the mining claims in controversy was not over \$1,100; that on that day the defendant Hill was justly indebted to the defendant Reed in the sum of \$1,976.33, "and on said day, by agreement thereto with said Reed, said Hill executed and delivered to said Reed the conveyance of said properties mentioned in the complaint herein, and certain other mining property not described in the complaint, in full satisfaction, discharge, and payment of said indebtedness, and said Reed accepted said conveyance in full satisfaction, payment, and discharge of said indebtedness; that the said indebtedness, and the satisfaction and discharge thereof, was a full and adequate consideration for the properties thus conveyed; that the said conveyance was made and accepted in good faith, and without any intent to hinder, delay, or defraud plaintiff, or any creditor or creditors of defendant Hill; that the defendants Reed and Hill did not collude or intend, by said conveyance or otherwise, nor did either of them intend, thereby to hinder, delay, or defraud the plaintiff or his co-executor, or any creditor or creditors of the defendant Hill, from collecting, by execution or otherwise, any anticipated or other judgment that might be rendered against defendant Hill, or to prevent,



hinder, or delay the collection of any debt or demand due by defendant Hill to any one." It was accordingly adjudged and decreed that the defendant Julia S. Reed is, and since the 18th day of May, 1883, has been, the owner of all the properties conveyed to her on that day by defendant Hill, and is entitled to hold the same as against the plaintiff; and that neither the plaintiff nor the estate of Matthew Reed, deceased, ever acquired or had or held any title to, or right, interest, or estate in, said properties, or any part thereof.

It is claimed for the appellant that the findings were not justified by the evidence, and that the judgment should be reversed, and a new trial granted for that reason. The answer is that as to all of the disputed facts there was a clear conflict in the evidence, that given in behalf of respondents being quite sufficient to justify each of the findings. The well-settled rule in regard to conflicting testimony must therefore control the action of this court. It is also claimed that the court committed several errors in admitting and rejecting evidence, which should cause a reversal of the judgment. We shall speak briefly of each of these alleged errors. The plaintiff was called as a witness in his own behalf, and testified that he told defendant Hill in presence of defendant Reed that he must foreclose, and that defendant Reed asked him if he could come on the other claims if the property mortgaged did not bring the amount due, and he answered, "No." Counsel for plaintiff then asked why he said "No." The question was objected to and excluded by the court, and we see no error in the ruling. It was certainly immaterial for the court to know what secret motives induced the witness to answer as he did. The defendant Reed was called as a witness by the plaintiff, and was asked how she paid for the property conveyed to her. She answered that when she purchased the property her aunt (defendant Hill) owed her \$1,976.33, and added: "The consideration of the indebtedness was this: my mother gave my aunt \$500 for me September 10, 1868." She was then asked how she knew her mother gave \$500 to her aunt, and she answered that her aunt told her so. Counsel for plaintiff moved to strike out the answer, and the court denied their motion. We see no error in this ruling. The answer was responsive to the question, and the fact that it was hearsay was no reason for striking it out. Indeed, the plaintiff would seem to have been left in a better position with the answer in than out. On cross-examination the same witness was asked if Matthew Reed, in his life-time, said anything to her about her aunt owing her this money. The question was objected to, and the objection overruled. This ruling was proper. The plaintiff was claiming for the estate of Matthew Reed that the conveyance to the witness was made without any consideration, and it was proper, therefore, to show, as a declaration against his interest, that Reed, in his life-time, knew and spoke of the indebtedness. The witness was also asked, on her cross-examination, if she took the deed for the purpose of preventing any one else from getting the property; and the question was objected to but allowed. The question was entirely relevant and proper. It was insisted for the plaintiff that the witness took the deed to hinder, delay, and defraud creditors, and, whether she did so or not, was the principal issue to be decided. She was a competent witness, and it was proper for her to state what her purpose was. The defendants were permitted, against the objection of plaintiff, to prove by the witness Hobson that in 1879 plaintiff's testator told him that defendant Hill held \$500 in trust for defendant Reed. For the reasons above stated, we see no error in this ruling. The testimony of Hobson as to what plaintiff said about the value of the mortgaged property, and the petition of defendant Hill to set aside the sale under the Gleason mortgage, were admissible to show that defendant Hill might honestly have believed, and did believe, when she conveyed the claims in controversy to defendant Reed, that the mortgaged property was more than sufficient to pay all incumbrances upon it. One of the grounds upon which the plaintiff made his motion for a new trial was newly-discovered evidence, which

he could not with reasonable diligence have discovered and produced at the trial. Applications for new trial are addressed to the sound legal discretion of the trial court, and the action of that court will not be disturbed, except for an abuse of its discretion; the presumption being that the discretion was properly exercised. And to entitle a party to a new trial on the ground of newly-discovered evidence, it must appear—"First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence be not cumulative merely; third, that it be such as to render a different result probable on a retrial of the cause; fourth, that the party could not, with reasonable diligence, have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence of which the case admits." Hayne, New Trial & App. § 88. In support of his motion the plaintiff filed two affidavits, and these were met by counter-affidavits on the part of defendants. After carefully reading all of the affidavits, we are of the opinion, assuming what is said in them to be true, that the court below acted rightly in denying the motion, as a retrial probably would not and ought not to produce any different result.

We find nothing in the record which calls for a reversal of the judgment, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(75 Cal. 268)

STRICKLAND v. HOLBROOKE. (No. 12,170.)

(Supreme Court of California. March 20, 1888.)

NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—WHAT CONSTITUTES.

Suit was brought on an instrument reading as follows: "\$1,000. Three years from date, I promise to pay to Daniel Strickland, for value received, in United States gold coin, at the rate of 10 per cent. per annual," and dated and signed. Held a valid promissory note.<sup>1</sup>

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action upon a written instrument, brought by Daniel Strickland against Ellen E. Holbrooke. Judgment for plaintiff, and defendant appeals.

Cross & Simonds and A. B. Dibble, for appellant. A. J. Ridge and J. I. Caldwell, for respondent.

FOOTE, C. This action was brought against Ellen E. Holbrooke, to recover a money judgment upon a writing as follows:

"GRASS VALLEY, July 8, 1882.

"\$1,000. Three years from date, I promise to pay to Daniel Strickland, for value received, in United States gold coin, at the rate of 10 per cent. per annual.

DANIEL P. HOLBROOKE.

"ELLEN E. HOLBROOKE."

Had the \$1,000, in figures and dollar-mark, been expressed in words, the writing would have read thus:

"GRASS VALLEY, July 8, 1882.

"One thousand dollars. Three years from date, I promise to pay Daniel Strickland, for value received, in United States gold coin, at the rate of 10 per cent. per annual.

DANIEL P. HOLBROOKE.

"ELLEN E. HOLBROOKE."

<sup>1</sup> Where the maker's obligation is not an independent, absolute, and unconditional one for the payment of a precise and definite sum of money, at all events, without contingency, the instrument is not a promissory note. *Edwards v. Ramsey*, (Minn.) 14 N. W. Rep. 272.

The action was brought upon this instrument as if it was a promissory note for the payment of money. The prayer of the complaint was a judgment against Ellen E. Holbrooke for \$1,000, and interest at the rate of 10 per cent. per annum from date. A demurrer to the complaint being overruled, an answer was filed denying all the allegations of the first-mentioned pleading. Judgment was rendered as prayed for, and an order made denying the defendant's motion for a new trial. From the judgment and order this appeal is taken.

The instrument above set out was offered in evidence. It was objected to, but admitted by the court. It was read, and the plaintiff offered evidence which tended to prove that no portion of the principal sum of money or interest thereon had ever been paid. The defendant offered no evidence whatever. The question for determination is, what is the legal effect of the alleged promissory note? To us it seems that by the terms thereof, at Grass Valley, on the 8th of July, 1882, Daniel P. and Ellen E. Holbrooke, \$1,000, three years after said 8th of July, 1882, promised to pay Daniel Strickland, for value received, in United States gold coin, with 10 per cent. per annum; or, what is the same thing, at Grass Valley, on the 8th day of July, 1882, Daniel P. and Ellen E. Holbrooke promised to pay, three years after the said 8th day of July, 1882, Daniel Strickland, \$1,000 in United States gold coin, for value received, with interest at the rate of 10 per cent. per annum from said last-mentioned date. Taking the whole instrument, in all its terms, it is evident that it was a written engagement, by the signers thereof, to pay a certain sum of money at a certain time, with interest from the date of the instrument, for value received. The sum or amount of such an instrument need not necessarily be expressed in words; if expressed in figures or ciphers, it has the same effect. Story, Prom. Notes, §§ 20, 21. No particular form of words is necessary to constitute such a writing. The form of it may be varied at the pleasure of the individual executing it, provided that in all cases the form adopted amounts, in legal effect, to a written promise for the payment of money, absolutely and at all events, and it interferes with no statute regulation. Id. § 12. The instrument in question needed no correction or addition to or subtraction of words therefrom, to make it a promissory note. It was just as certainly a promise to pay, for value received, \$1,000 in gold coin, three years after a certain date, with interest at a certain rate, as if the \$1,000 had been written after the word "pay" in the body of the note, instead of being written, as it was, before the word "three." For these reasons we are of the opinion that the judgment and order of the court below should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(75 Cal. 287)

DIEMER v. HERBER. (No. 9,838.)

(Supreme Court of California. March 20, 1888.)

**MALICIOUS PROSECUTION—PROBABLE CAUSE—COMMITMENT ON PRELIMINARY HEARING.**

In an action for malicious prosecution, it appeared that plaintiff won money from defendant on a wager; that defendant threatened to have plaintiff arrested if he did not return such money; that plaintiff was arrested, at defendant's instance, and committed on a charge of larceny; that an information, duly filed, charging plaintiff with such crime, was dismissed for want of evidence. *Held*, that such commitment was only *prima facie* evidence of probable cause for such prosecution, and that it was fully rebutted by the other evidence.<sup>1</sup>

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

<sup>1</sup>See, also, *Fincham v. Com.*, (Va.) 3 S. E. Rep. 843, and note.

Action by John Diemer against John Herber for malicious prosecution. Judgment for defendant, and plaintiff appeals.

*L. Quint*, for appellant. *Edw. Salomon*, (*Henry Eickhoff*, of counsel,) for respondent.

FOOTE, C. This is an action for damages for a malicious prosecution. A jury was impaneled to try the issues joined, and evidence was introduced on the part of the plaintiff. Thereupon the defendant moved for a nonsuit, and it was granted. From the judgment therein given and made, and from an order refusing a new trial, this appeal is prosecuted. The facts of the case as they appeared in evidence are as follows: The plaintiff and the defendant got into a discussion as to whether any watch could be found in San Francisco which would run longer than a week without being wound up. The defendant was willing to bet five dollars against a hundred that no such watch could be produced. Finally the parties each bet and put up a hundred dollars; the plaintiff betting that sum that he could, and the defendant betting that he could not, produce such a watch. Then the plaintiff produced a watch that he said would run longer than a week, and was told by the defendant to take the money which had been put up on the wager. The plaintiff, in accordance with this permission and request, took the money, and went out of the defendant's premises. In a very few minutes the defendant sent a messenger after him to bring back the money, or he would be arrested. The plaintiff, thinking he had won the money fairly, treated the demand with scorn. Afterwards, through his attorney and others, the defendant endeavored to induce the plaintiff to return the whole, and then a part, of the money; one of the propositions made being that, if the plaintiff would pay back \$50, the defendant would "have it published in all the papers in San Francisco that he was wrong." Finally, the defendant and one McPherson came to the plaintiff to see him about the matter, and were told that the plaintiff would not pay a cent. Then the defendant had the plaintiff arrested, and, after a preliminary examination, he was bound over to the superior court to answer a charge of grand larceny. An information was duly filed against the plaintiff accusing him of that crime in stealing \$100 from the defendant. This information was dismissed, upon motion of the prosecuting attorney, for the reason that there was "no evidence to convict." The plaintiff then instituted this action.

As the matter appears to us, the defendant having made a foolish bet in a vein of braggadocio, and given up the money he had staked, repented of it in a very short time, and sought to get his money back. Finding that the person he had bet with treated the affair as serious, he tried the influence of lawyers and friends to get back that which he had thus wagered. This not bringing about the desired result, he had the defendant arrested, charged with an infamous offense, and he sued him, also, civilly, to recover the money, and obtained a judgment. He succeeded by this latter means in accomplishing the desired result. From the evidence before us there does not appear to have been the least ground to believe that the plaintiff had committed a larceny; and it is hardly comprehensible how the defendant could have believed, in good faith, that such a crime had been committed. The whole affair, so far as the defendant is concerned, exhibits a reckless disregard of the rights and character of the plaintiff, and a willingness to resort unjustly, and without any proper foundation, to the harsh arm of the law, in the shape of a criminal prosecution. The fact that plaintiff was held to answer by the committing magistrate does not alter the case. The fact is *prima facie* evidence of probable cause, (*Ganea v. Railroad*, 51 Cal. 140,) but it is not conclusive. That is to say, if the defendant was clearly guilty of having instituted a malicious prosecution against plaintiff without probable cause, the fact that the committing magistrate held plaintiff to answer does not take away the malice,

or establish conclusively that there was probable cause. We do not understand the case of *Jones v. Jones*, 71 Cal. 89, 11 Pac. Rep. 817, or *Hahn v. Schmidt*, 64 Cal. 284, to be in conflict with the foregoing. Those cases, as we understand them, went upon the theory that there was reliance upon the advice of counsel after a full disclosure of the fact; the counsel being the officers designated by the law to act in such affairs.

The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(75 Cal. 290)

GERLACH v. TERRY. (No. 9,923.)

(*Supreme Court of California.* March 20, 1888.)

**EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF DEMANDS—EVIDENCE.**

In an action against an administrator for medical services, where the answer denied the employment of plaintiff by deceased, evidence that one T. and deceased had lived together for many years as husband and wife, and that plaintiff stated that he looked to T., who employed him, for payment and not to deceased, was admissible as tending to show that deceased did not employ plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by George Gerlach against L. A. Terry, administrator of the estate of Mary J. Turner, for medical services rendered deceased. Judgment for defendant, and plaintiff appeals.

A. P. Needles, for appellant. Stetson & Houghton, for respondent.

FOOTE, C. Plaintiff instituted this action to recover a sum of money for services as a physician, performed, as he alleged, at the special instance and request of the defendant's decedent. The court below gave judgment in favor of the defendant, and from that and an order refusing a new trial the plaintiff has appealed.

There seems to have been no conflict as to any of the allegations of the complaint, except as to whether or not the services had been rendered at the request of the decedent, and on her employment of the physician. The complaint alleged that the physician had performed the services at the special instance and request of the reputed Mrs. Turner, and the answer denied that such was the case. It is claimed that all the evidence, which tended to show the marital relations between the decedent and J. W. Turner, which the court below allowed to be introduced on the trial, was not admissible, because the answer did not set up as a special defense the coverture of the decedent. "Anything which rebuts the idea of a contract, express or implied, is proper evidence," where an action is brought for services rendered on a contract to pay for them, either express or implied. *Angulo v. Sunol*, 14 Cal. 408. According to the evidence in this cause, Turner had lived for many years with the decedent, openly claiming her as his wife, and the marriage ceremony had been performed between them, both, at that time, being in ignorance of the fact that Turner was not divorced from a former wife. It was also in evidence that when the decedent was taken sick, in her last illness her reputed husband, Turner, employed Dr. Gerlach, and that Dr. Gerlach afterwards, while attending her, stated that he looked to him for payment, and not to the decedent.

As it appears to us the evidence introduced as to the marriage of the parties was not introduced for the purpose of showing that Turner was respon-

sible for medical services performed for his wife, as such, and under cover-ture, but that it was introduced for the purpose of showing the relations actually existing between the parties, which, taken in connection with the other evidence in the case, tended to show the probability of the defense set up, viz., that the decedent did not employ the plaintiff, but that the person who, in all respects, had in good faith for many years assumed towards her the relation of a husband, and towards whom she, in the same way, had held the relations of a wife, had made the contract of employment. This certainly went to rebut the allegation that she had employed Dr. Gerlach, and requested the services which he rendered, viz., had made a contract for them as was alleged in the complaint. The findings seem to us responsive to the issues made by the pleadings, and are supported by the evidence. We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

I concur: BELCHER, C. C.

HAYNE, C. I concur on the ground that while the valuable services received by the deceased constituted sufficient consideration to support the subsequent promise to pay which, I think, the evidence shows was made, yet the terms of such promise seem to me to bring it within the statute of frauds, as being a promise to pay the debt of another.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(75 Cal. 323)

PEOPLE v. SNYDER. (No. 20,376.)

(*Supreme Court of California.* March 21, 1888.)

RAPE—INDICTMENT—PLEADING AND PROOF.

Under Pen. Code Cal. § 261, which defines rape as an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under the following circumstances: With a child of tender years; with a lunatic or insane woman; by intimidation; by the administration of intoxicating or narcotic substances, etc.—it is sufficient if the information charge that the crime was committed by force, violence, and against the will of the prosecuting witness; and it is not necessary to set out the exact circumstances, as described in the subdivisions of the Code, by which the crime was accomplished.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*John D. Whaley*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

McFARLAND, J. The information charges the appellant with the crime of rape, and the jury found him guilty. The charging language of the information, after proper averments of time, place, etc., is that the defendant, "with force and arms, in and upon one Louisa Bell, a female over the age of ten years, who was not then and there the wife of the said John H. Snyder, violently and feloniously did make an assault, and her, the said Louisa Bell, then and there, to-wit, on the day and year last aforesaid, feloniously did ravish and carnally know, and accomplish with her an act of sexual intercourse, by force, violence, and against her will and resistance, contrary to the form," etc.; and the main contention of appellant is that there was a fatal variance between the information and the proofs. This contention is that while the information charges the crime to have been committed by force, violence, etc., the proof shows that it was committed (if at all) by means of an intoxicating or narcotic substance administered to the prosecuting witness by the accused; and that under section 261 of the Penal Code an information charging the crime to have been committed by force cannot be supported by proof showing it to have been committed by fraud or artifice.

The common-law definition of rape was "the carnal knowledge of a woman forcibly, and against her will." 4 Bl. Comm. 210. And the indictment was substantially in the form of the information in the case at bar. And, through decisions made from time to time, it gradually came to be the settled law (although there are cases to the contrary) that under such an indictment it was competent and sufficient to prove that the act charged was committed upon a child of tender years, incapable of consent; upon a lunatic or insane woman; by intimidation; when the woman was unconscious of the nature of the act; by the administration of intoxicating or narcotic substances; by false personation of a husband, etc. The criminal law of this state followed the common-law definition of the crime down to the adoption of the Codes. Hitt. Gen. Laws, 1449. Section 261 of the Penal Code commences as follows: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances." Then follow six subdivisions which recite substantially the things which, as above briefly indicated, could be proven under the general, common-law indictment. And the position taken by appellant really is that the indictment and the proof must follow, and be confined to, one of the six subdivisions of the section. We think the true construction of section 261 to be that thereby the legislature meant merely to put beyond doubt the rule that on an information for rape the things mentioned in the subdivisions could be proven, and would establish the crime. It is not intended to alter or establish a rule of pleading, or to create six different kinds of crime. Now, as before the adoption of the Code, under an indictment similar to the information in this case, any of the matters mentioned in section 261 may be proved. They are included in the words, "by force and violence, and against her will," and "did feloniously ravish," as fully now as they were then.

2. The court properly allowed evidence of the fact that the injured party made complaint of the injury while it was recent, and the point that evidence should not have been admitted showing that she named the defendant in her complaint has no basis in the record.

3. We cannot say that the evidence did not warrant the verdict.

There are no other points which require special notice. Judgment and order denying new trial affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; MCKINSTRY, J.; SHARPSTEIN, J.; TEMPLE, J.; THORNTON, J.

(75 Cal. 258)

*In re Estate of DORSEY. (No. 12,195.)*

*(Supreme Court of California. March 20, 1888.)*

1. EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—PRIVATE SALES.

An administrator cannot object to granting the petition of a creditor that the property of a deceased person be sold at public auction to pay the debts of the intestate, on the ground that it could be more advantageously sold at private sale, as Code Civil Proc. Cal. § 1544, provides that sales of the kind in question must be made at public auction, unless in the opinion of the court it would be more beneficial to sell it in whole or in part at private sale.

2. SAME—NOTICE OF SALE.

Where the court on the 3d of March ordered property to be sold at private sale on or before the 9th of the next April, there was sufficient time given under Code Civil Proc. Cal. § 1549, which provides that notice of the sale must be posted and published for two weeks successively next before the day on or after which the sale is to be made, and "the notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least 15 days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter."

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

*F. W. Street*, for appellant. *F. D. Nichol*, for respondent.  
v.17p.no.4—14

BELCHER, C. C. It appears from the record that Caleb Dorsey died at Sonora, in the county of Tuolumne, on the 28th day of March, 1885. In July following, Esther M. Dorsey was duly appointed and qualified as administratrix of his estate. The estate consisted of a small amount of personal property, a dwelling-house and lot in Sonora, several gold mines and interests in mines, and a water-ditch and water-right connected therewith. By an order of the court the dwelling-house and lot were set aside for the use of the administratrix and her family. Claims against the estate were presented and allowed, aggregating more than \$7,800. In October, 1885, an order was made and entered by the court authorizing the administratrix to sell all the mining properties and ditch at private sale, but no bids were received, and no sales effected. On the 25th day of January, 1887, George Winnie—the largest creditor of the estate—presented to the court a petition, which, after setting out the necessary facts, asked that an order be made directing that all the real property of the estate (except the portion thereof set aside for the family of deceased) be sold at public auction to the highest bidder for cash. After due notice, this petition was heard, and on the 3d day of March an order was made, authorizing and directing the administratrix to sell at public auction, and in one parcel or subdivisions, as she should judge most beneficial to the estate, the ditch and all the mines and interests in mines belonging to the estate, except the mine known as the "Lady Washington Mine," or so much thereof as should be necessary. The order further directed that the Lady Washington mine be sold at private sale, "said sale to be made on or before the 9th day of April, 1887." The administratrix was present at the hearing of the petition, and objected to having the property sold at public auction, on the ground that a private sale would be most beneficial to the estate and to the creditors thereof. The appeal is by the administratrix from the order as made, and from the whole thereof.

In support of the appeal it is urged that the court erred in ordering the property to be sold at public auction, when, in the judgment of the administratrix, it could be more beneficially disposed of at private sale. It is said that the court should have accepted and acted on her judgment in the matter. The objection is met and fully answered by the Code. Section 1544, Code Civil Proc., providing for sales of the kind in question, says: "Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate." Under this provision all sales must be made at public auction, unless, in the opinion of the court, the best interests of the estate would be subserved by a private sale. When, however, a private sale is asked for, the court may act upon the opinion of the executor or administrator, and order such a sale to be made. In this case a private sale was not asked for, and there is nothing in the record to show that the judgment of the court was not properly exercised.

It is also urged that the court erred in requiring the sale of the Lady Washington mine to be made on or before the 9th day of April, 1887. It is said that it would have been impossible for the administratrix to have complied with the order, and section 1549, Code Civil Proc., is cited in support of the contention. That section provides that notice of the sale must be posted and published for two weeks successively next before the day on or after which the sale is to be made. "The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter." As the order was made on the 3d day of March, we



are unable to see why the administratrix could not have complied with it. Suppose, for instance, the notice had been published on the 4th day of March, and the 20th day of the same month had been designated as the day on or after which the sale would be made, there would then have been left 16 days during which offers or bids might have been received. Certainly this might have been, and, so far as we are advised, was a sufficiently long time within which to make the sale.

We find no errors in the record, and the order appealed from should, therefore, be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(75 Cal. 306)

PEOPLE v. WILLIAMS. (No. 20,879.)

(Supreme Court of California. March 20, 1888.)

1. HOMICIDE—ERRONEOUS INSTRUCTION—ASSUMPTION OF GUILT.

The court in an instruction on voluntary drunkenness, as determining the degree of an offense, said: "In this case, if the killing was willful, that is, intentional, deliberate, and premeditated, it is murder in the first degree; otherwise, it may be murder in the second degree, or manslaughter, as the evidence may convince your minds;" but in concluding the instruction added: "I desire to say, in connection with these instructions, that I do not intend to intimate to you, or tell you in any way, whether this defendant is guilty of any crime or not;" and the jury were fully instructed that the prosecution must establish every essential fact beyond a reasonable doubt. *Held*, that the inadvertence in assuming guilt of defendant was fully cured by the context, and the correction of the court.

2. SAME—MANSLAUGHTER—MODIFICATION OF INSTRUCTION.

It is proper for the court to qualify an instruction asked to the effect that unless it was established by the evidence that the killing was unlawful, and with malice aforethought, they must acquit, by adding "of the crime of murder."

*in bank*. Appeal from superior court, Butte county; L. D. FREER, Judge. The defendant, Williams, was indicted for murder, and, being convicted of manslaughter, appeals.

W. J. Herrin, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

TEMPLE, J. The defendant was tried for murder, and, being convicted of manslaughter, appeals from the judgment, and from an order denying his motion for a new trial. There is no bill of exceptions, however, in the record, and we have before us only the judgment roll.

The first exception urged here is as to the refusal of the court to give an instruction, asked by the defendant, to the effect that, if the killing was done in necessary self-defense, the defendant must be acquitted. This proposition is fully covered by instructions which were given.

It is next objected that the court instructed the jury as follows: "In this case, if the killing was willful, that is, intentional, deliberate, and premeditated, it is murder in the first degree; otherwise, it may be murder in the second degree, or manslaughter, as the evidence may convince your minds." Taken by itself, this instruction is, no doubt, defective, in assuming the guilt of defendant. We may assume, however, that the fact of killing by defendant was admitted. This is an extract from a lengthy instruction on the subject of voluntary drunkenness, and the court was explaining the proposition that, although such intoxication does not excuse crime, yet it may be considered in determining the degree of the offense. Taken with the context, the extract plainly means, "In this case, if a crime has been committed by the defendant while in a state of voluntary intoxication, if the killing was willful," etc. In concluding the instruction upon the subject, the judge added: "I desire to say, in connection with these instructions, that I do not intend to

intimate to you, or to tell you in any way, whether this defendant was guilty of any crime or not. I call attention to this because, as I remember now, that, in giving part of one instruction which I just read to you, I omitted to state that which I should have stated at the time." The jury were very fully instructed as to the burden of proof, and that the prosecution must establish every essential fact beyond a reasonable doubt. We think the inadvertence was fully cured. Not conceding that there was error, in any possible view, in telling the jury that, in determining the weight to be given to the testimony of the witnesses, they should consider the character and appearance of the witnesses, it is enough, for this appeal, to say that we cannot tell that evidence was not before the jury as to the character of each witness called.

The judge very properly qualified the instruction asked to the effect that unless it was established by the evidence that the killing was unlawful, and with malice aforethought, they must acquit, by adding "of the crime of murder." Admitting that the charge contains an instruction upon the subject of insanity, we cannot say, in the absence of a bill of exceptions containing the evidence, that it was not warranted by some issue in the case. There is no such plea as insanity, and we do not know that the issue did not arise at the trial. The judgment and order are affirmed.

We concur: SÉARLS, C. J.; MCKINSTRY, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

(75 Cal. 265)

GWINN v. HAMILTON. (No. 12,128.)

(Supreme Court of California. March 20, 1888.)

1. APPEAL—FORMER APPEAL—EFFECT OF DECISION.

Where the court, upon a former appeal, held that the complaint stated a cause of action, its sufficiency cannot be again called in question.

2. SAME—REVIEW—SUFFICIENCY OF EVIDENCE.

When the evidence is conflicting, and upon the whole testimony it cannot be said that the court below came to a wrong conclusion upon such evidence, the judgment must be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; J. B. MCFARLAND, Judge.

For former appeal, see 7 Pac. Rep. 837.

This was an action by Belden R. Gwinn against David Hamilton, the administrator of his father's estate, Harrison Gwinn, deceased, to recover a sum of money for labor and services alleged to have been performed by the son for the father. After the institution of the action Belden R. Gwinn died, and his administrator, John M. Gwinn, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals.

*Ball & Craig, W. H. Beatty, and S. C. Denson*, for appellant. *Armstrong & Hinkson*, for respondent.

HAYNE, C. Action for services rendered by a son to his father. Judgment was rendered in favor of plaintiff for \$605, and the defendant appeals.

1. It is contended that the complaint does not state a cause of action. But we think that matter was concluded by the decision on the former appeal. Upon the first trial judgment was rendered for plaintiff for \$2,328.87, and the defendant appealed. The judgment was reversed because a great part of the demand was considered to be barred by the statute of limitations. This of course did not involve the sufficiency of the complaint. But the question of the sufficiency of the complaint was the main point discussed, and as we understand the opinion the court decided against the defendant, and held that the complaint stated a cause of action. We readily concede that the rule as to the law of the case does not protect *mere dicta*. But a decision upon a

point which arose in the case, and was decided, is not a *dictum*, although it was not necessary to the disposition of the appeal. *Table Mountain v. Stranahan*, 21 Cal. 551; and compare *Olney v. Sawyer*, 54 Cal. 384, 385; *Camron v. Kenfield*, 57 Cal. 553, 554; *San Francisco v. Water-Works*, 58 Cal. 610. Doubtless the counsel for the plaintiff relied upon the decision, and it would be unjust to suffer the sufficiency of the complaint to be again called in question. If the complaint is held to be sufficient, the finding by reference to it is sufficient. *McEwen v. Johnson*, 7 Cal. 260; *Pralus v. Mining Co.*, 35 Cal. 34, 35; *Carey v. Brown*, 58 Cal. 184; *Moore v. Clear Lake Co.*, 68 Cal. 146, 8 Pac. Rep. 816; *Johnson v. Klein*, 70 Cal. 186, 11 Pac. Rep. 606. Possibly the reference in question would not cover the plea of the statute of limitations. But that point is not raised by counsel, and we do not think that the circumstances are such as to require us to notice it.

2. It is urged that the defendant should have been allowed a credit of \$566.48, which was the price of a crop of grain raised upon the land of a third person. The evidence seems to us to justify the respondent's contention that this crop was put in by the son and one St. Louis for their own benefit, and that this was with the consent of the father. There is some evidence against this view. Thus it was shown that the son used father's team for the work, and that the father paid a man to assist in harvesting the crop. On the other hand, the son evidently made the cropping contract in his own name, and ostensibly for his own benefit. This was the understanding of the owner of the land. For he says: "I judged his father let him have the team to give him a show." And it was proven that on one occasion, when the father was asked whether the cropping contract was not an extension of his business, he said: "I've got nothing to do with it; it is Belden's." And he further said "that his crop was all in, and that Belden could have his team to put in the crop." The subsequent remark about "running the ranch" appears to us to refer to the ranch upon which they lived, and not the place where this crop was put in. Upon the whole testimony we cannot say that the court below came to a wrong conclusion as to this matter. The other matters do not seem to require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(75 Cal. 298)

PEEK v. PEEK. (No. 12,315.)

(*Supreme Court of California*. March 20, 1888.)

APPEAL—SUBMISSION ON BRIEFS—DELAY IN FILING.

In a cause to be submitted on briefs filed, the appellant failed to file his brief at the time fixed in the order, and the respondent then filed a document containing no argument, but simply asking for judgment on the ground of default. Some time after, without leave of court, or giving any reason for the default, appellant filed his brief. *Held*, that respondent was not entitled to the judgment requested, but that he was not in default, and could have time to file his brief on the merits.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

*Rowell & Rowell, Harris & Allen*, and *Wells, Vandyke & Lee*, for appellant. *H. C. Rolfe*, for respondent.

HAYNE, C. On October 5th the court ordered that the cause be submitted on briefs to be filed,—the appellant to file his opening brief within 30 days, the respondent to have 30 days to answer, and the appellant 10 days to reply. The appellant neglected to file his opening brief, and on November 26th the

respondent filed a document which contained no argument, but simply called attention to the defendant's default, and asked that the judgment and order be affirmed. About three weeks after this the appellant's counsel, without (so far as the record shows) having obtained any extension of time, either from the court or counsel, and without the permission of the court, and without offering any excuse for their default, placed their brief on file; and in this condition of affairs the case is sent to us for examination.

The rule is that where the appellant neither makes an oral argument nor files any brief, the court will affirm the judgment without an examination of the record. *Hickinbotham v. Monroe*, 28 Cal. 489; *Brewster v. Johnson*, 51 Cal. 222; *Faris v. Lampson*, 14 Pac. Rep. 674; *Scott v. Sowden*, 16 Pac. Rep. 768, (filed February 21, 1888.) The respondent, having waited a reasonable time after the default of appellant, had a right to invoke this rule without submitting an argument on the merits; there being nothing for him to reply to. And although we think it would have been better for him to have submitted an argument upon the merits, or to have ascertained the intention of opposing counsel as to filing of a brief, he is not in default for not doing so. But there being a brief on file for appellant,—although improperly so,—we think it would be harsh to apply the rule invoked by respondent; but the respondent, not being in default, has a right to be heard, and we do not think the cause should be disposed of in the absence of an argument in his behalf. The cause of the waste of time and labor occurring in this case is the neglect of the appellant's counsel. They had no right to disregard the order of this court as to the time of filing briefs. The dispatch of business requires some order in the proceedings; and the learned counsel for the appellant will readily see that if they are at liberty to disregard the orders and rules of the court, every other counsel would be equally at liberty to do so, which would produce an undesirable confusion. The court has always been liberal in relieving against defaults. But it is hardly respectful for the counsel to place their briefs on file after the expiration of the time allowed therefore, without the permission of the court or the consent of opposing counsel. We think that where such a course results in a waste of time, and imposes additional labor on an overburdened court, it should be discouraged, and to that end that the brief of appellant be considered as improperly on file, and that it be allowed to remain only as an argument on the merits, all the technical points as to the admissibility of evidence being taken to be waived, and that the respondent be permitted to file a brief on the merits. In the briefs to be filed we think the attention of counsel should be called to the question whether the contract upon which the defendant relies is not within the statute of frauds; (see Civil Code, § 178, and section 1624, subsec. 3; *Lloyd v. Fulton*, 91 U. S. 480; *Browne, St. Frauds*, § 215;) and, if so, whether there was such a part performance as to take the case out of the statute. See *Dundas v. Dutens*, 1 Ves. Jr. 199.

We therefore advise that the submission of the cause be set aside, with leave to respondent to file a brief within 30 days, the appellant to have 30 days to reply.

We concur: BELCHER, C. C; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the submission of the above cause is set aside, with leave to respondent to file a brief within 30 days, the appellant to have 30 days to reply.

(75 Cal. 301)

PEOPLE v. GRUNDELL. (No. 20,859.)

(Supreme Court of California. March 20, 1888.)

1. CRIMINAL LAW—CONTINUANCE—CONSENT OF DEFENDANT—RECORD.

Upon a trial for larceny, the recorded affidavit of the committing magistrate failed to set out that all the continuances were with the consent of the defendant,

but the affidavit of the attorney prosecuting so alleged, and was opposed by only the counter-affidavit of the defendant. *Held*, the record does not show such want of consent as to violate Pen. Code Cal. § 861, providing that a postponement cannot be had \* \* \* unless by consent, or on motion of the defendant.

2. **SAME—EVIDENCE—REPORTER'S TRANSCRIPT OF TESTIMONY.**

Upon a trial for larceny, the admission in evidence of the reporter's transcript of the testimony of a deposing witness is not error, under Pen. Code Cal. § 864, placing the reporter's certified transcript of the testimony of a deposing witness, when properly filed, on the same footing as depositions; and section 1945, providing that depositions may be read in evidence by either party upon the trial, etc.

3. **SAME.**

The provision of Pen. Code Cal. § 869, stating that a reporter shall, within 10 days after the close of taking a deposition, \* \* \* file with the clerk a certified copy of his notes, transcribed in long-hand, is merely directory, and the deposition is admissible in evidence, if the filing is within a reasonable time.

4. **SAME—DEPOSITIONS—DESCRIPTION OF DEPOSING WITNESS.**

A deposition which states that the deposing witness is a boy 16 years of age, living with his brother on a place in the mountains, contains a sufficient designation of the deponent's business or profession, under Pen. Code Cal. § 869, which provides that a deposition must state the business or profession of the deponent.

5. **SAME—REPORTER'S ORIGINAL NOTES.**

A record must show affirmatively that the reporter's "original notes" of a deposition are not on file with the transcript, before it will have violated Pen. Code Cal. § 869, providing that a reporter shall file his "original notes" of a deposition with the clerk, together with the transcript of the same.

6. **SAME—WAIVER OF OBJECTIONS.**

A defendant, on trial for larceny, having appeared by counsel, and consented that the testimony of a deposing witness be taken down and read in evidence, cannot, upon the trial, object to the reading of such deposition on the ground that it does not conform to all of the provisions of the Penal Code relating to depositions.

7. **SAME—EVIDENCE—OF ACCOMPLICE.**

The testimony of an accomplice, upon the trial of the principal for stealing a steer, is admissible in evidence; and finding the hide and entrails of the missing animal buried in the principal's back-yard is sufficient corroboration of accomplice testimony to sustain conviction.

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

*M. H. Hyland*, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

**HAYNE, C.** The appellant was convicted of grand larceny, and sentenced to one year in the state prison. Several points are made on the appeal.

1. A motion was made in the superior court to set aside the information, on the ground that the committing magistrate had continued the hearing without an affidavit, or the consent of the defendant, as provided by section 861 of the Penal Code. Without expressing any opinion as to whether this section is merely directory or not, it is sufficient to say that from the record before us it cannot be determined that the continuance was not by consent. The magistrate says in his affidavit that the examination was set by consent for the 30th of March, and was begun on that day; that, when the prosecution rested, the hearing was continued for 10 days, at the request of the defendant; and that before the expiration of that time he was taken sick, and was unable to transact business before May 17th; but he does not state whether the intervening continuance was by consent or not. The assistant district attorney, who had charge of the case, says in his affidavit that "each and all of said continuances were with the knowledge and consent of defendant and each of his counsel." As we construe this, it includes the continuance complained of. The only opposing evidence is the affidavit of the prisoner himself. The affidavit of his then counsel is significantly absent. The court below evidently did not believe the statement of the defendant, and we do not see that it was bound to do so.

2. At the trial, the prosecution read in evidence, against the defendant's objection, the short-hand reporter's transcript of the testimony of one Lewis, given before the committing magistrate, and this is assigned as error. Section 869 of the Penal Code provides for the taking down of such testimony "as a deposition," and that "the transcript of the reporter, appointed as aforesaid, when written out in long-hand writing, and certified as being a correct statement of such testimony and proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings." And the section goes on to provide that "the reporter shall, within ten days after the close of such examination, if the defendant be held to answer the charge, transcribe into long-hand writing his said short-hand notes, and certify and file the same with the county clerk of the county or city and county in which the defendant was examined, and shall in all cases file his original notes with said clerk." In the case of *Reid v. Reid*, 14 Pac. Rep. 781, it was held by department 2 that section 273, Code Civil Proc., did not render the unfled transcript of the reporter admissible as evidence. But that case is not similar to this. In the first place, the transcript in that case was not filed, and stress was laid upon that circumstance in the opinion. In this case it was filed. Such a transcript, when filed by the officer in pursuance of a provision of law, may be regarded as in the nature of an official entry. Code Civil Proc. § 1920. The publicity of such a record is a safeguard against the dangers mentioned in *Reid v. Reid*. Such a document is quite a different thing from the unfled and unsworn certificate of one who may no longer be an officer, produced at the trial from the pocket of one of the parties. In the second place, the statute is different from that considered in *Reid v. Reid*. Section 869 of the Penal Code places such transcripts upon the footing of *depositions*. And by section 1345 depositions "may be read in evidence by either party at the trial, upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the state." There is no provision placing reporters' transcripts in civil cases upon the footing of depositions. For these reasons the case of *Reid v. Reid* is not in point. We think it sufficiently appeared that the witness was out of the jurisdiction, and therefore it was proper to read the deposition in evidence. *People v. Oiler*, 66 Cal. 102, 4 Pac. Rep. 1066.

There are, however, several objections taken to the form of the deposition. (a) It is said that it appears that the deposition was not filed within 10 days after the close of the examination, as required by the provision above quoted. But we think that the specification as to time is directory, merely. If the filing be within a reasonable time, it is sufficient; and we are not prepared to say that the time in this case was unreasonable. (b) It is said that the deposition was not admissible, "because it did not show the business or profession of the deponent." But it states that he was a boy of 16 years of age, living with his brother on a place in the Santa Cruz mountains. At that age it is not to be presumed that he had any business or profession, especially as he was living with his brother. Under the circumstances, we think the objection was properly overruled. (c) It is said that the "original notes" of the reporter were not filed with the transcript, as required by the section; but the record does not show that they were not filed. The presumption is in support of the judgment, and it is the duty of the appellant to make an alleged error apparent from the record. It may be that it appeared that the original notes were on file. *Clark v. Sawyer*, 48 Cal. 141, 142. The same may be said as to the want of a certificate and signature, although objections on these latter grounds were not taken at the trial, and are not argued in the briefs. It is to be observed that what is here said relates to the construction of the record, and not to the showing to be made at the trial.

3. The prosecution also read in advance the deposition of one Rost, which was taken before Judge BELDEN in open court, and written down by the re-

porter of the court. Certain objections were taken to the mode of authentication of this deposition, and also that there was no proof that the witness could not be produced at the trial. It appears, however, that the defendant appeared by his counsel in open court, and consented that the "deposition of Ernest Rost, a witness detained in custody to testify, may be taken; that the said testimony of the said witness be taken down by the short-hand reporter of this court, and the same may be by him hereafter written out, and said written notes of the direct and cross examination read in evidence upon the trial of said cause, with the same force and effect as if said witness were himself present and testifying." This was an express consent that this identical deposition should be read in evidence at the trial. There was no condition that it should be shown that the witness could not be produced. The deposition was taken as provided in the stipulation, and is to be governed by it, and not by the provisions as to depositions in the Penal Code. In this view the certificate was unnecessary.

4. It is said that the above-mentioned depositions were not admissible, or sufficient to support the conviction, because the witnesses were accomplices. But the objection that a witness was an accomplice does not go to the admissibility, but only to the effect, of his evidence. In this case, if it be assumed that there was such knowledge on the part of Rost as to make him an accomplice, we think that the other evidence to the effect that the owner missed his steer, and shortly afterwards its hide and some entrails were found buried in defendant's back-yard, is sufficient corroboration of the accomplice. See *People v. Cleveland*, 49 Cal. 577; *People v. Cloonan*, 50 Cal. 449; *People v. Kunz*, 14 Pac. Rep. 836. The court below informed the jury of the rule as to the testimony of an accomplice, in its oral charge, to which no exception was taken.

The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

I dissent: PATERSON, J.

(75 Cal. 308)

OTTO v. JOURNEYMEN TAILORS' PROTECTIVE & BENEVOLENT UNION OF SAN FRANCISCO. (No. 11,645.)

(Supreme Court of California. March 21, 1888.)

1. BENEVOLENT SOCIETIES—PUNISHMENT OF MEMBERS—RIGHT OF EXPULSION.

Where the only penalty imposed by the constitution and by-laws of an unincorporated tailors' benevolent union against members working for parties against whom a strike has been declared is a fine, the expulsion of a member for such an offense is invalid.

2. SAME—GOOD FAITH.

A member, in good standing, of an unincorporated association having a benevolent fund, in the benefit of which such member is entitled to participate, was expelled from the association on a charge for which the only penalty provided was a fine, and was afterwards reinstated in order that he might be again expelled on a charge of conspiracy to injure and destroy the association, in reality the same offense for which he was first expelled. *Held*, that he is entitled to an order from the court commanding the association to restore him to membership, and to the rights and privileges incident thereto.

3. SAME—INTERFERENCE OF THE COURT.

A member of an unincorporated benevolent association will not be bound by the decision, made in bad faith and maliciously, of the central body of the association, although it is provided in the constitution that any member having a grievance may lay it before such body, whose decision shall be final.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

*John M. Days*, (*John C. Hall*, of counsel,) for appellant. *Rhodes Borden* and *L. M. Hoefler*, (*O. P. Evans*, of counsel,) for respondent.

SEARLS, C. J. This is an appeal from a writ of mandate issued by the superior court, commanding appellant to reinstate the respondent, August Otto, to membership in the society, and to restore him to all the rights, privileges, and immunities of membership therein.

The appellant is, and since 1873 has been, an unincorporated association composed of about 200 persons, tailors by occupation, organized for the purpose of transacting the business of a benevolent association, of improving the condition of its members, and for protection against unjust and arbitrary encroachment of capital. The association has a constitution and by-laws, providing for its government, and has a benevolent fund to which members may, under proper circumstances, become entitled to a certain extent. Plaintiff became a member about October 1, 1883, and continued such in good standing until June 9, 1884, when, as the court finds, he was expelled without any hearing or trial whatever. On May 24, 1884, plaintiff was a regular member, in good standing, of the association and of the benevolent fund branch of the association, and entitled to its pecuniary benefits, when a question arose in reference to the employment of non-members of the association by a firm of tailors, and such proceedings were had that a special meeting of all members of shop meetings was called, at which it was decided by a vote of 89 for and 39 against, to declare a strike against the offending firm, for which plaintiff was laboring. By the constitution and by-laws it is provided that a two-thirds majority of the members shall be necessary to ordering a strike. There were at the time 176 members entitled to vote on the question; of whom two-thirds did not vote, but two-thirds of those present at the meeting did vote in favor of the strike. Plaintiff opposed such strike. He at first expressed a determination to abide by the decision, but finally, upon being offered work by the offending firm, accepted such work, and was therefore expelled from the association, as hereinbefore stated, and all union members were informed thereof, whereby he has since that date, under the rules of the association, been prevented from procuring employment in union shops, which seemed to include most of the better class of shops in the city (San Francisco.) The expulsion was invalid in this: members working for parties against whom a strike is declared are subject to a fine of not less than \$10 nor more than \$100, and no other or further penalty is provided, so far as appears by the constitution and by-laws. On the 17th of July, 1884, the striking members of the union agreed to terminate the strike, and to return to work for the employers of the plaintiff, on the condition that they would discharge the latter, which was done, and the strike thus terminated. On the 13th of October, 1884, the central body of the union rescinded the expulsion of plaintiff, and on the same day of the same month other charges involving conspiracy on the part of plaintiff and others against and to the injury of the society and its members were preferred. The 27th day of October was set for the trial of plaintiff upon the charges, which trial subsequently took place, and plaintiff was found guilty of conspiracy, and expelled from the society. The court below finds as bearing upon this point in substance: *First*. That the expulsion of June 9th was for working for a firm against whom a strike had been ordered. *Second*. That the rescission of October 13th was not made in good faith, and was only for the purpose of expelling him again. *Third*. That the first and second expulsions were for one and the same offense, and was not called "conspiracy" until the charges were drawn by an attorney, and then only that a charge might be formulated which would warrant expulsion, independent of the constitution and by-laws. *Fourth*. That the trial of October 27th was by the



central body, and not by the union as a whole; that this was not fair, was contrary to natural justice; not provided for by the constitution or by-laws, etc. The findings fully sustain the allegations of the petition, and warrant the judgment of the court, provided it is within the province of that tribunal to investigate and question the action of the appellant in expelling plaintiff. Appellant specifies many particulars in which it is claimed the decision of the court is not supported by the evidence. We have examined the testimony and are of opinion that it warrants the findings of the court in all essential particulars. To enumerate the several objections, and specify the evidence in support of the findings excepted to, would extend the decision beyond reasonable limits, without any corresponding benefits to the parties; hence we dismiss this branch of it thus summarily. Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character. Respondent, as a member of the association, in good standing, who had paid all his dues and assessments, and who was entitled to participate in the benefit feature of the company, had property rights involved, which, if violated, entitles him to the protection of the courts.

The right of expulsion from associations of this character may be based and upheld upon two grounds: *First*, a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation; *second*, for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute. We content ourselves with stating the propositions thus broadly, and, for the purposes of this case, need not refer to the numerous authorities defining and limiting the power. In the matter of expulsion the society acts in a *quasi* judicial character, and, so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal. *Com. v. Society*, 8 Watts & S. 250; *Burt v. Lodge*, 44 Mich. 208; 33 N. W. Rep. 13; *Robinson v. Lodge*, 86 Ill. 598. The courts will, however, decide whether the ground for expulsion is well taken. *Hirs. Frat. & Soc.* 55; *Cotton Exchange v. State*, 54 Ga. 668. It has been held in reference to the expulsion of members from societies of this character, that the courts have no right to interfere with the decisions of the societies, except in the following cases: "*First*. If the decision arrived at was contrary to natural justice, such as the member complained of not having an opportunity to explain misconduct. *Secondly*. If the rules of the club have not been observed. *Thirdly*. If the action of the club was malicious and not *bona fide*." *Hirs. Frat. & Soc.* 56; *Dawkins v. Antrobus*, 44 Law T. 557; *Lambert v. Addison*, 46 Law T. 20.

Article 25 of the appellant's constitution provides as follows: "If any member defrauds this union, he shall be dealt with as the central body may decide." Beyond this no specific provision appears in the constitution or by-laws under which members may be expelled. The contention of appellant is that the power of expulsion is inherent in every society, and that the offense of which plaintiff was found guilty was sufficient ground for expulsion, as matter of law, irrespective of any provision of the constitution or by-laws. We subscribe to that portion of the proposition which asserts the inherent right of expulsion, subject, however, to the limitations hereinbefore expressed. For the purposes of this case we assume, also, without deciding—*First*, that the charges and specifications against plaintiff were sufficient, upon being proven, to warrant his expulsion under the inherent right so to do mentioned; *second*, that the "Central Body,"—that is to say, the board of delegates of shop societies, as contradistinguished from the entire body of members, may

exercise the power of expulsion. Conceding these propositions, however, (so far as the latter is concerned, we doubt if it can be maintained,) the facts as found by the court still remain, that plaintiff was really and in fact found guilty for no other offense than that for which he was expelled in the first instance, viz., for working for parties against whom a strike had been ordered; that the expulsion was not in good faith, was not fair, and was contrary to natural justice; that the charge of "conspiracy to injure and destroy the union," was in substance but a pretext to punish him for an offense only subjecting him to a fine, in a manner wholly different from the imposition of the penalty provided therefor, etc. We think, as before stated, that there was evidence from which the facts as found were fairly deducible. These facts raise the inevitable conclusion, that the trial and conviction of plaintiff was a travesty upon justice, and lacking in the essential elements of fairness, good faith, and candor, which should characterize the action of men in passing upon the rights of their fellow-men.

We are referred to the provision of appellant's constitution which provides that "any member having a grievance, shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be final." No doubt when action is properly taken in the manner indicated, it is final, and the courts will not interfere, but when under the guise of remedying the grievance of a member, the central body acts in bad faith, and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may, however, to that extent, be the subject of review. The judgment is affirmed.

We concur: PATERSON, J., MCKINSTY, J.

(2 Cal. Unrep. 852)

LONGNECKER v. HIS CREDITORS. (No. 12,268.)

(Supreme Court of California. March 21, 1888.)

INSOLVENCY—DISCHARGE OF INSOLVENT—DISCRETION OF THE COURT.

The disposition of a motion to set aside a decree of final discharge in insolvency rests largely on the discretion of the *nisi prius* court, and will not be reviewed except in case of an abuse of that discretion.

Department 2. Appeal from superior court, Butte county; LEON D. FREER, Judge.

W. R. Felter, one of the creditors of G. H. Longnecker, an insolvent debtor, filed in the superior court an opposition to the insolvent's discharge, which opposition was demurred to. Felter's attorney confessed the demurrer, and 15 days were allowed in which to amend the opposition, but no amended opposition was filed within the time granted, and a default was entered, and the insolvent discharged. The motion to set aside the default was based upon an alleged verbal understanding between the parties as to the filing of the amended opposition.

Albert M. Johnson, for appellant. W. J. Herrin, for respondent.

PER CURIAM. This is an appeal from an order denying a motion to set aside a decree of final discharge in insolvency. The motion was based upon the inadvertence, surprise, excusable neglect, etc., of the appellant. The disposition of motions of this kind rests largely in the discretion of the *nisi prius* court; and in this case we see no such abuse of discretion as would warrant us in disturbing the ruling of the court below. Order affirmed.

(75 Cal. 317)

*In re WILLIAMSON'S ESTATE.* (No. 12,226.)

(Supreme Court of California. March 21, 1888.)

## WILLS—CONSTRUCTION—AMOUNT OF PROPERTY DEVISED.

Where a will, after declaring that all of testator's property is the common property of himself and wife, recites: "I bequeath to my son \* \* \* all my property, real, personal, or mixed, \* \* \* that is to say, an undivided half interest in said property, leaving the remaining undivided one-half of said community property to my said wife, as the law directs;" and the wife dies before the testator,—her half of the property is not disposed of by the will, and should go to the heirs.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Appeal by Caroline Judd from a decree of distribution in the matter of the estate of William Williamson, deceased.

A. S. Kittredge, for appellant. Julius Lee, for respondent.

HAYNE, C. This is an appeal from a decree of distribution. The question presented is as to the construction of the will. The will first declares that all of the testator's property is the community property of himself and his wife, Artemesia, who was then living, and that an advancement had been made to his daughter, Caroline Judd, (the appellant here;) and then, after reciting that his son, Robert Samuel Williamson, "by his valuable labor and service, has greatly assisted, and is now greatly assisting, me in making and accumulating my said property," proceeds as follows: "First. I give, bequeath, and devise to my said son, Robert Samuel, \* \* \* all the property, real, personal, or mixed, of whatsoever nature or character, or wheresoever the same may be situated, in or to which I now have, or hereafter may acquire, any right, title, or interest; that is to say, an undivided one-half interest in said property, or all of which I have power under the law to make testamentary disposition, leaving the remaining undivided one-half of said community property to my said wife, Artemesia, as the law directs. Second. I request and desire that my said wife, in case she survives me, by testamentary disposition or otherwise, distribute her portion or half of said community property equally between our said children, Robert Samuel and Caroline, and any others that may be begotten unto us." The wife died before the testator, and the contest is between the two children as to the share which would have gone to the wife had she lived. The court below decided that the son took the whole of such share, and the daughter appeals.

We think the court erred. The testator first used language which, if not limited by what follows, would undoubtedly have given the whole estate to the son. But he immediately defines the sense in which he used the sweeping language by the following: "That is to say, an undivided one-half interest in said property, or all of which I have power under the law to make testamentary disposition." This shows that, when he spoke of bequeathing "all the property" to the son, he meant all over which he supposed he had power of disposition, which was one-half of the community property. And, as if to clinch the matter, he adds this clause: "Leaving the remaining undivided one-half of said community property to my said wife, Artemesia, as the law directs." Now, if the wife had survived the testator, there would have been no doubt at all as to the intention. It would have been perfectly clear that the testator intended the son to take only one-half of the property. The fact that the wife died before the testator does not seem to us to alter the case. The argument that the words, "all of which I have power under the law to make testamentary disposition," show that it was the testator's intention to give to the son the wife's half of the community property, in case he acquired power of disposition over it by her death, is plausible, but not sound. The phrase is used in opposition to the preceding one, viz., "an undivided one-half interest in said property." And the intention of the testator that the whole property

should not go to the son at the wife's death is shown by his request to the wife: "I request and desire that my said wife, in case she survives me, by testamentary disposition or otherwise, distribute her portion or half of said community property equally between our said children, Robert Samuel and Caroline, and any others that may be begotten to us." It seems to us that the wife's half was not disposed of by the will, and that it should go to the heirs as the law directs. The learned judge of the court below was led into error by attributing too much force to the sweeping words of disposition first quoted.

No other question has been argued by counsel. We therefore advise that the judgment be reversed, and the cause remanded for a decree in accordance with the views above expressed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a decree in accordance with the views above expressed.

(75 Cal. 319)

BAUGHMAN v. REED. (No. 12,141.)

(Supreme Court of California. March 21, 1888.)

LANDLORD AND TENANT—RENTING ON SHARES—PARTITION.

Where a tenant under a lease by which he agreed to deliver to the lessor two-fifths of all grain produced on the premises, has raised certain crops of grain which he threatens to convert to his own use, denying the lessor's right to any part, the latter is entitled to a partition, and the appointment of a receiver under Code Civil Proc. Cal. § 564, par. 1, providing that a receiver may be appointed in an action between persons jointly interested in any property, on the application of one whose interest is in danger.

Commissioners' decision. Department 2. Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

Action by Adam Baughman, surviving partner, against R. B. Reed, for partition of personal property, appointment of a receiver, and for general relief. Demurrer to complaint sustained; judgment for defendant, and plaintiff appeals. The facts sufficiently appear from the opinion.

*Lindley & Spagnoli and Reddick & Solinsky*, for appellant. *Blanchard & Swisler and Eagon & Rust*, for respondent.

BELCHER, C. C. The court below sustained a general demurrer to the complaint, and, plaintiff declining to amend, judgment was entered in favor of the defendant, from which the plaintiff has appealed. The material facts stated in the complaint are as follows: In October, 1882, the plaintiff executed to the defendant a written lease, for the term of five years then next ensuing, of a certain ranch in Amador county, and also of certain farming utensils and stock. The plaintiff was to erect certain improvements on the premises, and to furnish to the defendant the seed needed to put in a crop the first year. The defendant was to till and in all respects cultivate the premises in a husband-like manner, and out of the crop raised the last year was to return to the plaintiff the same number of pounds of seed, and of the same kinds as he received the first year. The defendant was also to deliver to the plaintiff, or his order, "two-fifths of all the crops produced on the said farm and premises aforesaid, of every name and description or kind, to be divided on the place; hay in bale under shelter, grain of all kinds in the granary, apples, peaches, pears, plums, etc., in the fruit-house, grapes in the vineyard after being gathered, and in a reasonable time after such crops shall have been harvested or gathered." The defendant entered under his lease, and continued to occupy and cultivate the premises until the 26th of July, 1886, when this

action was brought. It is further alleged that plaintiff, in October, 1882, furnished to defendant, to be used as seed, 82,469 pounds of barley and 3,700 pounds of wheat; that during the year 1886 defendant had raised on the premises 37 tons of barley of the value of \$1,000, and 45 tons of wheat of the value of \$1,350, and that all of this grain was severed from the ground and in process of being threshed and sacked; that defendant intended and had threatened to and would leave and abandon the premises on completing the harvesting of the crop, and that he denied the right of the plaintiff to any part thereof, and threatened and intended to remove the whole crop, and to dispose of and convert the same to his own use; that defendant is insolvent. The prayer is that 82,469 pounds of the barley, 3,700 pounds of the wheat, and two-fifths of the remainder of the crop be segregated and set apart to the plaintiff, and that a receiver be appointed pending the action, and for general relief.

We fail to see why the complaint does not state facts sufficient to constitute a cause of action. The action was in effect for a partition of personal property, owned by the parties as tenants in common. Now conceding that plaintiff did not own that part of the crop which he claimed in return for the seed furnished in 1882, (*Callender v. McLeod*, 16 Pac. Rep. 194,) still he unquestionably did own, as tenant in common with the defendant, two-fifths of all the wheat and barley raised on the leased premises. *Bernal v. Hovious*, 17 Cal. 542; *Knox v. Marshall*, 19 Cal. 617; *Freem. Co-Tenancy*, § 100. The defendant was in possession of the whole crop and was threatening to sell it and appropriate the proceeds to his own use. In such a case an action for partition was the proper remedy, and the appointment of a receiver was authorized by the Code. *Freem. Co-Tenancy*, §§ 426, 448; *Code Civil Proc.* § 564. It is urged for respondent that the complaint was insufficient, because it failed to allege that plaintiff had performed all the conditions of the lease which were to be performed by him, but we think sufficient facts were stated in this regard. It is further argued that the action was commenced prematurely, because the defendant was to deliver to plaintiff his share of the grain in the granary. But as the defendant denied the plaintiff's right to any part of the crop, and was threatening to appropriate it all to his own use, we do not see why plaintiff was called upon to delay the commencement of an action to determine his rights. The judgment should be reversed, and the cause remanded with directions to overrule the demurrer.

We concur: HAYNE, C., FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with directions to overrule the demurrer.

(75 Cal. 346)

*In re STUTTMEISTER'S ESTATE.* (No. 12,254.)

(*Supreme Court of California.* March 26, 1888.)

1. EXECUTORS AND ADMINISTRATORS—EXPENSES OF ADMINISTRATION—ATTORNEY'S FEES.  
Where the executor was negligent in his duties and some of the heirs employ an attorney to prosecute the matter, and hasten administration, the estate is not bound for the payment of such attorney's fees.

2. SAME—ALLOWANCE OF DEMAND—VOID ORDER.

In such case, on petition of the attorney against the heirs, an order was entered by the probate court, on default, that the attorney's fees be paid out of the estate. *Held*, on petition against the administrator to enforce payment under such order, that the order was void.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

For former report of this case, see 14 Pac. Rep. 35.

*Ben. Morgan*, for appellant. *E. J. & J. H. Moore*, for respondent.

PATERSON, J. The petitioner herein is an attorney at law. On June 12, 1884, he filed a petition in the probate department of the superior court, asking for an order citing V. R. and W. O. Stuttmeister, Bertha M. Byer, and George C. Hoadley, guardian of the estate of Alice L. Stuttmeister, a minor, to appear and show cause why they should not pay the petitioner their proportion of the sum of \$300 claimed by him as an attorney fee. In his petition he alleged, among other matters, that the executor of the last will of Stuttmeister, deceased, had grossly neglected the duties of his trust, and delayed the settlement of the estate; that the heirs and devisees were unable to learn anything about the affairs of the estate; that two of the heirs, V. R. Stuttmeister and B. M. Byer, being greatly in need of money, retained the petitioner as their attorney to prosecute the matter in their behalf, he consenting to act without a retaining fee; that he was retained by them as their attorney to prosecute their claim for themselves and minor heirs; that Hoadley, as guardian of the estate of the minors, retained him to prosecute, on behalf of the minors, proceedings against the executor, on the same terms and conditions. He further alleged that, in pursuance of his agreement, he had performed services which were worth the sum \$300; that he had presented his claim to the heirs and Hoadley, the guardian, and demanded payment, but all objected to the payment of the same except the guardian, who was willing to pay whatever sum the court might allow. On September 19, 1884, the default of the respondents for failure to answer the petition was entered. On October 8, 1884, the court made an order allowing the petitioner \$300 "for services rendered as attorney for the heirs herein in hastening the administration of the estate," and ordered "that judgment be entered in favor of petitioner for the sum of \$300, \* \* \* to be paid from said estate in due course of administration." No appeal was taken from this order. Thereafter, on May 11, 1887, the petitioner filed another petition in said estate, setting forth the making of said order, and praying that the administrator of said estate be compelled to pay him said sum of \$300. To this petition the administrator filed an answer, and, the matter coming on to be heard, the court granted the prayer of the petition, and ordered the administrator to pay the petitioner forthwith, out of the funds in his hands belonging to said estate, the said sum of \$300, from which order this appeal is taken.

From the foregoing statement, it will be seen that the contract upon which the petitioner relies in support of the orders of the court was a contract between himself and V. R. Stuttmeister and B. M. Byer. The executor was not a party to the agreement, and there was no order appointing the petitioner attorney for minor or absent heirs. The heirs could not by their contract bind the estate. The executor was not made a party to the proceeding which resulted in the first order, and the estate was not represented. The claim was not one which arose in the life-time of the testator, and it was not an expense of administration. The fact that no appeal was taken from the original order is immaterial, because the proceedings, on their face, are void. They show a contract with parties who could not bind the estate, the petition states no facts authorizing the order, and no one representing the estate was a party thereto. In *Stuttmeister v. Superior Court*, 14 Pac. Rep. 35, it was decided, simply, that an appeal having been taken from the order now before us, and a *supersedeas* bond filed, the court had no power to enforce the payment of the money by proceedings for contempt. The order is reversed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

(75 Cal. 271)

BOOTH *et al.* v. HOSKINS. (No. 12,363.)

(Supreme Court of California. March 20, 1888.)

## 1. MORTGAGES—WHAT CONSTITUTES—ABSOLUTE DEED.

Plaintiffs conveyed land by a quitclaim deed to defendant, and at the same time borrowed money from defendant, both signing an agreement at the same time to mutually repay and reconvey. *Held*, that although on the face of the deed it was an absolute conveyance, yet it was clearly the intention of the parties to create a mortgage only, and such must it be considered.<sup>1</sup>

## 2. LIMITATION OF ACTIONS—WRITTEN AGREEMENT—ORAL EVIDENCE TO VARY.

Where there is a written agreement in which appears a stated time for the repayment of a loan, the lender will not be allowed to adduce in evidence an oral agreement to alter the terms of, or be substituted for, the written agreement, if made at the time of the loan; nor, if made subsequently, can such an oral agreement create a new or continuing contract so as to prevent the running of the statute of limitations.

## 8. QUIETING TITLE—MORTGAGED PREMISES—PAYMENT OF MORTGAGE DEBT.

Plaintiffs, owing defendant a mortgage debt, brought action against the latter to quiet title to the property subject to such charge, defendant's cause of action to recover his money being barred by statute. *Held*, that the plaintiffs must be denied any affirmative relief in equity until they had done equity by payment of the debt and interest to defendant.

Commissioners' decision. Department 1.

Appeal from superior court, Placer county; B. F. MYRES, Judge.

Action brought by Edward Booth *et al.*, plaintiffs and appellants, to quiet title to land in Placer county, California, against J. H. Hoskins, respondent and defendant.

*Taylor & Holl*, for appellants. *J. M. Fulweiler* and *C. A. & E. P. Tuttle*, for respondent.

BELCHER, C. C. The plaintiffs commenced this action on the 29th day of July, 1885, to quiet their title to a quarter section of land in Placer county. By his answer the defendant denied that the plaintiffs, or either of them, had owned the land in question since the 13th day of July, 1878, admitted that he claimed to own it, and, by way of cross-complaint, alleged that on the 13th day of July, 1878, the plaintiff, Booth, was the sole owner of the land, and on that day, for and in consideration of the sum of \$408, gold coin, paid to him by defendant, executed and delivered to defendant a good and sufficient deed of the same, and thereby the defendant became, ever since has been, and now is the owner thereof. And the prayer was that the defendant's title be quieted as against the plaintiffs. The plaintiffs answered the cross-complaint, and admitted the execution of the deed as alleged, but averred that it was a quitclaim deed, and was made for and as a mortgage, and was so understood and intended by the parties thereto, to secure the payment of \$408, with interest thereon at the rate of 1½ per cent. per month, due from Booth to the defendant for money loaned and advanced to him by defendant; and then further averred that all claim and demand which defendant may have had against Booth, on account of the money so loaned and advanced, was, before the commencement of the action, barred by the provisions of sections 337, 339, Code Civil Proc. At the trial the deed referred to, being an ordinary quitclaim deed, was introduced in evidence, and also a paper signed by both parties, which reads as follows: "This agreement, made and entered into this 13th day of July, 1878, by and between Edward Booth, of Placer county, state of California, and J. H. Hoskins, also of said county and state, witnesseth, that whereas, the said party of the first part has entered at the Sacramento land-office (describing the quarter section in controversy;) and whereas, said party of the second part has furnished the said party of the first part \$408, in United

<sup>1</sup>See note at end of case.

States gold coin, for the said above-described land; and whereas, to secure the party of the second part, the said Edward Booth has this day deeded to J. H. Hoskins his right, title, and interest in the above-described land: now, therefore, this agreement witnesseth, that if the said Edward Booth shall repay to the said J. H. Hoskins the sum of \$408 within three months from the date of this instrument, with interest at  $1\frac{1}{2}$  per cent. per month, then the said J. H. Hoskins shall reconvey to the said Booth the above-described land, and all its appurtenances." The defendant was a witness in his own behalf, and testified "that at the time of the execution and delivery of the said deed, Booth also delivered to him the certificate of purchase, just received from the receiver of the land-office, with the express understanding that the patent was to be delivered to him (Hoskins) when it should be issued by the government; and that although the written instrument recited the promise to pay within three months from the 13th day of July, 1878, yet it was distinctly understood and agreed between him and Booth that he (Hoskins) should receive the patent and hold it as additional security; and that Booth should have a reasonable time, after the issuance of the patent, to pay the \$408 and interest; that he never asked Booth to pay him, or expected Booth to pay him, or that his money was due until after the patent had been issued; that it was not until about the 25th day of July, 1881, when he went to the land-office and found that the patent had been issued during the winter preceding, and that Booth had caused it to be delivered to him by making an affidavit, etc.; that about the last of August, or in the forepart of September, 1881, he saw Booth and asked him about his getting the patent, and the payment of what Booth owed him for the purchase of the land; that Booth admitted that he got the patent, and said he was going to keep it, and that his deed to Hoskins was not good because it was not signed by Booth's wife, and that he did not propose to pay him, Hoskins, until he got ready, if at all; that then was the first time that Booth had ever been asked by him for the money, or had refused to stand by his agreement made at the time of the payment for the land and execution of the deed." The foregoing was all the evidence introduced by either side upon the question as to the purpose and effect of the deed from Booth to defendant, and upon the question as to whether the defendant's cause of action to recover back his money was barred by the statute of limitations or not. The court found that prior to the execution of the deed Booth resided with his family upon the quarter section, and filed a homestead thereon, stating in his declaration of homestead all the facts required by law to be stated therein, and, among others, that the property was then of the value of \$2,500; that at the time of the trial the property was of the value of \$20,000; that the deed "was intended to vest the title to said premises in said Hoskins in trust, and to secure the payment of \$408, with interest at  $1\frac{1}{2}$  per cent. per month, loaned by Hoskins to Booth on the day last aforesaid to pay for and secure the title to said land from the government of the United States;" that the amount then due was \$918, no part of which sum had been paid or tendered, and that defendant's right to recover the amount due him was not barred by the provisions of sections 337, 339, Code Civil Proc. And as a conclusion of law the court found "that in fairness the plaintiffs ought not to have any relief in this action until they first pay the defendant his just debt; that, seeking equitable relief, they should show equity on their side; that defendant Hoskins is entitled to a decree foreclosing his said deed as a mortgage, and foreclosing plaintiffs of and from all right, title, and equity of redemption therein, after execution of sheriff's deed therefor according to the law and the practice of the court, and for the sum of \$918, to be paid out of the amount arising from the legal sale of said premises, over and above the sum of \$5,000, exempt as a homestead." Judgment of foreclosure was accordingly entered in favor of the defendant, from which and from an order denying them a new trial the plaintiffs have appealed.



The first question that presents itself for consideration is, what was the character of the defendant's deed? We think it entirely clear that the deed was intended to be and was only a mortgage. The defeasance, executed contemporaneously, shows beyond doubt that it was made to secure the payment of a sum of money loaned by the grantee to the grantor, and payable at a future day, with interest. In such a case a deed absolute is held to be and is treated as a mortgage. *Farmer v. Grose*, 42 Cal. 169; *Montgomery v. Spect*, 55 Cal. 352. The next question is, was the defendant's cause of action to recover back his money barred by the statute of limitations? We think it was. By express provision of the written contract, made at the time of the loan, the money was to be repaid in three months. Under this contract the debt became due, and the statute began to run in October, 1878, and an action was consequently barred after four years from that time. There is nothing to take the case out of the general rule except the testimony of defendant that it was understood and agreed between him and Booth that the latter should have a reasonable time to pay the money after the issuance of his patent. But this agreement was oral, and, if made at the time of the loan, could not change the terms of, or be substituted for, the written contract, and, if made subsequently, could not create a new or continuing contract, so as to take the case out of the operation of the statute. Code Civil Proc. § 360. Besides, if we could accept defendant's theory, we should meet with a new difficulty. Defendant learned, in July, 1881, that the patent had been issued, and in August or September following was informed by Booth "that he did not propose to pay him, Hoskins, until he got ready, if at all," and still he waited for three years and a half after that without attempting to assert his rights. Under such circumstances the delay would seem to have been unreasonable and inexcusable. Now, conceding, what we do not decide, that under our law, as at present framed, a mortgage upon a homestead, executed by the husband, but not by the wife, is void only as to the homestead value, and is good as to the excess, (*Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Ma-bury v. Ruiz*, 58 Cal. 14,) still, the defendant's right to recover the money due him being barred, he was not entitled to have his mortgage foreclosed. But were the plaintiffs entitled to any relief without first paying the defendant? The whole case shows that Booth justly owed the defendant all the money claimed by him. It was by the use of the money loaned by defendant that Booth acquired the title to his property, now of large value. Common honesty requires a debtor to pay his just debts, if he is able to do so, and the courts, when called upon, always enforce such payments if they can. The fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon is, as suggested by the court below, that he who seeks equity must do equity. In accordance with this maxim, we think the plaintiffs should be denied any affirmative relief until the money justly due to the defendant is paid. The other questions discussed by counsel do not require special notice.

The judgment and order should be reversed and the cause remanded, with directions to the court below to enter a decree upon the findings in accordance with this opinion.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded, with directions to the court below to enter a decree upon the findings in accordance with the views above expressed.

## NOTE.

**MORTGAGE—DEED ABSOLUTE.** A deed absolute upon its face will be construed as a mortgage in connection with a bond for a reconveyance executed as part of the same transaction, *Cosby v. Buchanan*, (Ala.) 1 South. Rep. 898; *Frey v. Campbell*, (Ky.) 8 S. W. Rep. 368, and note; as it will, also, in connection with any instrument of defeasance, *Id.*; *Gaither v. Clark*, (Md.) 8 Atl. Rep. 740; *Bunker v. Barron*, (Me.) *Id.* 253; *Joint-Stock Ass'n v. Merklin*, (Md.) 5 Atl. Rep. 544; *Morrison v. Markham*, (Ga.) 1 S. E. Rep. 425. Any instrument executed merely as security for a debt will be so treated. *Knapp v. Bailey*, (Me.) 9 Atl. Rep. 122; *Pearson v. Sharp*, (Pa.) *Id.* 38; *Hanlon v. Doherty*, (Ind.) 9 N. E. Rep. 782, and note; and a bill of sale will under such circumstances be held a chattel mortgage, *Id.* note, 786; *Butts v. Privett*, (Kan.) 14 Pac. Rep. 247. It is immaterial that the instrument is executed by a party other than the debtor, *Robtinson v. Bank*, (Tenn.) 3 S. W. Rep. 656; *Bank v. Ashmead*, (Fla.) 2 South. Rep. 657; or that the reconveyance is to be made to some third party, *Martin v. Pond*, 80 Fed. Rep. 15. The facts may be shown by parol evidence. *Knapp v. Bailey*, *supra*; *Pearson v. Sharp*, *supra*; *Darst v. Murphy*, (Ill.) 9 N. E. Rep. 887, and note; *Butts v. Privett*, (Kan.) 14 Pac. Rep. 247; *Bank v. Ashmead*, *supra*.

(2 Cal. Unrep. 853)

**MARKHAM v. FOWLER et al.** (No. 11,098.)

(*Supreme Court of California.* March 26, 1888.)

**APPEAL—PRACTICE—FILING BRIEFS.**

Case to be submitted on briefs will be dismissed for failure to file briefs within time allowed.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*Bennett, Wiggington & Creed*, for appellant. *J. M. Wood*, for respondents.

**PER CURIAM.** The above-entitled cause having been ordered submitted on briefs to be filed within 30 days from February 14, 1888, and the time having expired, and no briefs having been filed, it is ordered the judgment appealed from be affirmed.

(75 Cal. 356)

**BURKE v. KOCH.** (No. 11,088.)

(*Supreme Court of California.* March 26, 1888.)

**1. REPLEVIN—ALTERNATIVE JUDGMENT—WHEN NOT NECESSARY.**

Under Code Civil Proc. Cal. § 667, providing that judgments in actions to recover possession of personal property may be for the possession, or value thereof, in case a delivery cannot be had, the court is not bound when it appears, in such an action, that property which belonged to plaintiff was fraudulently disposed of by defendants, to find the character or value of such articles as could be returned, or to render a judgment in the alternative.

**2. SAME—EVIDENCE—FRAUD.**

In an action of claim and delivery, when it appears that property which belonged to plaintiff was fraudulently assigned by one defendant to the other, both being participants in the fraud, the fact that a consideration passed between them is immaterial to the case.

**3. SAME—DAMAGES—CLAIM IN PETITION.**

In an action of claim and delivery, it is error for a trial court to allow any damages beyond the amount prayed for in the petition.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action brought by Alfred I. Burke, as assignee of the estate of Jacob Zech, insolvent, against Jacob D. Koch and Jacob Zech, to set aside an alleged fraudulent assignment, etc. The court decided for plaintiff, and defendant Koch alone appealed. After such appeal he died, and his executors, K. Meussdorffer and A. Grass, were substituted as defendants.

*A. C. Ellis*, for appellant. *Tilden & Tilden*, for respondent.

**PATERSON, J.** Conceding that this action is, as claimed by appellant, an action of claim and delivery, it does not follow that the judgment is void or

erroneous because not in the alternative. The court found that the defendants sold and disposed of a large portion of the property sued for, and appropriated the proceeds thereof. Under the findings of the court,—and the findings are supported by the evidence,—the defendants stand as wrong-doers, as fraudulent assignor and fraudulent assignee. The defendant Zech, with the intent to hinder, delay, and defraud his creditors, made the assignment to his brother-in-law, defendant Koch, and the latter, with full knowledge of the fraudulent purpose, accepted the same, to aid Zech in defrauding his creditors. In pursuance of their scheme, a part of the property which should have gone to the possession of the assignee, this plaintiff, was disposed of by the defendants. This fact appearing at the trial, the court was not bound to find the character or value of the articles which could be returned, or to enter a judgment in the alternative. *Wheatsmore v. Rupe*, 65 Cal. 238, 3 Pac. Rep. 851; *Brown v. Thompson*, 45 Cal. 76.

The fact that Koch paid \$2,200 for the property, if such be the fact, is immaterial; it entitles the defendant Koch to no consideration, either at law or in equity. The defendants were both fraudulent actors. Actual fraud characterized the transaction *ab initio*, and the creditors are not called upon to reimburse Koch for money which was paid him to insure the fraud against detection. *Goodwin v. Hammond*, 13 Cal. 168; *Swinford v. Rogers*, 23 Cal. 234.

The statement shows that "plaintiff offered in evidence, as admissions made by Jacob Koch as to why he took the property, and his knowledge of the circumstances of Mr. Zech, and also showing he was told the value, the testimony of Mr. Koch taken at the trial of the opposition to the discharge of Jacob Zech in insolvency." The evidence was objected to by defendant, as "irrelevant and inadmissible." Objection was overruled, and defendant excepted. The evidence following this offer and ruling appears to be a transcript of the sworn testimony of Koch, but is not shown to be such except by the statement above quoted. The evidence was not irrelevant, if it was in fact a statement made by Koch, and the objection that it was inadmissible was insufficient to test the question of its competency. The ruling is therefore not shown to be erroneous.

The judgment is for \$7,470 and costs. The plaintiff prayed for the sum of \$6,000, the value of the property, and \$500 damages; and the prayer follows the *ad damnum* clause of the complaint, which alleges that plaintiff has been damaged in the sum of \$500 by reason of the detention. In the absence of an amendment to the complaint, therefore, the court could not allow any damages beyond the amount prayed for.

The order denying a new trial is affirmed, and the cause is remanded, with directions to modify the judgment by striking out the figures "\$7,470" and inserting the figures "\$6,500" in lieu thereof. In all other respects the judgment is affirmed.

We concur: SEARLS, C. J.; MCKINSTY, J.

(75 Cal. 332)

STOCKTON BLDG. & LOAN ASS'N v. CHALMERS *et al.* (No. 11,828.)

(Supreme Court of California. March 23, 1888.)

1. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—RIGHTS AS INDIVIDUALS.

The wife of a deceased mortgagor was made a party to a foreclosure suit as executrix only. A homestead previously declared by her was set up in defense. The land was sold under a decree giving plaintiff possession. *Held*, that a writ of assistance should not issue against the wife, as, not being a party to the suit in her individual capacity, such homestead exemption could not be properly pleaded in defense.

## 2. SAME.

Under Code Civil Proc. Cal. §§ 887, 889, prescribing two methods by which new parties may be brought into an action, viz., by intervention and by order of court, one who is before the court as executrix cannot become a party to the action in her individual capacity, except by one of the methods prescribed.

PATERSON, J., dissenting.

In bank. Appeal from superior court, El Dorado county; GEORGE E. WILLIAMS, Judge.

*W. L. Dudley and Geo. G. Blanchard*, for appellant. *Chas. N. Fox*, for respondents.

SEARLS, C. J. This is an appeal from an order after final judgment, refusing a writ of assistance. Robert Chalmers, in his life-time, executed a mortgage upon certain premises in El Dorado county. Subsequently his wife, Louisa, declared a homestead upon a portion of the same premises. Chalmers departed this life, and an action to foreclose the mortgage was brought against the executor and executrix of his last will, viz., against George Chalmers and Louisa M. Chalmers, as executor and executrix thereof. Louisa Chalmers, the widow, was made a party defendant as executrix, but not in her individual capacity. The executor and executrix set up the fact of the declaration of homestead by the latter, and the court found the existence of the homestead as a fact, and that it was subsequent in time and subject to the lien of the mortgage. A decree was entered in favor of plaintiff under which the property was sold, purchased by plaintiff, and, a sheriff's deed having passed, possession was demanded of Louisa M. Chalmers, (who had before that time intermarried with one Hardie,) pursuant to a clause in the decree requiring possession to be delivered to the purchaser, which was refused, whereupon plaintiff applied for a writ of assistance. The court below denied the writ upon the grounds that Mrs. Chalmers was not individually a party to the foreclosure suit, and was not made such, or concluded by the answer made in her representative capacity, setting up the homestead, or by the decree rendered therein.

It is well settled that a judgment for or against a party in one right cannot affect him when acting in another right. Thus, a plaintiff, suing as administrator of his wife, is not affected by a judgment against himself in her life-time, in an action to which she was not a party. *Blakey v. Newby*, 6 Munt. 64. "A decree against one as administrator, on a bill to compel the delivery of slaves claimed as a gift from the intestate, will not conclude his rights as a creditor, on a bill by him against the former plaintiffs, to set aside the gift conveyance for fraud." Freem. Judgm. § 156, and cases cited. Louisa Chalmers was sued as the executrix of the last will of her deceased husband. As such she could only avail herself of such defenses to the foreclosure suit as would have existed in favor of her testator, had he been living, and a party to the action, and had he been living and a party defendant he could not have concluded by a defense or want thereof his wife's right to the homestead. Such result could only be reached, if by action, in a proceeding to which she was a party. *Revalk v. Kraemer*, 8 Cal. 66; *Same v. Same*, Id. 75; *Van Reynegan v. Revalk*, Id. 76; *Cook v. Klink*, Id. 347; *Stoops v. Woods*, 45 Cal. 439. It is true, a party may be before the court in two or more capacities, and in *Corcoran v. Canal Co.*, 94 U. S. 741, an individual, as trustee for certain bondholders, was brought before the court and a decree rendered against him as such, and it was held he could not relitigate the same matter on the ground that he was himself a bondholder of some of the bonds. If he was such holder, it was said he was bound by the former decree, because, as trustee in the former suit, he was representing himself. That, however, is not this case. Louisa Chalmers, as executrix, represented the estate of her deceased husband, and the decree rendered is binding upon such estate; but her right in the homestead, if taken from the community property of herself and husband, vested

absolutely in her upon the death of the latter, and as executrix she could not represent it. But it is claimed that defendant did, in effect, make herself individually a party to the action by setting up the homestead right when sued as executrix. The Code specifies but two methods by which, after the commencement of an action, new parties may be brought in; one is by an order of the court and the other by complaint of intervention. No such order was made or proceedings had in this case; hence we conclude she was not individually a party to the cause. It may well be that a party who voluntarily files an answer in a cause without an order of court making him a party defendant, and who goes to trial upon the issues made by his answer to the complaint, will be concluded by the judgment rendered on the trial of such issues, and estopped from denying that he was a party to the action. But in the present case we search the decree in vain for any adjudication of defendant's homestead rights. The conclusion reached by the court below was "that Mrs. Chalmers (now Mrs. Hardie) never was a party to this action, and therefore the judgment and decree do not affect her homestead right, and, being in possession under the homestead right, she is rightfully in possession."

We are of opinion this conclusion was warranted by the premises, and the order denying the writ is affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; THORNTON, J.; MCKINSTRY, J.

PATERSON, J. I dissent. It is true that Louisa M. Chalmers was not, technically speaking, a party defendant in the action, but she voluntarily set up her individual rights in the property, and caused the same to be litigated. Her homestead right was set forth in detail. It was treated as an issue in the case. The trial proceeded upon the theory, by all the parties, that her individual rights were in controversy, and the findings of the court upon that matter were as full as the allegations of the answer. Her individual right was not necessarily, or even properly, in the answer as a part of the defense made by the defendants in their representative capacities. The estate could not in any way be benefited by the determination of the homestead rights of Mrs. Chalmers; on the contrary, if her homestead right had been established, (the court found that plaintiff's mortgage was a lien upon the property described in said declaration of homestead,) the estate would have lost a fund which otherwise would have been devoted to a payment of the debts. She, therefore, in effect and in fact, became a party to the suit in her individual capacity. Her rights were determined, and I think she was bound by the decree rendered in the case. If the name "Louisa M. Chalmers" had been repeated in the title of the cause without the addition of the official designation "executrix," there can be no doubt that judgment would be binding upon her. "A nominal, but not substantial, difference in parties does not effect the estoppel. The general rule that a judgment of a court having jurisdiction of the subject-matter and the parties and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not complied with when the same person, though a party in both suits, is such in different capacities, in the one individually, in the other as administrator. So, if an action is brought by A., as guardian of B., a minor, a judgment against A., as guardian, is in his official capacity, and will not preclude him from maintaining a subsequent action in his own right individually, and *vice versa*; for, in the prior action, A., properly speaking, had not been a party. The real party in interest was the minor, by A., his guardian. The subsequent action in A.'s own name is not then between the same parties. The person may be the same, but in different capacities, and the former action cannot preclude him from maintaining the subsequent action; but where they litigate their individual rights in the same action, the judgment is conclusive. Thus, where

an executrix, who was also the widow of the testator, being sued in the former capacity only, but raising in her defense of the suit the issue of her rights as usufructuary, will be personally concluded by the judgment, and cannot subsequently attack its validity on the ground that she was not cited in her individual capacity." 1 Herm. Estop. § 94.

(76 Cal. 349)

LOWRIE *et al.* v. SALZ *et al.* (No. 12,188.)

(Supreme Court of California. March 26, 1888.)

1. PRINCIPAL AND AGENT—REVOCATION BY DEATH—TRUSTS.

L., leaving home, left one M. in charge of his farm, with general instructions to manage same. M. had business transactions with one H., who was indebted to the estate, and who purchased the goods in question, and who deposited them with warehousemen in the name of M., but for the account and risk of —, no person being named. The warehouseman knew H., but not M. H. never handed the receipt to M., but borrowed money from defendants, to whom, upon surrender of the receipt, a new one was issued by the warehouseman. L. was dead at the time of the transaction. *Held*, that M.'s agency was revoked by death of principal, and that the goods were never in the possession of M. so as to create a trust for the benefit of the estate.

2. EVIDENCE—OPINION—ADMISSIBILITY.

In an action for the value of goods deposited, a witness was asked "whom he understood was the depositor." *Held*, such question is objectionable, as requiring the opinion of the witness, and should have been excluded.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action of trover and conversion, brought by Mary Lowrie and M. B. Sturges, plaintiffs and appellants, against S. Salz and E. Niehaus, defendants and respondents. Verdict for defendants. Plaintiffs appeal.

*T. C. Van Ness*, for appellants. *Thos. C. Huxley*, for respondents.

SEARLS, C. J. This is an appeal from a judgment of nonsuit, and from an order denying a new trial. The motion to dismiss the appeal from the judgment must be granted. The judgment was entered January 11, 1886, and the appeal was taken April 26, 1887, more than one year after the entry of such judgment.

The proof of service of notice of appeal was sufficient, under the rule enunciated in *Reed v. Allison*, 61 Cal. 461, and the motion to dismiss is denied as to the appeal from the order denying a new trial.

One of the grounds specified in the notice of motion for new trial is "insufficiency of the evidence to justify the decision and judgment." The statement fails to specify any particular in which the evidence is insufficient; and hence to that extent, under section 659, Code Civil Proc., the statement must be disregarded. There was evidence tending to show that one John Lowrie was a ranch-owner in Alameda county, and was engaged in the business of farming and fruit-growing. In the summer of 1883 he departed from this state for Alaska, leaving in charge as general superintendent and manager of his lands one John Munson, who was authorized to carry on the business, sell the product of the ranch, etc. John Lowrie was lost at sea on or about October, 1883, but his death was not known here until July, 1884. In the mean time Munson had conducted the farming business. James Hogan, who was engaged in the business of purchasing and packing fruit at Centerville, Alameda county, had purchased fruit from the Lowrie ranch through Munson; and on or about August 23, 1884, was indebted therefor to the extent of about \$1,500. It would seem that Hogan had agreed to pay some money on the fruit, from time to time, to pay for picking, and the residue of the purchase price when he (Hogan) sold the fruit. In August, 1884, Hogan deposited in the warehouse of Mortimer & Wamsley, at Niles, in Alameda county, five loads of canned fruit, amounting to 300 cases, and directed the ware-

houseman to give him a receipt as if deposited by Munson. A receipt was accordingly given in the following words and figures:

"NILES, August 23, 1884.

"Received in Niles Warehouse from Jno. Munson the following cases of canned goods on storage, for account and risk of ———. (Not transferable or negotiable:) Three hundred and sixty (360) cases canned goods. Storage charges one cent. per month, or for any fractional part of a month.

"MORTIMER & WAMSLEY, Proprietors."

The receipt should have been for 300 cases, but by mistake was made 360. The warehouseman knew Hogan, did not know Munson, and supposed the deposit was in the name of the latter to avoid danger of legal proceedings by the creditors of the former. Hogan had previously informed Munson that he should deposit fruit in this warehouse, (indeed, he had already deposited some,) "and when he had got enough in there to secure me [Munson,] he would give me the warehouse receipt, and that was all the talk we had about it. \* \* \* I never asked him for the receipt, and he never gave it to me." Hogan never gave the receipt to Munson, but borrowed money on it from defendants, to whom, upon the surrender of this receipt, a new one was given by the warehouseman. Defendants afterwards received the amount due them from Jones & Co., to whom they assigned their security, and the fruit was sold by the latter for \$1,200. Plaintiffs are the executors of the last will of Lowrie, and, as such, sue for the value of the fruit; and their right to recover was the question involved in the nonsuit.

1. The agency of Munson ceased with the death of his principal. From that time forward he could not bind the estate of the latter by contracts in the name of his former principal, for the reason that a dead man cannot have an agent, in the ordinary acceptance of the term.

2. If Munson, assuming to be the agent of Lowrie, received property or benefits accruing by reason of such assumed or supposed agency, and which property belonged to the estate of one for whom he assumed to act, he could be treated as a trustee, and would be liable as such.

3. The goods were deposited by Hogan in the name of Munson as depositor, it is true, but not for him or for his account, but for account and risk of ———; that is, of some person not named. The receipt was given to Hogan, who had delivered the goods, and was never delivered to Munson. Had this receipt been filled out so as to show that the deposit was for the account and benefit of Munson, it would have been evidence of his right to the property; but in the form in which it was issued it failed in this particular. Had Hogan filled the blank by the insertion of the name of any given person, as we think he might lawfully have done, it would, upon delivery to such person, have entitled him, upon return of the receipt, to the possession of the goods. What he did do was to return the receipt, and procure another in the name of and for account of defendants. As the first receipt and deposit did not entitle Munson to possession, or give him constructive possession, of the property, he could not, without delivery of the receipt to him, have recovered the property, and the representatives of Lowrie, whom we may suppose he was assuming to represent, were in no better condition. The case of *Honig v. Bunk*, 15 Pac. Rep. 58, relied upon by appellants, is not in point. There the money was deposited by Peyser in the name of, and for the account of Honig, and the certificate of deposit issued by the bank read as follows: "N. Honig has deposited in this bank two hundred and fifty dollars in gold coin, payable to self or order on the return of this certificate, properly indorsed," etc.; and this court held the bank liable in having paid the certificate without the indorsement of Honig. Had the receipt in this case specified Munson as the person for whose account the deposit was made, the analogy would have been complete, and, so far as like rules apply to the two cases, they would have been parallel. Had the Honig certificate failed to name any person to whom it

was payable, we may safely assume the decision would have been different. It would then have been payable to bearer upon return and surrender of the certificate. So, here, the goods were subject to delivery upon the return of the receipt. The receipt was not negotiable, and that fact was impressed upon its face, substantially as provided by section 8 of the act of March 1, 1878, relating to warehouse receipts, etc., (St. 1877-78, p. 949.)

The exceptions founded upon the rulings of the court touching the testimony of the witness Wamsley, who was recalled by plaintiff pending the motion for non-suit, are not, we think, either important or tenable. It was first sought to be shown, by the witness, for whom he delivered the receipt in question. Upon objection, the court held that plaintiff might show all that was said between him and the boy (Hogan's boy) fully. This was all that was proper. No occult theory of the witness on the subject, no mental reservation or intention of his, not expressed, could alter the rights of the parties. The witness was then asked whom he understood to be the depositor of the fruit, and the court permitted the question, and the witness replied: "Do you mean the owner?" And the court said: "Depositor. You know what that means, don't you?" And the witness answered: "The man that put it in there." The court thereupon asked the witness if he understood the meaning of the term, and received for response: "Well, I understand the use of the word 'depositor' to mean the owner of the fruit." To which the court responded: "You can answer it in that light if you see fit. But that is not necessarily the construction of the word. The man who delivered the fruit there is the depositor, as a matter of law. Now, with that view of it, answer the question." *Answer.* "Why, Hogan was the man that delivered the fruit." The witness certainly gave his own views upon the subject, and later answered as to the fact in the view presented by the court. The question as put was objectionable, so far as it called for the opinion of the witness, rather than for the facts upon which his understanding was based; and, had the court sustained defendants' objection, there would have been no error in the ruling, and there was no error in the explanations and inquiries of the court and witness.

Taking the case as a whole, we think the testimony failed in establishing a predicate for recovery, and that the nonsuit was properly granted, and the motion for a new trial was properly denied. The appeal from the judgment is dismissed, because not taken within one year from the entry of such judgment, and the order denying a new trial is affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

(2 Cal. Unrep. 853)

*Ex parte* McDONALD. (No. 20,405.)

(*Supreme Court of California*. March 26, 1888.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—HABEAS CORPUS.

Where, in proceedings supplementary to execution, defendant pleads a previous discharge in insolvency, and refuses to answer questions as to her property, and is committed for contempt, her remedy is by appeal, and not by *habeas corpus*.<sup>1</sup>

In bank. Petition for writ of *habeas corpus*.

Petitioner, Maggie McDonald, was intrusted by another with several thousand dollars to purchase mining stock for her. Petitioner received the money to invest on account of such person, and so agreed to invest same. On demand for delivery of the stock, the petitioner refused, and afterwards sold the stock for which judgment was given against her. Execution issued, and court ordered petitioner to answer certain questions as to her property, which

<sup>1</sup>See note at end of case.



she refused, pleading a discharge in insolvency previously given her, and she was committed for contempt. Petitioner sued out this writ.

*Geo. W. Tyler*, for petitioner. *Chas. F. Hanlon*, in opposition.

**PER CURIAM.** The petitioner, being restrained of her liberty, sues out a writ of *habeas corpus*, praying to be discharged, upon the ground that the judgment under which the proceedings were had which resulted in her imprisonment for contempt had been discharged by subsequent proceedings under the insolvent laws of this state. The superior court had jurisdiction to hear and determine this question, and, it would appear, did determine it adversely to the petitioner. If wrong in so doing, it is but error, and petitioner's remedy, if any, is by appeal. The application is denied, and petitioner remanded to the custody of the sheriff of the city and county of San Francisco.

#### NOTE.

**HABEAS CORPUS—WHEN LIES.** *Habeas corpus* will not lie to correct errors of a court having jurisdiction of the subject-matter and the person charged, *Zelle v. McHenry*, (Iowa,) 2 N. W. Rep. 264; nor to retry issues of fact, or to review the proceedings of a legal trial; that can only be properly done by writ of error on appeal, *Ex parte Lemkuhl*, (Cal.) 18 Pac. Rep. 148. But an appellate court may make use of the writ as one means of exercising its supervisory power. *In re Hamilton*, (Mich.) 16 N. W. Rep. 327. The acts of an officer *de facto* not being void, the right of the justice issuing the commitment to hold his office cannot be inquired into on *habeas corpus*. *Ex parte Johnson*, (Neb.) 19 N. W. Rep. 594. *Habeas corpus* is not the proper remedy to procure the discharge of a person arrested in a civil action on an affidavit which merely alleges, in the language of the statute, that defendant fraudulently contracted the debt sued on, without alleging the facts tending to show fraud; such defect in the affidavit rendering the proceedings voidable only, and not absolutely void. *Barton v. Sanders*, (Or.) 16 Pac. Rep. 921. Where one held in custody under the judgment of a court institutes *habeas corpus* proceedings, he must show that the judgment is not merely irregular or erroneous, but absolutely void. *Rolfs v. Shallcross*, (Kan.) 1 Pac. Rep. 523; *In re Turner*, (Cal.) 16 Pac. Rep. 898. In such case the petitioner for the writ assails collaterally the judgment under which he is imprisoned, and, to entitle himself to a discharge from such imprisonment, he must show the judgment, either by his petition or by his proof on the hearing, to be an absolute nullity. *Willis v. Bayles*, (Ind.) 5 N. E. Rep. 9. Respecting the grounds upon which a judgment may be collaterally attacked, see *McCarter v. Neil*, (Ark.) 6 S. W. Rep. 731, and note.

(75 Cal. 325)

#### FISHER *et al.* v. SLATTERY. (No. 12,185.)

(*Supreme Court of California.* March 22, 1888.)

#### 1. EJECTMENT—WHEN LIES—LANDLORD AND TENANT.

A lessee, under a written lease for a year, renewable at his option, and prohibiting him from letting or subletting without the written consent of the lessors, after six months' possession, sold his business, and permitted the purchaser to go into possession of the premises leased, retaining, however, the right to keep certain personal property there, and himself paying the rent. At the end of the year, without having sublet the premises, or assigned the lease, he surrendered the premises to the lessors who had refused to accept rent from the purchaser. *Held*, such findings, in an action of ejectment, entitle the lessors to judgment for possession.

#### 2. SAME—INADVERTENT FINDING.

A finding in an action of ejectment that plaintiff was in possession at the commencement of the action, being evidently a mere inadvertence, as the pleadings admitted, and the other findings indicated that defendant was then in possession, will not defeat a judgment.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; PHILLIP W. KEYSER, Judge.

Action of ejectment by Phillip and Anna M. Fisher against P. C. Slattery. Judgment for plaintiffs, and defendant appeals.

*J. H. Craddock*, for appellant. *E. A. Davis*, for respondents.

**FOOTE, C.** This is an action in ejectment. One of the plaintiffs, Anna M. Fisher, obtained a judgment in the court below for the possession of the premises sued for, etc. From that this appeal is prosecuted upon the judgment roll. The appellant urges that the findings are conflicting and contradictory;

that they do not sustain or justify the judgment; and that the judgment is against law. It appears that Anna M. Fisher was on the 26th day of October, 1885, the owner of the premises sued for, that upon that day she, jointly with her husband, who had no interest in them, leased the premises to one Sullivan by a written lease for one year, commencing on said date, it being agreed therein that Sullivan might, at his option, continue the lease until the 26th day of October, 1888. The lease also contained a clause to the effect that Sullivan was prohibited from letting or underletting the premises without the written consent of the lessors. Sullivan thereupon entered into possession of the premises, but about the 1st of May, 1886, he sold a butcher business, of which he was the proprietor, in Yuba City and Marysville, to the defendant; also certain personal property in the former place. A deed to the latter was executed and delivered by Sullivan to Slattery, acknowledged and recorded. Slattery entered into its possession at once; also the shop, fixtures, meat, etc., therein included. Upon the same day, with Sullivan's consent, the former also entered into possession of the premises sued for in this action, together with the shop, meat, and fixtures therein contained, Sullivan retaining the right to keep therein certain goods not sold to Slattery, until it should be found convenient to remove them. A bill of sale of the personalty was also given to Slattery by Sullivan. The court further finds that Sullivan did not sublet the premises, nor assign his lease of them to Slattery.

We see nothing in this which renders the findings contradictory. It is true that Sullivan allowed Slattery to go into possession of the premises in Marysville, leased from Mrs. Fisher and her husband, but the former retained the right to keep certain property there, and himself paid the rent to the lessors for two months, and when Slattery applied to be allowed to pay the rent to them it was refused, and his tenancy was repudiated. Sullivan, the lessee, paid the rent up to the end of the first year's tenancy, and then, on the 26th of October, 1886, handed over his lease to the attorney for the plaintiffs, and stated that he did not desire to occupy the premises any longer, and his tenancy was at an end, and Mrs. Fisher was entitled to the possession of her property as against Slattery, who was as to her a mere trespasser. Mrs. Fisher never acknowledged Slattery as her tenant, refused to do so when he applied for recognition and offered to pay rent, and never received any rent except from Sullivan. There is nothing which indicates any acquiescence on her part, with any letting, subletting, or assignment of the lease by Sullivan to Slattery. She seems to have looked to Sullivan, and Sullivan only, as her tenant, and not in any way to have waived her right not to have the premises sublet without her written consent. There is no indication from these facts that any subletting by the written consent of the lessors was given, or that any parol assignment of the lease was made. The appellant claims further that the court has found that Mrs. Fisher was actually in possession of the premises she sued for when her action was brought, and that therefore he could not have been in the wrongful possession thereof at that time. Ordinarily a finding in an action of ejectment that the plaintiff was in possession at the commencement of the action would be fatal to a judgment for the plaintiff. But in this case it was admitted by the pleadings that the defendant was in possession at the commencement of the action. The finding that plaintiff was in possession at the commencement of the action was evidently a mere inadvertence. The pleadings and the other findings indicate that defendant was in possession, and claimed a right to the possession.

We perceive no prejudicial error in the record, and advise that the judgment be affirmed.

I concur: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(75 Cal. 342)

## SIMPSON v. APPLGATE. (No. 12,040.)

(Supreme Court of California. March 24, 1888.)

## 1. VENDOR AND VENDEE—PAROL CONTRACT—RESCISSION—WHEN ABSOLUTE.

Plaintiff, being in possession of certain public land, contracted by parol to sell it to defendant, who paid for it, took possession, and improved it. Afterwards, the contract having been rescinded in order to enable plaintiff, under the pre-emption laws, to make final proof, and defendant to act as witness for him, a patent was obtained to this with other land, and plaintiff then agreed by parol to convey it to the defendant. *Held*, the rescission enabling plaintiff to make final proof must be taken as effectual, and defendant has no equitable title.

## 2. SAME—TENANT AT WILL.

Defendant in ejectment, although tenant at will, as vendee in possession, after rescission of the contract of sale, waives his right as tenant to notice to quit by a denial of plaintiff's right in his answer.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. M. WALLING, Judge.

Action of ejectment by James E. Simpson against George W. Applegate. Judgment was rendered for plaintiff and defendant appeals.

*Hale & Craig*, for appellant. *C. A. & F. P. Tuttle*, for respondent.

HAYNE, C. Ejectment. The plaintiff claims under a United States patent. The defendant set up an equitable defense, and prayed for a conveyance from plaintiff of the legal title. The court below gave judgment for the plaintiff, and the defendant appeals. The case comes up on the judgment roll.

Certain points are made by the respondent as to the construction of the findings, but for the purposes of this opinion we shall assume that the finding that the plaintiff was "the owner" of the premises at the commencement of the action is a conclusion of law, within the rule laid down in *Levins v. Rovigno*, 71 Cal. 273, 12 Pac. Rep. 161, 343.

The facts as disclosed by the findings are as follows: The appellant and respondent were respectively in possession of adjoining pieces of public land. In 1862, the respondent made a parol agreement to sell to the appellant the tract in controversy for \$75. This sum was paid, and the appellant took possession of the property, and improved the same; thus bringing himself fairly within the rule as to specific performance of partially executed parol agreements for the conveyance of real property. But no deed was made. Afterwards the respondent applied for a patent from the United States for a tract which included the premises in controversy. This was with the knowledge and acquiescence of appellant, who drew up the declaratory statement, at respondent's request. What then occurred is stated by the findings as follows: "Thereafter, and within the time allowed by the pre-emption laws to make final proof and payment, plaintiff applied to defendant to go with him to said land-office as a witness for him, to make proof of his right to his said land. The defendant then explained to plaintiff that he could not become such witness while there existed any contract or agreement between them for a conveyance by plaintiff to defendant, or to any one else, of any part of the land so to be pre-empted; and, further, that the plaintiff himself could not take the oath prescribed by law while any such contract or agreement existed; and that before defendant could become such witness, or plaintiff himself could take such prescribed oath, it was indispensable that all existing contracts and agreements in respect to a conveyance of any part of the land should be canceled and rescinded; and it was then and thereupon agreed between them that all said contracts and agreements then or theretofore existing between them should be, and then were, canceled and rescinded, and said defendant then became such witness." A patent was accordingly issued to the plaintiff. It is further found that "after the making of said final proof

and payment for said land, and after the issuance of said patent, there were conversations between plaintiff and defendant as to a conveyance of said land by said plaintiff to said defendant; and therein defendant requested plaintiff to convey the same to him, and plaintiff verbally consented and agreed so to do, for the sum of \$1.25 per acre, the defendant's proportion of the expense of procuring the patent." The plaintiff, however, subsequently changed his mind, and brought the present action to remove the defendant from possession.

The finding that the parties rescinded their contract in order to qualify the defendant to become a witness on the application for the patent must be taken to mean an effectual rescission. There is nothing in the record to show that they did not intend it to be such; and, if the record had shown that such was not their intention, it cannot for a moment be supposed that any court would countenance such a trick upon the officers of the land department, or such trifling with the obligations of an oath. The contract was therefore entirely rescinded and gone; and for the purposes of this branch of the case this left the parties as if no contract had ever existed. The subsequent "conversations" amounted to nothing. If we assume that there was a consideration for any subsequent agreement, such agreement was not valid, because it was not in writing, and there was no subsequent part performance. The appellant appears to have relied entirely upon the honor of the respondent, and, if he has been disappointed in such reliance, he is without a remedy.

It is argued for appellant, however, that, if his equitable defense fails, he is a tenant at will, and that, since he has received no notice to quit, the action must fail. The court below found that he was "not the tenant at will of the plaintiff." We are inclined to think, however, that this must, in view of the other facts found, be considered to be a mere conclusion of law, and that he must be held to be a tenant at will, because he was a vendee in possession after the rescission of the contract to sell. *Frisbie v. Price*, 27 Cal. 253. But, if we assume this to be so, it does not help the appellant, because the answer denies the right of the plaintiff; and it is found that the defendant, in 1882, executed a conveyance of the premises to one Seaver, and about a year afterwards received a reconveyance from him, and "at all times claimed to be the owner of said demanded premises, except during the time that Seaver held the deed from defendant." These things constituted such a disclaimer of the relationship as dispensed with notice. Taylor, in his work on Landlord and Tenant, after stating the general rule as to denials by the tenant of the landlord's right, says: "But if the tenancy is from year to year, or at will, the law is otherwise; for these tenancies are always determinable by notice, and, as notice would be waived by a denial of the relation of landlord and tenant, the tenancy is in fact forfeited." 8th Ed. § 522. And this is the law in California. *Smith v. Ogg Shaw*, 16 Cal. 88; *Dodge v. Walley*, 22 Cal. 225; *Bolton v. Landers*, 27 Cal. 104.

We do not think the findings, when properly construed, are contradictory. It may be remarked with reference to the transcript that it is not the practice in this state to change the title of a case when it is appealed. There is no propriety here in making the defendant in the court below appear as the plaintiff on appeal. Such a course, being against usage, has a tendency to produce confusion, both on appeal and in the court below.

We advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(75 Cal. 293)

LEVISTON v. RYAN *et al.* (No. 9,271.)

(Supreme Court of California. March 20, 1888.)

## 1. PUBLIC LANDS—PATENTS—VALIDITY—BURDEN OF PROOF.

A patent, under which plaintiff claims in ejectment, is *prima facie* valid; and, if its validity can be attacked at all, the burden of proof is upon the defendant.

## 2. SAME—PROVINCE OF THE COURT.

In ejectment, where there is some evidence to establish the validity of a patent under which plaintiff claims title, the court should not declare such patent invalid on the ground that there is not sufficient evidence to determine the question of its validity.

## 3. SAME—LAND SUBJECT TO ENTRY.

Where, in ejectment, plaintiff claimed under a patent, the selection having been made under Act Cong. March 3, 1871, (16 St. 581,) providing that a selection may be made from land subject to pre-emption under any laws of the United States, with certain specified exceptions, the defendant, in order to defeat the patent, if he can attack its validity at all, must show that the land was not subject to acquisition in any mode allowed by any law.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action of ejectment, brought by plaintiff, William Leviston, against William Ryan and others, to secure possession of certain lands situate in the city and county of San Francisco. The superior court found for defendant, and plaintiff appeals.

*Wm. & Geo. Leviston*, for appellant. *Tobin & Tobin* and *Thos. F. Barry*, for respondents.

HAYNE, C. Ejectment. The plaintiff claims through a patent from the state of California, issued under the act of 1862 and amendatory acts in relation to agricultural colleges. The defense is that the patent is void. The court below gave judgment for the defendant, and the plaintiff appeals. Two points are made by the defendant in support of the judgment.

1. It is said that the tract in controversy is part of the four leagues confirmed in the city and county of San Francisco as successor of the pueblo. If this were true, there could be no doubt but that the plaintiff's patent is void; but there is nothing in the findings or the evidence to show that it is true. The finding is that "it is impossible to determine whether or not the lands in controversy are within the limits of the lands so confirmed to the city and county of San Francisco." It may be remarked, in this connection, that we see nothing impossible in the determination of the question. There is no question of fact which is material to the decision of a cause,—that is to say, which the law requires to be decided,—which cannot be settled by proof or presumption. The machinery of a court must be supposed to be equal to any demand which the law permits to be made upon it. The law does not require impossibilities. In the present instance the description in the decree of confirmation is clear, and it was a mere question of applying it to the ground. If sufficient evidence to satisfy the mind of the court was not produced by the parties, it should have found the fact against the party on whom was the burden of proof, (*Speegle v. Leese*, 51 Cal. 415,) and the burden in this case was upon the defendant. It was not required to make an official survey, but simply to decide as between the parties before it, whether the tract in controversy was within the description contained in the decree of confirmation. The facts which the court did find showed a valid patent, and, this being the case, the supposed impossibility of finding further facts showing it to be invalid was no reason for holding it to be so. In the absence of a showing that the land was part of the four leagues, we must conclude that the patent is valid, unless there be some other ground upon which it can be attacked.

2. The defendant contends that such other ground is furnished by the fact that the land was, at the date of the selection, within the limits of an incorpo-

rated city. It is alleged in the complaint, and not denied by the answer, that the land "is situate in the city and county of San Francisco." This averment, of course, speaks only from the time of the commencement of the action. But we know as a matter of law that the act establishing the corporate limits has not been changed since the date of the selection, and the land has certainly not moved since then; so that it must be taken as an established fact that the land was within the limits of the city and county of San Francisco at the date of its selection. This does not necessarily mean that it was a part of the four leagues. It is well known that the corporate limits extend somewhat beyond the four leagues; so that the tract might be "in the city and county of San Francisco," without being a part of the four leagues. And the respondent's argument upon this point is based upon the assumption that such is the case. The argument is that the statute of the United States provides that "lands included within the limits of any incorporated town, or selected as the site of a city or town," shall not be subject to pre-emption. Rev. St. § 2258, reproduced from act of 1841. But pre-emption is not the only mode in which public lands may be acquired. For example, the prohibition against pre-emption of lands within the limits of a city or town does not prevent the issuance of a patent for public mineral land within such limits. *Steel v. Smelting Works*, 106 U. S. 447, 1 Sup. Ct. Rep. 389. And upon the same principal we suppose that, if the land be public land, the prohibition against pre-emption does not prevent its acquisition in any other mode that may be applicable, (see *Doll v. Meador*, 16 Cal. 322,) unless the acts under which the proceedings were had contain something to the contrary. It is obvious, therefore, that it is necessary to examine the acts under which the proceedings were had. The original act was passed on July 2, 1862. It provided that "there be granted" to the several states a certain quantity of land for the purpose of providing colleges for the benefit of agriculture and the mechanic arts. The provision in relation to the lands to be selected as part of the grant was as follows: "Whenever there are public lands in a state subject to sale at private entry at \$1.25 per acre, the quantity to which said state shall be entitled shall be selected from such lands within the limits of such state." 12 St. U. S. p. 503, § 2. This act also contains a proviso that "no mineral lands shall be selected or purchased under the provisions of this act." On June 8, 1868, an amendatory act was passed, whereby it was provided that the selection could be made "from any lands within said state subject to pre-emption and sale," with the same proviso as to mineral lands, and a further proviso excepting lands already subject to rightful claims. 15 U. S. St. p. 68, § 4. On March 3, 1871, another amendatory act was passed, whereby it was provided that the selection could be made "from any lands within said state subject to pre-emption settlement, entry, sale, or location under any laws of the United States," with the same proviso as to mineral lands and lands subject to rightful claims. 16 St. U. S. 581. The selection was in 1872, and was therefore under the last-mentioned act. It is obvious that its provisions on the subject are different from those of the prior acts. As we construe it, the selection is not confined to lands which are subject to pre-emption, but may be made from public lands which are subject to acquisition in any mode, except mineral lands and lands subject to rightful claims; or, in the language of the statute, from any land which is subject to "settlement, entry, sale or location under any laws of the United States," with the exceptions mentioned. The language of the statute being express that the selection may be made from public lands subject to acquisition in any mode, (with specified exceptions,) we do not see how it can be construed to mean that the selection must be made from land subject to acquisition in one particular mode. This being the proper construction of the statute, it is not sufficient for the respondent to show that the land was not subject to pre-emption. He must go further, and show that the land was not subject to acquisition as public land in any mode. In other words, he must

show that the land was not of such character as to bring it within any law of the United States providing for the acquisition of public land. To apply this principle, he must show that the land was not timber land, desert land, or land of any special character which would subject it to acquisition under any law of the United States. The court cannot take judicial notice of the character of the land. In all the cases which we have seen in which patents have been held to be invalid, the defendant has proved by evidence the facts showing such invalidity. Whether a patent is conclusive or not, it is at least *prima facie* valid; and if a defendant in ejectment can attack it at all, the burden is on him to show the invalidity. *Minter v. Crommelin*, 18 How. 88; *Collins v. Barlett*, 44 Cal. 381. The findings in this case set out the patent in full, and do not show that the land was of such a character as not to be subject to selection. They, therefore, do not support the judgment. The question, therefore, as to the conclusiveness of the patent,—which is the main one argued,—does not arise upon the record. We do not suppose it probable that the land was of such a special character as to bring it within any special mode of acquisition, and if the parties can stipulate that such is the fact, and agree to resubmit the cause, we suppose it would be proper (following the precedent of *Soto v. Kroder*, 19 Cal. 94, 95) to take up the case again, and determine what seems to be the main question involved; the controversy being undoubtedly genuine. In the present condition of the record, however, the judgment cannot stand. We therefore advise that the judgment be reversed, and the cause remanded for a new trial, with leave to the parties to file a stipulation, and proceed as above mentioned.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial, with leave to the parties to file a stipulation, and proceed as above mentioned.

(75 Cal. 443)

SWAMP-LAND RECLAMATION DIST. NO. 407 v. WILCOX. (No. 11,782.)

(Supreme Court of California. March 29, 1888.)

1. PUBLIC LANDS—SWAMP LANDS—ASSESSMENT—ALTERATION OF ORDER OF BOARD OF SUPERVISORS.

In an action to enforce payment of a swamp-land assessment, an entry in the record of the board of supervisors appointing the assessors, which is conceded to have been altered without authority by one who was, at the time of the entry, but not at the time of the alteration, clerk of the board, is admissible in evidence, where it appears that the record as altered conforms to the original entry book from which it was made, and the party making the alteration testifies that it was done to amend a clerical error. Reversing 14 Pac. Rep. 843.

2. SAME—ASSESSMENT LISTS—DESCRIPTION.

Under Pol. Code Cal. § 3461, requiring certain assessment lists to contain "a description by legal subdivisions, swamp-land surveys, or natural boundaries, of each tract assessed," a description naming the adjoining proprietors on their respective boundaries is sufficient. Following 14 Pac. Rep. 843.

3. SAME—EXPENSES AND BENEFITS—DUTY OF COMMISSIONERS—PRESUMPTION.

Under Pol. Code Cal. § 3456, providing that assessments for swamp-land improvements shall be in proportion to the whole expense and to the resulting benefit, and section 3461, requiring the assessment list to contain, among other things, "the amount of the charge assessed against each tract," where a list conforms to the requirements of the latter section, it will be presumed that the assessment was made in compliance with the former, there being no evidence to the contrary. Following 14 Pac. Rep. 843.

4. SAME—AMOUNT OF ASSESSMENT—OMISSION OF DOLLAR-MARK.

In an action to enforce payment of a swamp-land assessment, it appeared that, in the assessment list, there was no dollar-mark before the figures opposite defendant's name, under the heading "Amount of Charges Assessed," but such mark preceded the figures in the same column in other places. Held, that the figures must be construed to represent dollars. Following 14 Pac. Rep. 843.

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**5. SAME—OATH OF COMMISSIONERS.**

The commissioners of swamp-land assessments were verbally sworn before viewing the land, but it did not appear that they subscribed their oath and filed it in the county clerk's office, as required of all "officers" by Pol. Code Cal. §§ 904, 909. *Held* that, even if the commissioners were "officers" within the meaning of those sections, a failure of strict compliance with their requirements would not avoid official acts fully performed. Following 14 Pac. Rep. 843.

In bank. Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

Action by swamp-land reclamation district No. 407 against William Wilcox, to enforce payment of a swamp-land assessment. Judgment for plaintiff, and defendant appeals. For former opinion in this case on appeal in department 1, see 14 Pac. Rep. 843.

*Freeman, Johnson & Bates, Armstrong & Hinkson, and W. H. Beatty, for appellant. A. P. Catlin, for respondent.*

**SHARPSTEIN, J.** This appeal is from a judgment entered in favor of plaintiff and from an order denying the defendant's motion for a new trial in an action to enforce payment of a swamp-land assessment. After alleging that it is a corporation organized for the purpose of reclaiming certain swamp land, and that in the month of March, 1882, it became necessary to construct in said district, levees, embankments, ditches, drains, and other reclamation work, the plaintiff alleges that in order to provide for such reclamation works, and the maintenance, protection, and repair thereof, the board of trustees of said swamp-land reclamation district No. 407 employed Jim C. Pierson, a competent engineer, to survey, plan, locate, and estimate the costs of the works necessary for such reclamation, and of the maintenance, protection, and repair thereof. That thereafter the said Pierson did plan, locate, and survey said works, and estimated the cost thereof, and made a report in writing thereof to the said board of trustees, which report was approved and adopted by the said board, and was afterwards, on or about the — day of August, 1882, by the said board, presented to the board of supervisors of Sacramento county, together with an estimate, made by said board of trustees, of the amount necessary for the incidental expenses of superintendence, repair, and other expenses. That said report was received by the said board of supervisors, and filed with the clerk thereof on the 25th day of August, 1882. From said report it appeared that the aforesaid works of reclamation, together with the incidental expenses of superintendence, repairs, etc., would cost the sum of \$78,000. That thereupon, on the day last mentioned, the said board of supervisors approved the said report, and adopted an order appointing three disinterested persons, residents of said county, commissioners to assess the charge upon the said land, of which order the following is a copy: "Ordered that J. M. Upham, James Stephenson, and John Miller, three competent and disinterested persons, and residents of Sacramento county, be and are hereby, appointed commissioners, who must, in the manner provided by law, view the lands of said district, and assess thereupon the proper assessments and charge for the reclamation of said lands, to-wit, the sum of \$78,000, in the manner and at the cost surveyed, planned, and estimated by J. C. Pierson, engineer of said district, and by the board of trustees of said district, as exhibited by the report of said trustees filed this day with the clerk of this board." These allegations were denied by the defendant, and the plaintiff, for the purpose of proving them, offered in evidence the entry in the record of the board of supervisors of the county of Sacramento, being page 558 of the Minute Book K of the records caused to be kept by the board of supervisors, in which the clerk of the board was required to record all orders and decisions made by the board, and the daily proceedings had at all regular and special meetings, and when offered in evidence the entry therein read as follows, to-wit:



"OFFICE OF THE BOARD OF SUPERVISORS, Friday, August 25, 1882.

*"Swamp-Land District No. 407.*

"The report of the trustees of Swamp-Land District No. 407 was received, and following reports adopted: Ordered that J. M. Upham, J. M. Stephenson, and John Miller, three competent and disinterested persons and residents of Sacramento county, be, and are hereby, appointed commissioners, who must, in the manner provided by law, view the land of said district, and assess thereupon the proper assessment, and charge for the reclamation of said land, to-wit, the sum of \$78,000, in the manner and at the cost surveyed, placed, and estimated by J. C. Pierson, engineer of said district, and by the board of trustees of said district, as exhibited by the report of said trustees filed this day with the clerk of this board."

The attorneys for defendant objected to said entry as evidence on the ground that it appeared to have been altered and changed since it was made, and that it was an order appointing commissioners to view and assess a charge on lands in swamp-land district No. 341, and not upon land in swamp-land district No. 407. Thereupon the plaintiffs admitted that on the 17th day of June, 1885, the day before the trial, Thomas H. Berkey changed the figures designating the number of the district from 341 to 407. It was then shown that said Thomas H. Berkey was the county clerk of Sacramento on the 25th of August, 1882, but that his term of office had expired at the time he changed said records as above stated; that the record of the proceedings of the board of supervisors of the 25th day of August, 1882, of which said page 558 of Minute Book K was a part, was signed by P. R. Berkey, the president of the board of supervisors, but not signed by Thomas H. Berkey, who was county clerk, and, by virtue of his office, clerk of the board of supervisors of said county at the time said entry was made, nor was said record signed by any of his deputies. And it appears that said change was made by said Thomas H. Berkey without the direction or permission of said board of supervisors. Said Thomas H. Berkey, at the time he made the said alteration, was a deputy of the clerk of the county of Sacramento, and as such was acting clerk of the board of supervisors when sitting as a board of equalization. The board of supervisors was not in session when the alteration was made. Berkey testified that he made it as soon as his attention was first called to what appeared to him, by a comparison of the records and examination of different pages of said book K, to be a clerical error made by John H. Parnell, deceased, who, in August, 1882, was deputy witness, and acting clerk of the board of supervisors. A book was introduced in evidence, described by the witness "as the book of original entry," in which the clerk first entered the minutes of the proceedings of the board of supervisors, from which the Minute Book K was made up. In that book, under date of August 25, 1882, appeared an entry of which the following is a copy: "The Board of Swamp-Lands Commissioners No. 407. Report of Trustees filed and ordered adopted. See order." The bill of exceptions states that, "the testimony of the witness Berkey and inspection of the papers, among which was the original report of the trustees of swamp-land district No. 407, tended to show that the order was made upon the report of the trustees of the swamp-land reclamation district No. 407, and that the figures "341" was merely a clerical error of said Parnell in making up the minutes or records in said Book K." The testimony of said Berkey was duly objected to by defendant, on the grounds that a record cannot be altered, changed, or contradicted by parol, and his testimony was only an opinion, conclusion, or inference from circumstances, and was irrelevant, immaterial, incompetent, and so the admission in evidence of the said rough minute book, because the entry therein was indefinite, and the same was not a record, and was irrelevant and incompetent. The court overruled both objections, and admitted the testimony of said Berkey and said book in evidence, to which rulings, and each of them, the defendant then and there excepted. The plaintiff then offered

said entry in evidence again, to which the defendant then and there objected on the grounds: (1) That said order was irrelevant, immaterial, and incompetent; (2) that said record has been changed since this action was commenced, in a material respect, under the direction and with the knowledge of the attorneys for the plaintiff; (3) that the order made by the board of supervisors, as it appeared and was in fact before changed by said Berkey, was an order appointing commissioners to view and assess a charge upon the lands in swamp-land district No. 341, and not an order appointing commissioners to assess a charge upon the land in swamp-land district No. 407. The court overruled the objection and admitted said entry, so changed, in evidence. The defendant excepted.

We discover no error in that. The evidence tended to prove that the board of supervisors approved the report of the board of trustees, and appointed commissioners to view and assess the land of reclamation swamp-land district No. 407. The entry made in book K was *prima facie* evidence of the facts stated therein. Code Civil Proc. § 1920. But it was not conclusive of those facts. Proof of its having been altered might affect the credit and weight to be given to it, but did not render it inadmissible. *Wayland v. Ware*, 104 Mass. 46; *Sprague v. Bailly*, 19 Pick. 436. If the evidence proved that the entry in the official book, as it appeared when offered in evidence, contained the order made by the board, the circumstance of its having been altered after it was originally entered did not render it inadmissible. In *Sprague v. Bailly*, *supra*, it became necessary for the defendant to prove that he had taken the oath required to be taken by a collector of taxes. The records of the town were produced at the trial, and contained an entry of his having taken the oath of office as "treasurer." The defendant moved that the town clerk should be permitted to amend his record. This was objected to by the plaintiff. The objection was overruled, and the clerk amended by striking out the word "treasurer" and inserting the words "collector of taxes, according to the best of my knowledge and belief." On appeal to the supreme court the counsel for plaintiff insisted that this was error. SHAW, C. J., said: "Upon this point the court are of opinion that there was competent evidence to go to the jury to find whether the defendant was sworn as collector or not. The entry in the book is a memorandum, not a record, and may be left to the jury with other evidence upon the fact." In the case now before us it was necessary for the court to find whether the order introduced in evidence related to district No. 407, or to district No. 341. Evidence tending to prove that that related to either, was, in our opinion, admissible. The original entry of the clerk was *prima facie* evidence that the order was entered, as it passed, but not conclusive. The alteration did not prove or disprove that the original entry was erroneous. The validity of the assessment depended on the order made by the board, not upon the order entered by the clerk in his book. The entry of the order was *prima facie* evidence that it had been duly made as entered. But this might be contradicted and overcome by other evidence. Code Civil Proc. § 1833. We think it was clearly shown that the original entry of the order was erroneous, and that the order made by the board is correctly expressed in the amended entry. It was upon this point that the judgment and order of the court below was reversed by department 1 of this court, and upon this point the case was ordered to be heard in bank. Upon the other exceptions we are satisfied with the views expressed in the opinion filed by the department, which are as follows: "The defendant also objected to the assessment list, offered in evidence by the plaintiff, upon several grounds, and his objections were overruled. One ground of objection was that the land was not properly described. The Code required the list to contain 'a description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed,' and 'the number of acres in each tract.' The land assessed to the defendant was described as a portion of two swamp-land surveys, 'bounded

on the north by the lands of Mrs. R. F. Davis, on the east by the lands of L. C. Rube, on the south by the lands of the Pacific Mutual Life Insurance Company, and on the west by Old river, number of acres, 100.' This should be held, we think, to be a sufficient description, as otherwise it would seem impossible to describe the land so as to comply with the statute. Evidently it could not have been described by legal subdivisions, nor, being a portion of two surveys, by swamp-land surveys. If, then, the words 'natural boundaries' are to be construed as excluding all artificial boundaries, or boundaries made by man, it must follow that no sufficient description of the land could be made. We do not think such a result was intended or should be declared. In our opinion any description which clearly identifies and marks out the land is sufficient. Another ground of objection was that it did not appear, from the face of the assessment list, or from any other evidence, that the assessment or charge was made in proportion to the whole expense, and to the benefits which would result from the works of reclamation, nor that the charge was estimated in gold and silver coin of the United States, nor in any kind of money. Section 3456 of the Political Code requires the commissioners to 'view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works, and estimate it in gold and silver coin of the United States.' And section 3461 provides what the list must contain, as follows: 'The list must contain, (1) A description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed. (2) The number of acres in each tract. (3) The names of the owners of each tract, if known; and if unknown, that fact. (4) The amount of the charge assessed against each tract.' The list returned was signed by the supposed commissioners, and complied with the requirements of section 3461, and there is nothing to show that the assessment was not made in full compliance with section 3456. The commissioners were not required to report that in making the assessment they had complied with the requirements of section 3456; and if they had done so, their certificate to that effect would not have been even *prima facie* evidence of the fact. *People v. Hagar*, 49 Cal. 232. They were, however, charged with an official duty, and, in the absence of all evidence to the contrary, must be presumed to have regularly performed that duty. Section 1963, subd. 15, Code Civil Proc. It is true that there was no dollar-mark before the figures '4,764.45' placed opposite the name of the defendant under the heading of 'Amount of Charges Assessed;' but the record shows that this was only one of a number of assessments contained in the list, and that 'in a number of cases there was a dollar-mark (\$) preceding the figures in columns headed with the words "Amount of Charges Assessed," and in a number of instances, as in this, the dollar-mark did not appear.' It is not shown when, or in how many places, the dollar-mark did appear, but if it was prefixed to some of the items in the column, then all the figures standing in the same column and in the same relation to other similar items must be construed to be dollars, without a repetition of the mark before each item. *People v. Mining Co.*, 33 Cal. 171. Still another ground of objection was that it did not appear that Upham, Stephenson, and Miller took, subscribed, and filed their oath of office in the office of the county clerk before they assessed the land and made the assessment list. It did appear that they were sworn verbally by a justice of the peace before they went out to view the land. It is not necessary to decide whether or not they were such officers as sections 904 and 909 of the Political Code refer to; for, if they were, their official acts, after being fully performed, were not rendered void by the fact that they had failed to comply strictly with the requirements of those sections."

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; TEMPLE, J.; PATERSON, J.; THORNTON, J.

## SWAMP-LAND RECLAMATION DIST. NO. 407 v. RUELE. (No. 11,788.)

(Supreme Court of California. March 29, 1888.)

In bank. Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge. For former appeal in this case, see 14 Pac. Rep. 846.

W. H. Beatty, Freeman, Johnson & Bates, and Armstrong & Hinkson, for appellant. A. P. Catlin, for respondent.

PER CURIAM. This case does not differ in any material respects from that of *Reclamation Dist. v. Wilcox*, ante, 241, (No. 11,782,) filed this day. Upon the authority of that case, the judgment and order are affirmed.

(75 Cal. 464)

## MITCHELL v. AMADOR C. &amp; M. CO. (No. 12,887.)

(Supreme Court of California. March 30, 1888.)

## 1. MORTGAGES—DESCRIPTION OF PROPERTY—IMPROVEMENTS.

Plaintiff obtained a decree of foreclosure, and a deed for a canal and water-right, of which defendant was a *pendente lite* purchaser. Defendant after purchasing, and before the decree, constructed a new canal to take the place of the old one. Held, in an action to try title, that plaintiff has no right to the new canal, as simply an improvement, where the description of the property in the mortgages, *its pendens*, decrees of foreclosure, and deeds embraced only the old canal and appurtenances.

## 2. SAME—SUBSEQUENT PURCHASER—WASTE.

Where plaintiff obtained a decree of foreclosure and deed for property of which defendant was a *pendente lite* purchaser, he may recover actual damages for waste committed by defendant while in possession of the property, in an action to try title, and for rents, issues, and profits.

## 3. ESTOPPEL—IN PAID—EVIDENCE TO REBUT PRESUMPTION.

In an action for possession of a canal, which plaintiff claims as simply an improvement upon a canal for which he has obtained a decree of foreclosure and deed, where plaintiff is permitted to show, as matter of estoppel, declarations of officers of the defendant corporation to the effect that they regard the new canal as subject to plaintiff's mortgage, evidence on the part of defendant tending to show that plaintiff did not so regard it, and did not rely upon such declarations, is admissible.

In bank. Appeal from superior court, Amador county; C. V. GOTTSCHALK, Judge.

Action to try title, and for other relief, brought by Thomas Mitchell against Amador Canal & Mining Company. Judgment for plaintiff, and defendant appeals.

M. A. Wheaton and A. C. Adams, for appellant. Tilden & Tilden, (Lindley & Spagnoli, of counsel,) for appellee.

PATERSON, J. A full statement of the facts found by the court is filed herewith. This is an action to determine the title to, and recover possession of, a canal of great value, "formerly known as the 'Butte Ditch,' or canal, afterwards called the 'Amador Canal,' as the same is now held and used by the defendant, together with all of the franchises and water-rights belonging thereto, and all the appurtenances and rights connected therewith;" also to recover the rents, issues, and profits, and damages, amounting to the sum of \$1,000,000. Plaintiff claims title to the property under a decree of foreclosure entered October 4, 1873, and a sheriff's deed given in pursuance of a sale thereunder, dated June 6, 1884. The foreclosure suit was commenced on April 6, 1870, and a *lis pendens* was filed the same day. The mortgages upon which the decree was based were executed and delivered to plaintiff by Stickles and others, who then owned the property, in August and September, 1868. Respondent claims that the new line of ditch was constructed to take the place of the old ditch, under the rights, privileges, and franchises acquired from the mortgagors for the purpose of using those rights, privileges, and franchises to better advantage, and that the property as it now exists is but an improvement upon the old ditch, and as such subject to the mortgages. Appellant

claims that the property affected by the decree of foreclosure is not the property for the recovery of which judgment against appellant has been rendered in this case; that it is not the Butte Ditch extended or improved, but another and different aqueduct, called the "Amador Canal," and that a comparison of the descriptions in the decree of foreclosure and in the judgment herein makes this apparent.

In the mortgages, *lis pendens*, decree of foreclosure, and sheriff's deed the property is described as follows:

"That certain ditch commonly called the 'Butte Ditch.'"

"Commencing at the Old Pine-Log crossing on the North fork of the Mokelumne river."

"Conveying water thence to Slab Town, Butte City, and other localities in Amador county; also to the vicinity of Jackson, Scottsville, and other points in said Amador county."

"Together with all the appurtenances, flumes, aqueducts, branch ditches, reservoirs, pipes, and cabins connected with, or in any manner belonging to, the ditch property above mentioned, with the right to take water from the north fork of the Mokelumne river."

There is nothing in the language of these two decrees to indicate that the property described is the same in each. The names of the ditches, the courses,

In this case the court found that plaintiff was the owner of and entitled to the possession of the following described property:

"All that certain property now known as and called the 'Amador Canal,' with all its appurtenances as the same is now used, together with the water-rights and franchise thereunto belonging, which is more particularly described as follows:

"All the canal and works known as the 'Amador Canal,' situated in the county of Amador, commencing at the north side of the North fork of the Mokelumne river, at a point where said canal taps and takes the waters of said North fork of the Mokelumne river, about two hundred rods above the point which is known as 'Pine-Log Crossing.'

"And thence running in a westerly direction down the north side of said stream about eighteen miles, more or less, to a tunnel, and to the placer mines in the vicinity of Slab Town.

"From thence through a tunnel, in a general north-westerly direction, following the sinuosities and meanderings of said canal, twenty-two miles, more or less, to a point on Tanner's ranch, in the town of Sutter, Amador county, and in the vicinity of the Amador mine.

"Together with all the flumes, ditches and branch ditches, iron-pipe, aqueducts, buildings, cabins, reservoirs, dams, and tunnels belonging to said works, or in any nature connected therewith, and including the branch ditches extending to Jackson and Plymouth, and also all franchises, rights of way, and all water-rights, and all locations for the taking of water, with the right to the waters of said north fork of the Mokelumne river, and all hereditaments, and appurtenances in any way belonging to said property."

and the *termini* are different, and the branches, extensions, and franchises named in the decree herein are manifestly not included in the language used in the decree of foreclosure. Furthermore, it is true, as a matter of fact, that the Butte ditch and the Amador canal are not, and never were, physically identical at any point between their *termini*. The learned judge of the court below did not base his conclusion as to the legal identity of the two ditches upon any assumption of identity in fact, but upon the propositions that the Sutter Canal Company and the Amador Canal Company, in their constructions of the new ditch and its branches, always considered them subject to Mitchell's mortgages; that the property was treated as the same ditch, though under a different name; and that the new ditch was built for the purpose of using to better advantage the water-rights and franchises of the old Butte ditch,—was constructed to take its place. In a written opinion, the court thus clearly states the fact in this regard, and defines the issue of law upon which, in its opinion, the case turned: "As soon as the Sutter Canal & Mining Company came into possession of the Butte-Ditch property, July 16, 1870, it commenced the construction of a new ditch of larger capacity than the old Butte ditch on the same general line, but higher up the hill, and of a lesser grade; the new ditch having a grade of eight feet to the mile, whereas the grade of the Butte ditch was thirteen feet four inches. In digging the new ditch, the old Butte ditch, being lower down the hill, was filled up, the flumes were broken down, and the lumber of which they were built was used by the Sutter Canal & Mining Company to build cabins for their workmen, blacksmith shops, etc. The new ditch was built principally in the ground excavated; the old ditch consisted chiefly of flumes. In blasting out the new ditch, the rocks rolled down the hill, and broke down the flumes of the old ditch. In fact, no attention was paid to the old ditch. At a place called 'Bald Rock,' the new canal connected with the old Butte ditch, and for a distance of two miles below Bald Rock the new ditch was right over the Butte ditch. In 1872, the Sutter Canal & Mining Company became insolvent, and such proceedings were had that its property was sold, by order of the United States district court, to the Amador Canal & Mining Company, free and clear of all liens and incumbrances, except from a mortgage lien claimed by Thomas Mitchell on certain franchises of said bankrupt. The Amador Canal & Mining Company completed the ditch commenced by the Sutter Canal & Mining Company, in the prosecution of which it pursued the same course as its predecessors, filling up the old Butte ditch, breaking down the flumes, treating it, in fact, as of no value at all. In 1868, subsequently to the execution of the two mortgages to the plaintiff, the Butte Ditch Company extended their ditch by means of an iron pipe some thirteen hundred feet long, with a carrying capacity of fifteen hundred inches of water, to a place on the Mokelumne river about two hundred rods above Pine-Log crossing. \* \* \* Considerable has been said about the subsequently acquired title, but there is no question in this case of any future acquired title, neither by the mortgagors nor by their grantees. It is future acquired property, not future acquired title to the property mortgaged, which is the issue in this case. \* \* \* Plaintiff's contention is that his mortgages on the Butte-Ditch property, franchises, and water-rights covered the property of the defendant; not because the mortgagors, or their grantees and successors in interest, have acquired any better title to the property mortgaged subsequently to the execution of the mortgage, nor yet on the ground that the Amador canal should be considered as an appurtenance to the Butte ditch, but because the new canal was constructed to take the place of the old Butte ditch, and for the purpose of using to better advantage the water-rights, privileges, and franchises belonging to the last-mentioned ditch; in fact, because, as plaintiff contends, the Amador canal is an improvement of the mortgaged property, and goes to feed the mortgages. \* \* \* It was the intention of the Sutter Canal & Mining Company to use, by means of

the canal it was constructing, the water-right and franchises purchased by Bowman of the Butte Ditch Company. It was for this purpose it commenced the building of the new canal. The Amador Canal & Mining Company, after its purchase of the property, completed the work inaugurated by the Sutter Canal & Mining Company, and extended the ditch from Bald Rock up to the place on the north fork of the Mokelumne river, about two hundred rods above Old Pine-Log crossing, the same place to which the Butte Ditching Company removed their water-right location in 1870, claiming 5,000 inches of water. At this place the Amador canal tapped the river, and took out the water, and at the same place it has taken out and used the water ever since. Bowman went into possession of the Butte ditch and water-right under the title acquired from the Butte Ditch Company. The Sutter Canal & Mining Company commenced the construction of the new canal for the purpose of using such water-right. The Amador Canal Company, upon the completion of the canal, did use such water-right, and has used it ever since. If the water-right and franchises of the Butte Ditch company had not been purchased by Bowman, no new canal could have been constructed; because neither Bowman nor the Sutter Canal & Mining Company or this defendant ever took up, located, or acquired any water-right other than that of the Butte Ditch Company. \* \* \* Counsel for defendant says the new canal is about thirty miles in length, and from the tunnel extends in an entirely new direction to the Tanner reservoir, near Sutter creek; that no part of this new canal had ever been owned by the mortgagors,—no part of it covered by the description, or terms, or language of the mortgage. All this is true, but, as I said before, the new canal would not and could not have been constructed without having first obtained the water-right of the Butte Ditch Company, (the mortgagors,) and it was built for the purpose of using such water-right. \* \* \* Although the Amador canal is not, strictly speaking, the old Butte ditch, extended and enlarged, as alleged in plaintiff's complaint, and is in fact a new ditch, it was built for the purpose of using to better advantage the water-rights and franchises of the old Butte ditch; it was constructed to take its place,—in lieu of it,—and is in law subject to plaintiff's mortgages."

The findings of fact and conclusions of law are in consonance with the opinion of the court. At the trial, evidence was admitted, over the objection of the defendants, upon the questions whether the officers of the Sutter Canal & Mining Company, or of this defendant corporation, ever claimed that the ditch they were constructing was separate property, and not subject to the mortgage, and for what purpose the plaintiff lent the money. Evidence was admitted, also, of declarations made by the officers of the corporation, at the time the new ditch was being constructed, to the effect that the new ditch "was improving the property all the time, and helping the security, and that it was for this reason that proceedings in the foreclosure suit were delayed." This evidence was allowed on behalf of the plaintiff as matter of estoppel; and we are unable to perceive, in view of the evidence thus admitted, upon what theory evidence offered by the defendant tending to show that no reliance was placed by the plaintiff upon such declarations, and that he did not in fact consider the property as subject to the mortgage, was excluded. Thus, plaintiff's objection was sustained to defendant's offer to prove by Joseph Naphthaly that "while he (Naphthaly) was assignee, Mr. Mitchell stated that his mortgage did not cover anything of the bankrupt estate except the Butte ditch and the water-right connected with it; that it did not cover any portion of the new ditch; \* \* \* and that Mr. Mitchell repeatedly, in conversation at Mr. Naphthaly's office, (private conversation, as well as in testimony in the United States district court,) stated that his mortgage only covered the Butte-Ditch property, and for that reason requested these parties to stipulate that he might withdraw, upon the ground that they really had no interest in objecting to the withdrawal of his claim from the United States district court in the bank-

ruptcy proceedings." Defendant offered to show that plaintiff, Mitchell, had called Judge Thompson as a witness in the bankruptcy proceedings to prove by him that the mortgage only covered the Butte ditch and water-right of the bankrupt estate, that the Butte ditch and water-right were at that time of no value, and that it would cost more to put the Butte ditch in repair than it would be worth after it was repaired; but the offer was excluded. If it was material and proper for plaintiff to prove that he believed the property was subject to the mortgage, it would seem to be proper and just to allow the defendant to show that he never believed any such thing. But we cannot see how any such evidence can be material in this case. The mortgage has been foreclosed. It has become merged in the decree. The decree has been executed. The sheriff's deed has passed to the plaintiff. The action which culminated in that decree was commenced for the purpose of subjecting the property liable therefor to the satisfaction of plaintiff's claim,—the \$6,000 and interest; the issue therein raised the question what property was thus liable; and the determination of that issue by the findings and judgment therein conclusively settled the rights of the plaintiff and defendant herein as to the ditches, reservoirs, and franchises which could be taken, and which were to be sold in satisfaction of plaintiff's mortgage. The plaintiff had his day in court upon that issue. He offered his proof. The court determined the matter, and described the property as we find it in the decree. With that determination plaintiff was satisfied, for he took no appeal. If the description of the property in that decree was insufficient or uncertain, it seems to us it was the duty of the plaintiff to ask the court in that case to make it sufficient and certain. The court followed the description contained in the mortgage. If there were any equities entitling the plaintiff to property not included in the language of the mortgage, or if there were matters of estoppel *in pais*, extending the rights of the plaintiff to other ditches and franchises than those named in the mortgage, those matters ought to have been pleaded and proved in that action. *Marshall v. Water Co.*, 5 Pac. Rep. 101. It is important in such cases that the pleadings, the mortgage, and the decree should be certain as to the property affected; otherwise, purchasers *pendente lite* would be at the mercy of the mortgagor and mortgagee. The security offered by mortgages would be destroyed. The decree would determine nothing as to the property pledged, and would be the commencement of endless litigation, instead of a final determination of the rights of the parties interested. The policy of the law with regard to mortgages requires that they give definite information, not only as to the debt secured, but as to the property mortgaged. The rule of law which declares that to be certain which can be made certain is not applicable in a case like this. If there is any uncertainty as to the property described in the mortgage, and which is subject to the mortgage, it should be made certain in the pleadings and the proof, so that the decree may leave nothing in doubt. The information which the law requires to be given to creditors and purchasers by the mortgage and the foreclosure proceedings is that certainty as to the location and description which will enable one to know where the property is, and to distinguish it from other property of the same character which may be adjacent to it. *Herman v. Deming*, 44 Conn. 125.

We cannot see how the inquiry in this case, considered as an action of ejectment or to quiet title, can properly extend any further than to determine the identity of the property named in the decree of foreclosure. The defendant and the Sutter Canal Company, it must be remembered, were purchasers *pendente lite*. They were not made parties to the suit, and, of course, were bound by the decree against their grantors only to the extent of the property described in the complaint, decree, and the *lis pendens*. These, as we have seen, described the property exactly as it was described in the mortgage. Nothing is said in the complaint, *lis pendens*, or decree about any new water-right acquired after the execution of the mortgage. It matters not whether



the water-right is appurtenant to the ditch, or the ditch appurtenant to the water-right. If there was any other ditch than that commonly known as the "Butte Ditch," commencing at Pine-Log crossing, etc., it ought to have been described so that the sheriff and creditors might know that it passed by the decree; and, if there was a new or additional water-right of 5,000 inches, it could not be appurtenant to the Butte ditch, which already had the right to all it could carry,—about 750 inches.

Respondent claims that the Butte Ditch Company had the right to all the water of the stream; that the new works were simply intended as a new and improved method of enjoying the rights and franchises held by that company; and that "this case is not to be determined by simply referring to the descriptive language in the various instruments; but all of the facts and circumstances are to be considered, as well as the declarations and acts of the parties in their dealings with the property, illustrating their object and intention. The assertion that there are two descriptions does not determine whether one was built to use to better advantage the franchises and rights of the other; nor does such assertion determine whether the present property is, in law, an improvement of the property mortgaged." It is true, the court found "that said Butte Canal & Ditch Company was the owner of said water, water-rights, privileges, and franchises, and the right to construct canals and ditches to convey the waters of said stream;" but, if this is a finding that the Butte Ditch Company was entitled to all the waters of the north fork of the Mokelumne river, it is a finding which is not supported by the evidence. We have searched the record in vain for evidence of such fact. In the articles of incorporation it is stated that the object of the Butte Ditch Company is to take the waters of the north fork of the Mokelumne river; but, in the absence of proof of an actual appropriation and diversion, this evidence is not sufficient to show that the Butte Ditch Company enjoyed the franchise to the extent claimed for it. The right mortgaged was the right to take water from said stream, no mention being made of the quantity. Conceding that this language used in the mortgage is broad enough to cover all subsequently acquired franchises, without the necessity of an averment in the complaint in foreclosure of such additional right, we do not perceive any advantage to the plaintiff. In January, 1870, a notice was posted at a point 200 rods above Pine-Log crossing stating that the owners of the Butte Canal & Ditching Company had removed their location, or point of tapping the north fork of the Mokelumne river, to that point, and "appropriated of the waters of the north fork of the Mokelumne river, at this point, 5,000 cubic inches;" and that they were going on with due diligence to construct a canal of sufficient capacity to carry and distribute said amount of water. The company, however, never succeeded in tapping the river at that or any other point, so as to secure the benefit of this notice. The company became insolvent long before they reached that point, and their failure to proceed operated as a forfeiture of their right. The mere act of commencing a ditch, with the intention of appropriating the water, of itself gives no right to the water of a stream. The right depends upon the effectual prosecution of the work. The completion of the ditch and the diversion of the water are necessary elements of title; and the abandonment of the purpose is not so much a matter in avoidance of a title as it is matter showing that no title was ever obtained. The parties prosecuting the work must have the ability to complete the work within a reasonable time, and pecuniary inability to complete the work within a reasonable time cannot be urged as an excuse for not prosecuting the work. *Kimball v. Gearhart*, 12 Cal. 28. "Appropriation, use, and non-use are the tests of the right." *Davis v. Gale*, 32 Cal. 32. The right to the water does not exist when the notice is given, and it may never vest. "The most that is *in esse* is a right to acquire by reasonable diligence a future right to the water." *Canal Co. v. Kidd*, 37 Cal. 316. The right to 5,000 inches of water did not exist at the time the mortgage was

executed; and if such right was acquired, being an additional right,—a franchise, a new property,—it was not covered by the mortgage, because not in existence at the time the mortgage was executed. If the Sutter Canal & Mining Company forfeited its right to 5,000 inches by a failure to prosecute the work, no additional water-right passed to the defendant here by the assignment in bankruptcy; and defendant's right to the additional quantity of water, if any, must depend upon its own appropriation and diversion. It is unnecessary for us to inquire, in this case, whether the defendant has ever properly acquired a right to 5,000 or more inches of water. The question before us here is, how much water—what property—the plaintiff is entitled to under the description given in the decree of foreclosure. It is proper to say, however, that the defendant offered in evidence the recordation in the proper book of a notice of location of 10,000 inches of water of the Mokelumne river at the point where this ditch connects with the river. This offer was excluded, but there is evidence of an actual appropriation by defendant; and in view of the diversion, and the long and uninterrupted use, of the waters at that point by the defendant, it will be presumed for the purposes of this case, in the absence of proof to the contrary, that a notice was properly posted.

In determining whether the property now known as the "Amador Canal," and its appurtenances is an improvement of the original Butte ditch, and incident to it, or such an addition as may be said to have been contemplated by the parties to the mortgage, and constituting a basis for a decree subjecting it to the payment of the debt secured by the mortgages of 1868, it is important to bear in mind the events which have produced the changes in the character of the property, and the order in which they occurred. At the time the mortgages were given (August and September, 1868) the Butte ditch was about nineteen miles and a half in length, and extended from Pine-Log crossing to Slab Town, just as it is described in the mortgage, *lis pendens*, complaint, and decree. Immediately after the Butte Ditch Company received the money from the plaintiff, and gave mortgages therefor, the ditch was extended by means of a pipe 1,200 or 1,300 feet above Pine-Log crossing. This pipe carried 1,500 inches, which was double the capacity of the Butte ditch. On January 26, 1870, a notice was posted on behalf of the Butte Ditch Company claiming 5,000 inches of water at the point where the new ditch heads. In July, 1870, work was begun upon the first extension, but several miles north-west of the tunnel. This work was done by the Sutter Canal & Mining Company. The company worked towards the tunnel, leaving spaces for flumes. July 15th the property was conveyed to Bowman, and on July 16th Bowman sold to the Sutter Canal & Mining Company. It was the intention of the company, when it commenced the new construction, to build the ditch to the tunnel, excavate the tunnel, and from there construct the ditch to the point where the new ditch now heads. whenever the company could make sufficient money to enable it to complete the same. It was thought that, when a connection was made with the old ditch above the tunnel, the company could, by turning the water of the old ditch into the new ditch, and by turning the water down to Sutter creek, make sufficient money to complete the ditch to the point where the notice for 5,000 inches of water had been posted. At that time, the company, therefore, knew that it had not sufficient funds to finish the work in a reasonable time, so as to comply with the law applicable to the appropriation of water. The company struggled along with the work, however, completing the greater portion of the ditch to the tunnel, and excavating the tunnel, and built the new ditch along the river, above the old ditch, until it reached the lower end of Bald Rock. Here the lower end of the flume, which constituted a portion of the old ditch, was elevated so that the water from it ran into the new ditch they had built to that point. The water from the old ditch ran into the new ditch for two weeks after the connection thus made, but it never reached further than two miles below the point of connec-

tion in the new ditch, while the Sutter Canal & Mining Company held it. At this point the company failed, and was soon adjudged a bankrupt. The work stopped in the fall of 1871, at which time the water was turned out of the ditch, and abandoned until the Amador Canal & Mining Company turned it in again. The Sutter Canal & Mining Company was adjudged a bankrupt in March 1872. On October 4, 1873, the decree of foreclosure was entered in the suit referred to; on the 11th of October, 1873, the deed from Napthaly, assignee in bankruptcy, was delivered to the defendant corporation; and on October 14th, the defendant began work on the ditch at the point where the connection had been made with the old ditch at the lower end of Bald Rock. At this point a flume 80 feet higher than the old flume was placed around Bald Rock to the upper end thereof, and the ditch was constructed to the point where it now heads, and completed in the fall of 1874. Since the completion of the ditch in 1874 many miles of branch ditches have been built in different places, carrying the water in directions and to points different and far from those reached by the Butte Ditch Company.

How, therefore, can it be said that the property as it now stands is an improvement of the property as originally mortgaged by the Butte Ditch Company, or is an incident to it, or is such an addition as may be said to have been contemplated by the parties to the mortgage, or that the new ditch was built for the purpose of using to better advantage the water-rights and franchises of the old Butte ditch, or was constructed to take its place? It may have been the intention of the Sutter Canal & Mining Company to use, by means of the canal it was constructing, the water-right and franchise purchased by Bowman of the Butte Ditch Company, but in its failure to prosecute the work, as we have seen, it never acquired any greater franchise than that which was held by the Butte Ditch Company when it executed the mortgages to this plaintiff. It is said: "If the water-right and franchises of the Butte Ditch Company had not been purchased by Bowman, no new canal could have been constructed, because neither Bowman nor the Sutter Canal & Mining Company or this defendant ever took up, located, or acquired any water-right other than that of the Butte Ditch Company;" but there is nothing in the transcript to warrant the statement. A new canal could have been constructed without regard to the franchises held by the Butte Ditch Company, or by Bowman, or by the Sutter Canal Company; and it is not probable that a ditch of such capacity would be built for the purpose of using the water-right of the Butte ditch only,—about 750 inches. The inability and failure of the Sutter Canal & Mining Company to prosecute the work of construction left the franchise of the Butte Ditch Company no greater than it was at the time the mortgage was executed. The quantity of water to which the company was entitled is somewhat uncertain, and we do not mean to express any opinion upon that matter.

There can be no doubt that the Sutter Canal & Mining Company lost its right to the additional 5,000 inches claimed by it. The provisions of the Code are conclusive. Section 1416 of the Civil Code provides that, "within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain." Section 1417 provides that "by 'completion' is meant conducting the waters to the place of intended use." Section 1420 provides that "persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases." See also, cases cited under said sections in Deering's Annotated Civil Code. At the time of the entry of the decree of foreclosure, October 4, 1873, no part of the ditch as it now exists was constructed

between the lower end of Bald Rock and the river. Work was not commenced upon that portion of the ditch until 10 days after the entry of that decree. There was at the time of the entry of that decree a continuous line of ditch from Slab Town and the tunnel to the point on the river where the iron pipe had been laid, twelve or thirteen hundred feet above Pine-Log crossing. We cannot perceive how any ditch or ditches which were constructed subsequently can be claimed by the plaintiff under the decree. With respect to after-acquired property, it is only when the parties by their contract intend to create a positive lien or charge upon the property, that the lien attaches as a charge upon the particular property, or where it is an improvement or extension; or where it is expected to be the fruit of an undertaking already commenced, or a thing which, in the ordinary course of events, will exist at a future time, and which may be said, reasonably, to have been contemplated by the parties to the contract. *Seymour v. Railroad Co.*, 25 Barb. 305; *Barnard v. Eaton*, 2 Cush. 302; 1 Jones, Mortg. § 153. A man cannot grant a thing which he has not. The thing granted or pledged must have an actual or potential existence. There must be something *in presenti* of which the thing *in futuro* is to be the product, or necessary for its use, or incident to it. If it were otherwise, all property might be fettered with long-made and unknown mortgages, and the purchase thereof be made extremely hazardous.

In this state "a mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." There is no mention made in the mortgage of any water-right to be thereafter acquired; nor is there any language indicating any intention that the mortgage should cover after-acquired property of the character in controversy. The property is described in the mortgage with certainty. It was, at the time of the execution of the mortgage, well known, and there is now no dispute as to what property was at that time in existence. The Amador Canal Company received from the assignee a conveyance which in terms described the property as it then existed. The complaint necessarily alleged, in view of the theory of the plaintiff, that the property in controversy "was, and is in fact, the Butte-Ditch property hereinbefore referred to, although the same had been altered, extended, and improved; and all the franchises, water-rights, and rights of way thereby conveyed to said Amador Canal & Mining Company were the franchises, water-rights, and rights of way formerly owned by said Butte Ditch Company, \* \* \* and that said company continued the work of altering and improving said property, \* \* \* and all the said improvements were made for the purpose of employing to better advantage those water-rights covered by said mortgages, and the said property is and was subject to said mortgages of this plaintiff." But the findings of the court and the evidence show, we think, that the property in controversy is not the old Butte ditch, altered, extended, and improved; and that the Amador canal should not be considered as an appurtenance to the Butte Ditch. It is a singular fact that although the name of the ditch was changed after the purchase by the Sutter Canal & Mining Company, and again after the purchase by this company, yet no mention of these changes was made in the descriptions given in the foreclosure proceedings. In the complaint, *lis pendens*, decree, and deed it is described as "that certain ditch commonly known as and called the 'Butte Ditch,'" etc. Its place of commencement is fixed, and places to which it carries water are named. There is nothing indicating an intention to cover any ditches thereafter to be constructed; the language being, "Together with all the appurtenances, flumes, aqueducts, branch ditches, reservoirs, pipes, and cabins connected with, or in any manner belonging to, the ditch property above mentioned, with the right to take water from the north fork of the Mokelumne river." The new ditch was not projected at the time the mortgage was executed, and there is nothing to show that it was at that time ever contemplated.

In *Ellison v. Water Co.* the court considered a mortgage which, by its terms, covered, not only the works completed at the time of the execution of the instrument, but also all work then in progress, and thereafter to be constructed, by the company for conducting and distributing water; and yet Mr. Justice FIELD, in delivering the opinion of the court, said: "This broad language cannot, however, we apprehend, give a lien upon ditches for the construction of which no steps had been taken by a survey and location of lines, and which rested merely in contemplation. Some specific right of way, capable of identification from a previous survey or location, would seem to be necessary to constitute such property as is capable of mortgage or transfer, so as to pass subsequently constructed works thereon." 12 Cal. 554. Although this portion of the opinion appears to be *dictum*, it is nevertheless in accord with the weight of authority, and establishes a safe and certain rule for the protection of mortgagor, mortgagee, and creditor. While there is no evidence that there are in this case any creditors of the present owners of the property, there is no safe principle applicable which does not contemplate the rights of third persons who are bound only by the record. And in railroad cases, where the *termini* of the road are given in the mortgage, and authority is thereafter given to extend the road, such extension is not subject to the mortgage, unless the language of the instrument clearly and expressly includes such extensions. *Randolph v. Railroad Co.*, 28 N. J. Eq. 49; *Chapman v. Railroad Co.*, 26 W. Va. 310.

It is claimed that *Mining Co. v. Moses*, 58 Cal. 168, is a case directly in point and conclusive herein. In that case the principal property mortgaged was an extensive set of mining claims known as the "Kelly & Co. Claims." There was mortgaged, in connection with said claims, all the ditches, reservoirs, etc., used for working said claims. The ditches owned by the defendant in that case were used exclusively for the purpose of conveying the waters of Gansner creek and intermediate streams upon said claims. It clearly appears from the facts in that case that all of the works constructed by Gurnee, and all of the water-rights which he acquired, if any, were acquired solely for the purpose of being used in connection with the mines, which were the principal property mortgaged, and as such, were appurtenant to the mines. In his (Gurnee's) deed to the Hungarian Hill Gold Mining Company, he particularly described each parcel of the property, and provided that the whole thereof was subject to the mortgage which he had executed to the defendants, and that plaintiff should fully discharge and pay the same. In 1875, the plaintiff in that case, for convenience in working the claims, moved one of the water-pipes to the Hersey claim, for the purpose of working up the channel to the Kelly & Co. claims, and of working said claims to better advantage. In the foreclosure proceedings the Hungarian Hill Gold Mining Company was a defendant, and duly served with summons. A decree was entered in favor of the plaintiff, Moses, foreclosing said mortgage, and directed the sale of the "said Kelly & Co. mining claims, and all water-ditches, including the Salt Creek ditch, with all the water, water-rights, and privileges belonging to the said water-ditches, and each of them, and all reservoirs used, had, and belonging to said mining claims." In that case Gurnee was the mortgagor, and the owner of all the property in dispute, although the new ditch and reservoir were built by him after he executed the mortgage. The new ditch was clearly appurtenant to the principal property mortgaged. Both Gurnee and the Hungarian Hill Gold Mining Company were made parties to the foreclosure suit. The language employed in the mortgage to describe the property in that case was comprehensive, and, in view of the use made of the water, can be construed fairly to include the new property. It described the mining claims, and "also, all the water-ditches leading water onto said claims, including the ditch from Salt creek, with all the water, water-rights, and privileges belonging to said water-ditches; also all mining tools, implements, tunnels, cuts,

flumes, and reservoirs used, had, and belonging to said claims, and every part and portion thereof; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining." In this case there is no evidence of an agreement on the part of the defendant to pay the mortgages on the mortgaged property. The mortgagors never owned any portion of the property which is here in dispute, and described as the "Amador Canal." The mortgage was given upon the Butte ditch, which was not appurtenant to any other property mortgaged, except to the water-right of Pine-Log crossing. The water here is not used, or intended for use, at any particular place, or for any particular purpose, but is intended for sale to other parties. In this case no part of the property in dispute existed when the foreclosure suit was commenced, and neither the Sutter Canal & Mining Company nor the Amador Canal & Mining Company was a party to the suit. As stated by the respondent in his brief, in *Mining Co. v. Moses*, the property there in controversy "was clearly but an enlargement of a ditch and water-right, conceded as belonging to the estate mortgaged, or as an improvement thereon. The mortgagor, in making it, looked to the redemption of the property, and made the expenditure for his own benefit. He knew that he could save himself from loss by paying the debt for which the property was mortgaged. With this in view, he conveyed the whole property to plaintiff; expressly providing in the deed that plaintiff took the same subject to such lien, and that it should pay and discharge the mortgage."

In *Quirk v. Falk*, 47 Cal. 453, the court did not say that the water-ditch, and the water-right thereto appertaining, could not be appurtenant to a mining claim; but simply said that the plaintiff had failed to prove that the larger portion of the water was used in working those claims, and had failed to prove that the water-ditch, and water-right thereto appertaining, became appurtenant to the monitor claims. In *Wood v. Whelen*, 93 Ill. 153, cited by the respondent, the new gas-pipe works were held to be simply additions, fixtures, and therefore appurtenants to the property mortgaged. It was there said: "The granting clause of the mortgage is very comprehensive, and was, no doubt, intended to, as it does, include everything appertaining to the gas-works." A large number of cases has been cited by the respondent, but we deem it unnecessary, in view of what has been said herein, to review them at length. They are nearly all cases of mortgages upon railroad property. In some of the cases cited, the court held that the mortgage, by its terms, covered after-acquired property; in others, that after-acquired property passed as an incident to the franchise, as an accession to the subject of the mortgage, because essential to the exercise of the franchise, and incident to it. In *Sparks v. Hess*, 15 Cal. 186, it was held, in effect, that the structure—the bridge—was the superior thing, and that the land on either side passed as appurtenant to it. The property conveyed was "a certain bridge located, situated, and lying on the south fork of the Yuba river, etc., known as 'Spark's Bridge,' across the south fork of said river; together with the toll-houses, stables, and also the right and privilege of said Sparks in and to the dug road there made on each side of said bridge; together with all the privileges and appurtenances appertaining and in anywise belonging to said bridge." Where the structure is the principal thing conveyed, under such circumstances as appeared in that case, it will carry with it the title of the grantor in the land upon which it stands, or with which it is connected.

2. The court found that in the action of the Amador Canal & Mining Company against Mitchell the question was litigated as to whether the property acquired from the assignee by the Amador Canal & Mining Company was subject to the said mortgage; and that, after hearing and trial thereof, it was finally determined in favor of this plaintiff. This, we think, is an erroneous construction of the judgment in that case. The plaintiff there did not seek to have construed the decree of foreclosure, nor to determine the scope or

effect thereof. The action was brought to set aside the decree of foreclosure on the ground of fraud. The title to the Amador Canal was not there litigated. The court determined that there was no fraud; and that the Amador Canal & Mining Company, being a purchaser *pendente lite*, was bound by the decree of foreclosure, though not made a party to the suit. The question raised here, namely, what property is included in the descriptions given in the complaint, *lis pendens*, decree, and sheriff's deed, was not considered. *Mining Co. v. Mitchell*, 59 Cal. 168.

3. There can be no doubt, we think, that the acts of the defendant in destroying the old ditch and flume from Bald Rock towards the river, and in converting the lumber to its own use, were unlawful, and rendered the company liable in an action for damages. It is a question, however, whether such damages can be recovered in this action. It is difficult to determine from the issues herein whether the action can be considered anything beyond one in ejectment, and for rents, issues, and profits. There is, however, an allegation in the complaint that, "in the performance of said work, the said ditch or canal [Butte ditch] as originally constructed has been to a large extent filled up and destroyed," etc. There is also an allegation "that, by reason of the premises and the facts hereinbefore alleged, the plaintiff has been damaged by the defendant in the sum of \$500,000;" and there is a prayer for the recovery from defendant of the sum of \$500,000 damages. There is also a prayer for the appointment of a receiver, for the possession of the canal and water-rights, and for such other and further relief in the premises as shall be just and equitable. There was no demurrer to the complaint, but defendant answered, denying specifically the allegations of the complaint; and the trial seems to have proceeded upon the theory that it is an action to recover the land, and the rents, issues, and profits thereof. The defendant was not bound to use, improve, or repair the property; but it was the duty of the defendant, when it went into the possession of the property under the deed from Nathaly, as assignee, at least, not to destroy it. It had the right of redemption and actual possession. The defendant was in one sense a bailee for the plaintiff with respect to such property, and as such during the time it held possession was bound to do no act that would injure it. The defendant destroyed it and must now be held responsible for the waste. We think that the plaintiff may recover in this action the damages occasioned to him by the acts of the defendant, notwithstanding the fact that he has heretofore claimed other relief. The remedy for waste is ordinarily at law, but, where it is for the purpose of preserving the security of a mortgage, equity will interpose, by injunction, to prevent future waste, and in the same action an accounting will be decreed, and compensation given for past waste. For this purpose, "the remedy by bill in equity is so much more easy, expeditious, and complete that it is now almost invariably resorted to." 2 Story, Eq. Jur. § 917; 1 Story, Eq. Jur. §§ 515-518. Both before and after a decree of foreclosure, chancery will interpose to prevent any injury to the inheritance which depreciates the mortgage security; and the court will not "turn the plaintiff round to an action at law," but will require an accounting for waste committed by the one in possession. 1 Hil. Real Prop. 375-377; *Sarles v. Sarles*, 3 Sandf. Ch. 601. In this respect "the court of chancery does not now treat questions of destructive damage to property exactly as it did forty or fifty years back; its protection being more largely afforded than it then generally was." Add. Torts, 252.

The right of the plaintiff to take water from the north fork of the Mokelumne river still exists to the extent that the Butte ditch owned the same at the time the mortgage was executed; but plaintiff will be entitled to recover the actual damage sustained by reason of the negligent and wrongful acts of the defendant. From the lower end of Bald Rock towards the river the Butte ditch was destroyed, and the flume and pipes were appropriated by the defend-

ant, and plaintiff prevented from using his water-right. The measure of damages, therefore, must be the value of property destroyed, and compensation for the loss of the use of his water-right for such period as would have been necessary to enable the plaintiff to reconstruct his ditch after the same was destroyed from the point where it tapped the river to the lower end of Bald Rock. If the new ditch between these points is constructed upon a line which renders it necessary for plaintiff to build his ditch upon another more difficult and more expensive line than that upon which the old ditch was built, plaintiff will be entitled to additional damages to the extent of the difference in cost of construction upon the old line and the cost of construction upon the most feasible line remaining.

Judgment and order reversed, and cause remanded for a new trial, with leave to the parties to amend their pleadings, if they shall be so advised.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

(7 Mont. 299)

RAYMOND v. THEXTON *et al.*

(*Supreme Court of Montana. January 10, 1888.*)

1. NEW TRIAL—STATEMENT—SPECIFICATIONS OF ERROR.

Comp. St. Mont. div. 1, § 298, provides that a statement for a new trial shall contain specifications of the "particular errors" of law upon which appellant relies; and "if no such specifications be made, the statement shall be disregarded on the hearing of the motion." *Held*, that a statement which contains nothing but an unorganized mass of testimony, without any particular specifications of error, is not such a statement as is contemplated by the statute, and should be disregarded.

2. SAME—CERTIFICATE OF TRIAL JUDGE.

Where a statement upon the hearing of a motion for a new trial was simply certified to by the appellant's attorney as correct, *held*, that this was not a sufficient statement, under Comp. St. Mont. div. 1, § 298, requiring that a statement upon a motion for a new trial shall be signed by the judge, "with his certificate that the same is allowed," and would be disregarded on appeal.

3. APPEAL—TRANSCRIPT—MOTION TO STRIKE OUT.

Where it appears that the exceptions contained in the statement, the bill of exceptions, the notice to move for a new trial, and the affidavits in support of it, are not properly signed and certified to, all will be disregarded, and stricken from the transcript on appeal.

4. SAME—ORIGINAL COMPLAINT NO PART OF RECORD AFTER AMENDMENT FILED.

Where, upon demurrer to the complaint, and before any action thereon, plaintiff files an amended complaint, to which no objection is taken, this is a virtual confession of the demurrer. The original complaint and demurrer are no longer any part of the case, and will be stricken from the record on appeal.

Appeal from district court, Madison county; before Justice McCONNELL.

Motion to dismiss an appeal in the case of Winthrop Raymond, plaintiff and respondent, against George Thexton and others, defendants and appellants.

*Blake & Pigott*, for respondent. *James E. Calloway*, for appellants.

GALBRAITH, J. This is a motion to strike from the record certain portions of the transcript, on an appeal from an order overruling a motion for a new trial. The first of these alleged objectionable portions of the transcript are the original complaint and the demurrer thereto. Before any action was had by the court upon the demurrer to the original complaint, the respondent filed an amended complaint for substantially the same cause of action, and dismissing as to one of the defendants, mentioned in the original complaint as executor. This was a virtual confession of the demurrer. No objection was made to the filing of the amended complaint, and it was a substitute for and superseded the original. This amended complaint was practically an abandonment of the allegations contained in the original, which could not be considered for any further purposes in the action. The demurrer to



the original complaint was never acted upon by the court. Therefore both the original complaint and the demurrer thereto are wholly useless and immaterial portions of the record, and it should not be incumbered thereby. Another portion of the transcript alleged to be objectionable is the deposition of one Ramsey, and also what appears to be a literal copy of the stenographer's notes taken upon the trial. This constitutes all the testimony in the case, and it, and it alone, is contained in what purports to be a "statement," and is certified to by the attorneys for the respondent to be correct. It does not purport, even on its face, to be a statement on motion for a new trial, but simply a "statement." This so-called "statement" does not comply with the provision of the law, which requires that statements, upon motions for new trials, shall be signed by the judge, "with his certificate that the same is allowed." Comp. St. div. 1, § 298. In this respect the statute in relation to statements on motion for a new trial differs from that in relation to statements of the case on appeals in general. In the latter case the statement, in place of its being required to be certified to and signed by the judge, may be agreed to by the parties or their attorneys, and certified to by them as being correct. But in relation to statements on motion for a new trial there is no provision for such agreement, and the requirement that it be signed and allowed by the judge appears to be imperative. Where there is a general rule of law assuming to be applicable to all cases, and there exists also a special rule assuming to be applicable to a particular case, which might otherwise be included within the general rule, the special rule will prevail. This is substantially our statute upon this subject. Section 631, div. 1, Comp. St., provides that "when a general and particular provision are inconsistent, the latter is paramount to the former." Section 298, above referred to, is an exact copy of the statute of California in relation to the same subject; and the supreme court of that state has held that it must be literally complied with. *Schrieber v. Whitney*, 60 Cal. 431; *Adams v. Dohrmann*, 63 Cal. 417. The statement should have been certified to and signed by the judge. Again, this is not a statement on motion for a new trial, such as is contemplated by the statute. The above section (298) requires that the statement shall contain a specification of "the particulars in which" the "evidence is alleged to be" insufficient, or any "particular error" in law upon which the appellants "will rely." This evidently refers to cases where the testimony is alleged to be insufficient to justify the verdict or decision, or where it is claimed that errors of law occurred at the trial, as designated in subdivisions 6, 7, § 296, div. 1, Comp. St. It contains no specification of errors whatsoever, but is simply the undigested, unarranged mass of testimony taken in the case. The specification of errors "forms [to use the language of a former decision of this court] the frame-work of the statement;" it is the basis of the edifice; "and the evidence is only produced to strengthen and support the structure and make it complete." *Griswold v. Boley*, 1 Mont. 545. In this case, WADE, C. J., delivering the opinion of the court, says: "The motion must designate and specify with exactness and precision the grounds upon which the motion will be made, and these specifications must be carried into the statement, and form a part thereof; and only so much of the evidence shall be reproduced as tends to explain the specification of error." Without the specifications of error there is no statement on a motion for a new trial, such as is contemplated by the statute, when the motion is based upon subdivisions 6, 7, § 296, Code Civil Proc., (Comp. St.) It will be observed that the above section in relation to new trials uses the term "specify" when referring to the statement only. The notice of motion is only required to designate "the grounds upon which the motion will be made." It is the statement, therefore, which should contain the specifications which are referred to by this same section when it provides that "if no such specification be made, the statement shall be disregarded on the hearing of the motion." But if required to be disregarded upon

the hearing of the motion in the district court, it certainly cannot be regarded here. *Graham v. Stewart*, 68 Cal. 374, 9 Pac. Rep. 555; *Vilhac v. Biven*, 28 Cal. 410; *Ferrer v. Insurance Co.*, 47 Cal. 416; *Reamer v. Nesmith*, 34 Cal. 624; *Walls v. Preston*, 25 Cal. 60; *Spencer v. Long*, 39 Cal. 700; *Butterfield v. Railroad Co.*, 37 Cal. 381.

Again, this so-called statement is claimed to be objectionable in that it is simply a literal copy of a deposition taken upon interrogatories, and also a literal copy of the stenographer's notes taken upon the trial reduced to manuscript. These are not even reduced to the narrative form, but are *verbatim* copies of the questions and answers. It occupies over 80 pages (type-writing) of the transcript. We have had occasion before to advert to this method of stating the testimony, and to say that "it is not such a record as should be filed in this court." *Railway Co. v. Warren*, 6 Mont. 275, 12 Pac. Rep. 641. Such a statement of testimony must necessarily contain much immaterial, useless, and redundant matter. The section of the statute in relation to statements on motions for new trials, above referred to, requires that all useless and redundant matter shall be stricken out. Such a statement of the testimony as appears in this case, where it is all expressed in the interrogative form, is in itself objectionable. It is, upon its face, repugnant to the statute. It compels this court to perform that which is the duty of counsel; to search through a mass of testimony, much of which is obviously useless and redundant, to discover what is pertinent and material. We have heretofore been lenient in the consideration of records of this character, but hereafter they will be disregarded.

The exceptions contained in the so-called statement cannot be considered, for the reason that they are not settled and signed by the judge. Section 1981 of the act in relation to stenographers (division 5, Comp. St.) evidently contemplates that the stenographer's notes of the exception are not to be the bill of exceptions, but only become so when settled and signed by the judge.

The notice of intention to move for a new trial, and the affidavits in support of the motion, are not certified to, or in any way identified as having been used upon the hearing of the motion for a new trial, as required by section 438, div. 1, Comp. St., and must be disregarded. The interrogatories contained in the transcript are not properly authenticated, and cannot be considered.

What purports to be a bill of exceptions signed by counsel for the appellants is in no way contemplated by our Code of Civil Procedure. Bills of exceptions must be signed and settled by the judge. It is probably intended as a specification of errors, and, if so, it should be contained in a statement on motion for a new trial or statement on appeal. There is no statement on appeal, and it is not contained in the so-called "statement," no doubt intended as a statement on a motion for a new trial, which, as we have seen, must be disregarded. If intended as the common-law assignment of error, it is not a part of the transcript. For the foregoing reasons the motion to strike from the transcript the portions thereof designated in the motion must be sustained.

We concur: McLEARY, J.; BACH, J.

(7 Mont. 313)

RAYMOND v. THEXTON *et al.*

(Supreme Court of Montana. January 12, 1888.)

**PLEADING—DEMURRER.**

Upon examination of the judgment roll, *held*, that the demurrer to the amended complaint was properly overruled, and that the judgment is supported by the pleadings.

Appeal from district court, Madison county; before Justice McCONNELL.

*James E. Calloway*, for appellants. *Henry W. Blake* and *W. S. Pigott*, for respondent.

GALBRAITH, J. The action of this court in sustaining the motion to strike out certain portions of the transcript in this case leaves nothing to be inquired into, except the judgment roll. To anything contained in this there is no objection. The only questions, therefore, before us for consideration are whether or not the court erred in overruling the demurrer to the amended complaint, and whether or not the pleadings support the judgment. Upon examination, we find both in the affirmative. The appellants have filed no brief nor presented any arguments. The demurrer was properly overruled, and the pleadings sustain the judgment. The judgment is affirmed, with costs.

We concur: McLEARY, J., BACH, J.

(5 Utah, 519)

ORR v. RICH *et al.*

(*Supreme Court of Utah*. March 1, 1888.)

1. VENDOR AND VENDEE—RIGHTS OF PARTIES—RESCISSION OF CONTRACT.

Defendants agreed to sell plaintiff certain land, for which he agreed to pay in live-stock, and to give his note for any balance remaining unpaid at a certain time. The balance due at that time was never paid or tendered, and plaintiff thereafter notified defendants that the contract was rescinded, because they had failed to convey the land, and that he had vacated the premises, and demanded repayment of the amount paid by him, with interest. Defendants subsequently tendered plaintiff a deed to the land, which he declined. *Held*, that the trial court properly found, in an action for the amount paid, that the contract was not rescinded.

2. SAME—POSSESSION OF VENDEE—FINDINGS.

In an action by vendee to recover amount paid upon a contract for the sale of lands, silent as to his possession, on the ground that the contract has been rescinded, it is not necessary to find on plaintiff's allegation of his surrender of possession of the land.

3. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Where there is a substantial conflict of evidence, the findings of fact of the trial court will not be disturbed, on appeal.

Appeal from district court, Third district; before Justice ZANE.

Action by Matthew Orr against John T. Rich *et al.* to recover money paid by plaintiff on a contract which he claims was rescinded. Judgment for defendants, and plaintiff appeals.

*Sutherland & McBride*, for appellant. *Seeks & Rawlins*, for respondents.

BOREMAN, J. On the 7th of March, 1879, the defendants (respondents) and the plaintiff (appellant) had an agreement drawn up, wherein the defendants and one William C. Rydalch were named as the parties of the first part, and the plaintiff was named as the party of the second part. The agreement was signed by the defendants and by the plaintiff. Rydalch was not present and did not sign it. In this shape it was left with one Thomas Williams. Rydalch's name was never thereafter signed to it. The purport of the agreement was that the parties of the first part agreed to sell to the party of the second part a certain piece or parcel of land, the consideration being \$2,000. The consideration was to be paid in live-stock, at specified rates of value, and to be delivered at a specified place, and if any of the stock, not exceeding \$500 in value, should not be delivered by the 1st of September, 1879, the party of the second part was to give a note for such unpaid sum, drawing 6 per cent. interest per annum. Stock to the value of \$1,568 was delivered within the time; leaving the sum of \$432 unpaid on the 1st of September, 1879, and to be paid thereafter, and for which a note was, under the contract, to be given. According to the findings not excepted to, the sum last named was never paid or tendered to be paid. The parties not having reached any settlement or conclusion

as regards the further performance of the agreement, the plaintiff on the 6th of May, 1885, gave notice to the defendants that the contract was rescinded, and that he had vacated the premises which he had held possession of from the time of making the contract, and he demanded a repayment to him of \$1,600, and interest thereon, in all amounting to \$2,500. The reason stated in the notice for the rescission was that the defendant had failed to convey or caused to be conveyed to the plaintiff the land in question. On the same day a deed, dated 15th April, 1885, and signed by the defendants and by Rydalc, was shown to the plaintiff, and he declined to receive it, because it was not acknowledged, and for other reasons. Subsequently, on the 20th day of May or of June, 1885, the same deed, with notary's seal to the acknowledgment, was tendered to him, but it was also declined, on the ground that it was too late, as he had removed from the land and rented another place, and the contract had been rescinded. Thereafter, in September following, the plaintiff instituted this action. Trial being had before the court, a jury having been waived, judgment was rendered for the defendants. A motion for a new trial having been made and overruled, the plaintiff has appealed to this court from the judgment and from the order overruling the motion for a new trial.

The plaintiff assigns as error the making of the third, fourth, and fifth findings of fact, as being unsupported by the evidence. We have examined the evidence with care, and find that there was a substantial conflict of evidence on each of the points set forth in the findings. If we should take the evidence in behalf of the plaintiff alone, then of course the findings would be wrong, but this cannot be done. We must take the evidence introduced upon both sides, and then upon the well-settled rule (often recognized in this court) if there is a substantial conflict of evidence, this court will not disturb the decision of the court below upon the assumption that it is not supported by the evidence. It is the policy of the law to leave questions of fact very much in the hands of the juries, or of the court sitting as a jury, and unless the appellate court can see that the facts proven are very strongly against the verdict or decision, and there is no substantial conflict, it is not justified in holding that there is not evidence to support such verdict or decision. The appellant alleges that the lower court erred in holding that the plaintiff did not, on the facts of the case, rescind the contract. The appellant in his brief lays down the rule to be that "while the law requires consent on both sides to a rescission of a contract, the conduct of the defaulting party may and is often such as only requires the concurrence of the other in order to a rescission. In such a case, only one party takes affirmative action, but it is because the acts of the other imply an abandonment of the contract." We believe that this language, with the assumption that the rescinding party is not in fault, presents the correct rule. Let us apply it to the facts in the case at bar. There is no proof of the express consent of the defendants to the rescission. The question arises, then, whether the conduct of the alleged defaulting party implies an abandonment of the contract on their part. This is not an exception to any finding of fact, but an exception to the conclusion of law that "the plaintiff is not entitled to recover." That conclusion is based upon the findings of fact, and the findings of fact are supported by the evidence, as we have already seen. To ascertain, therefore, whether the holding that the plaintiff did not rescind is correct or not, we cannot go behind the findings, but must take them as a basis. In looking into the findings, we ascertain that the defendants were always ready and willing to perform their part of the contract, and had not abandoned it, and that the plaintiff was in default in not having performed his part of the contract. There was therefore no abandonment of the contract by the defendants, and there was no "consent on both sides to a rescission." It is alleged as error that the court below failed to find on the allegation as to the surrender of the premises. The contract of sale was silent as to the possession of the vendee, and, as a consequence, he

was not entitled to the possession. *Burnett v. Caldwell*, 9 Wall. 290. There was therefore no necessity for a finding upon that point. If he was not entitled to the possession until a completion of the contract, his possession and his subsequent surrender of possession could not affect the question as to the rights of the parties. It is alleged as error also that there was no finding as to the truth of the affirmative matter set up in the answer. It is assigned for error also that the court admitted evidence as to the value, and decrease in value, of the premises, and as to waste. These alleged errors belong to the same class. The court below, in its findings and decision, seems to have taken no account of the affirmative matter in the answer, nor of the waste, nor of the value, nor decrease in value, of the premises. The errors of the court, if such existed, were harmless to the plaintiff. They did not work to his injury or damage. If such errors existed and could have worked to the detriment of the plaintiff, they would be ground for reversal, but where they clearly could not have done so, they would not authorize a reversal. It is assigned for error that the court below admitted defendant Wrathal to testify that he was still ready to deliver the deed, and that he was willing that it should be delivered. No point is made on this alleged error in the argument set forth in the brief of the appellant, and we do not deem it material. It was not improper that the defendant should say that he was willing that the deed should be delivered. It tended to show good faith in now being willing to carry out the contract. It is finally assigned as error that the court below permitted John Rydaltch to testify as to a conversation he had had with one Anderson, who had charge of sheep belonging to plaintiff. The testimony was that Anderson stated that he did not have any sheep of the plaintiff of the kind described. The evidence was of very little importance. The plaintiff had sold the sheep which he had on the previous day offered to defendant Rich. The court found that the plaintiff never offered to make payment of the balance of \$432, which it was claimed the plaintiff offered these sheep to pay, and this finding of the court is not excepted to. If there was any error therefore it was wholly immaterial. We see no reason for a reversal of the decision of the court below, and we can see no harm to result to the plaintiff, as the defendants claim to stand ready to complete the contract. The order and judgment of the court below are affirmed.

ZANE, C. J., and HENDERSON, J., concur.

(2 Ariz. 443)

HENEY v. COUNTY OF PIMA.

(*Supreme Court of Arizona*. April 2, 1888.)

COUNTIES—LIABILITIES—TAX DEEDS TO TERRITORY—NOTARY'S FEES.

When a statute makes it a duty of the collector of taxes to execute deeds of lands struck off to the territory at tax sales conveying same to the territory without charge, the services of a notary public certifying the acknowledgment of such deeds are not a proper charge against the county.

Appeal from district court, Pima county; BARNES, Judge.

G. B. Heney sued the county of Pima to recover notarial fees for the acknowledgment of deeds. Verdict for plaintiff. Defendant appeals. For statement of facts, see case reported in 14 Pac. Rep. 299.

*Haynes & Mitchell* and *F. J. Heney*, for appellant. *Jeffords & Franklin*, for appellee.

PER CURIAM. In this case we are asked to review the decision of this court in case of same title reported in 14 Pac. Rep. 299. We see no good reason to change the views there expressed. The county is not bound by law to pay these fees; and, to be bound by contract, must assent to it. The board, however, have power to deal with the equities of the case, so forcibly urged upon

- us, and it rests with them to pay for these services as they see fit. The judgment is affirmed.

WRIGHT, C. J., and PORTER and BARNES, JJ., concur.

(2 Idaho [Hasb.] 442)

INNIS v. BOLTON *et al.*

(*Supreme Court of Idaho. March 6, 1888.*)

1. ELECTIONS AND VOTERS—QUALIFICATIONS—TERRITORIES—LEGISLATIVE POWERS.

The legislative assembly of a territory, having authority concurrent with congress, may legislate upon the subject of suffrage, observing, of course, the constitutional limitations, and also the restrictions imposed by congress.

2. SAME—TEST OATH—CONSTITUTIONAL LAW.

The act of the legislative assembly of the territory of Idaho, passed at its thirteenth session, creating additional disqualifications for voting, and prescribing a test oath as a mode of ascertaining the qualifications of persons offering to vote, is not in violation of the constitution of the United States.

3. SAME—RIGHT OF SUFFRAGE IN TERRITORIES.

The right of suffrage is not a natural right, nor an unqualified personal right, but in a territory is a right conferred by law, which may be abridged or withdrawn by the authority that conferred it, subject to constitutional limitations and restrictions.

(*Syllabus by the Court.*)

Appeal from district court, Bear Lake county; before Justice HAYS.

James B. Innis brought this action against Robert Bolton and others, judges of election for Paris election precinct, to recover damages for the alleged wrongful deprivation of plaintiff's elective franchise. From a judgment in favor of defendants for costs, plaintiff appeals.

Richard Z. Johnson, for appellant. *Ensign & Stull*, for respondents.

BRODERICK, J. This action was commenced in the district court in and for Bear Lake county. The complaint alleges "that, at a special election duly held in and for said county of Bear Lake, on the 20th day of November, 1886, for the election of a county surveyor, in and for said county, said defendants were the judges of election for Paris election precinct in said county, and being duly appointed and qualified as such judges, and acting as such, the defendants had the polls open for said election at the First ward school-house, in said Paris precinct, between the hours of 8 o'clock in the forenoon and 7 o'clock in the evening of said day. That this plaintiff then was a male inhabitant of said county and territory, over the age of 21 years, and a native-born citizen of the United States, and then resided, and, for the space of more than four months and for more than twenty years immediately preceding the day of said election, had resided continuously in said territory, and in said county of Bear Lake, and in said Paris precinct. That, as said defendants then and there well knew, this plaintiff was not, at the time of said election, under guardianship, *non compos mentis*, or insane, and was not and had not been convicted of treason, felony, or bribery in this territory, or in any other state or territory in the Union, or elsewhere, and was not a bigamist or polygamist, and did not cohabit with more than one woman. That, as an elector of said county and precinct, this plaintiff, while the polls were then and there open for the reception of votes as aforesaid, duly offered to the defendants, judges of said election as aforesaid, his vote or ballot for the election of said county surveyor for said county, and then and there requested defendants to receive and

<sup>1</sup>The constitution of the United States and acts of congress, so far as applicable, are the only limitations upon the legislative power of the territories. *Territory v. Connell*, (Ariz.) 16 Pac. Rep. 209. See, also, as to the legislative power of the territories, *Yeaman v. Speirs*, (Utah,) 10 Pac. Rep. 609; *Woolfolk v. Woolman*, (Mont.) 9 Pac. Rep. 445; *Ducheneau v. House*, (Utah,) 10 Pac. Rep. 838; *Stevenson v. Moody*, (Idaho,) 12 Pac. Rep. 902.

deposit the same. That this plaintiff being thereupon challenged by an elector entitled to vote at said poll, and one of the defendants having declared to this plaintiff the general qualifications of an elector, this plaintiff then and there declared himself duly qualified; whereupon, said challenge not being withdrawn, this plaintiff offered to take, and requested said defendants to administer to plaintiff the following oath: 'I do solemnly swear that I am a male citizen of the United States, over the age of twenty-one years; that I have actually resided in this territory for four months last past, and in this county thirty days; that I am not a bigamist or polygamist; that I do not cohabit with more than one woman, and that I have not previously voted at this election. So help me God.' But said defendants then and there refused to administer, or permit this plaintiff to take said oath. That said defendants, and each of them, not regarding their duty as judges of said election, and intending to wrongfully deprive this plaintiff of the elective franchise at said election, wrongfully, willfully, and maliciously refused to receive or deposit said ballot, although they, and each of them, then and there well knew that plaintiff was a qualified voter, and entitled to vote at said election; whereby plaintiff was deprived of his vote at said election, to his damage in the sum of ten thousand dollars. Wherefore plaintiff demands judgment against the defendants for the sum of ten thousand dollars and his costs and disbursements in this action." The defendants demurred on the ground that it appeared on the face thereof, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, plaintiff declined to amend, and elected to stand upon the pleading. The court thereupon ordered the complaint dismissed, and judgment was rendered in favor of defendants for their costs.

The plaintiff duly excepted and appealed from the judgment."

In 1885 the legislative assembly of the territory enacted what is commonly known as the "Test Oath Statute." Section 16, 13th Sess. Laws, 106, reads as follows: "If any person offering to vote shall be challenged by any judge or clerk of the election, or any other person entitled to vote at the same poll, and either judge shall challenge any person offering to vote whom he shall know or suspect not to be qualified, one of the judges shall declare to the person so challenged the qualifications of an elector. If such person shall then declare himself duly qualified, and the challenge be not withdrawn, one of the judges shall then tender him the following oath: 'You do solemnly swear (or affirm) that you are a male citizen of the United States, over the age of twenty-one years; that you have actually resided in this territory for four months last past, and in this county thirty days; that you are not a bigamist or polygamist; that you are not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization; that you do not either publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law either as a religious duty or otherwise; that you regard the constitution of the United States, and the laws thereof, and of this territory as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding; and that you have not previously voted at this election; so help you God.'" It is contended on behalf of the appellant that this act is void—*First*, because it is in violation of the first amendment to the constitution of the United States; and, *second*, because it is in conflict with the act of congress of March 22, 1882. Congress has the superior power to legislate for the territories upon this subject, as well as all others; but its policy has usually been to prescribe the qualification of electors at the first election after the organi-

zation of a territory, and thereafter allow the legislative assembly of the territory, under certain restrictions and limitations, to regulate and fix the qualifications for the exercise of the elective franchise at all subsequent elections. Section 1860, Rev. St. U. S., was in force at the time the territorial statute was enacted, and is as follows: "At all subsequent elections, however, in any territory hereafter organized by congress, as well as at all elections in territories already organized, the qualifications of voters, and of holding office, shall be such as may be prescribed by the legislative assembly of each territory; subject nevertheless to the following restrictions on the power of the legislature, namely: *First.* The right of suffrage and holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the constitution and government of the United States. *Second.* There shall be no denial of the elective franchise, or of holding office, to a citizen on account of race, color, or previous condition of servitude. *Third.* No officer, soldier, seaman, mariner, or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote in any territory by reason of being or service therein, unless such territory is and has been for the period of six months his permanent domicile." It cannot be doubted for a moment that this act clearly delegates to the territories legislative power over the subject of suffrage, subject to the restrictions enumerated therein. But of course, like all other grants in the organic act, this was subject to the constitutional limitations upon the granting power, and it is equally true, as contended, that by the grant congress did not and could not divest itself of the power subject to the same restrictions. The act quoted, except the last two subdivisions thereof, has been in force ever since the organization of the first of the now existing territories, and during all this time the power to fix the qualifications for voting and holding office has been a concurrent power of congress and the territorial legislature; the power of the former being limited by the federal constitution, and the power of the latter being limited by the constitution and by the acts of congress. March 22, 1882, congress, in the exercise of its power, passed an act, the eighth section of which is alike applicable to all the territories, and declares as follows: "Sec. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any person described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to, or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such territory or place, or under the United States." Counsel contends that by this act congress undertook to legislate upon the whole subject of disfranchisements growing out of polygamy, bigamy, and unlawful cohabitation, and thereby, by implication, withdrew or revoked the former grant of legislative power to the territories. We are unable to find anything in the act itself to warrant this conclusion. The act creates additional disqualifications, and it is to that extent, we think, to be regarded as an amendment to the organic law. Repeal by implication is not favored, and we cannot believe it was the intention of congress to take away the power over this subject delegated by section 1860 of the Revised Statutes, but think the intention was only to engraft or place another limitation upon that power. This view seems more in consonance with the policy heretofore pursued by the general government towards the territories. It is true that the congress has the paramount right, and may directly legislate for the government of any territory, and may directly repeal or abrogate any act of the territorial legislature. But it is also true that when congress confers power upon the legislative assembly of a territory, and, in pursuance of this power, laws are en-



acted for the government of the people thereof, such enactments must be respected and upheld, unless clearly in conflict with some higher law.

The act of March 22, 1882, disfranchises bigamists, polygamists, and those who are guilty of unlawful cohabitation, and disqualifies them from holding office. Section 2 of our statute contains substantially the same provision, as to this class of persons, and then further disqualifies all who counsel, advise, aid, and abet in the commission of these offenses. Section 16 of the statute (hereinbefore quoted) establishes the mode by which the disqualifications fixed by the former section and by the act of congress may be ascertained and determined. We see no reason why the legislature, under the delegation of power, could not do this, and therefore conclude the power was concurrent, and, so far as this question is concerned, that these acts may stand together. This brings us to the consideration of a more important question, and one which we approach with a full appreciation of the responsibility. Is this territorial enactment in violation of the provisions of the federal constitution which guaranties religious freedom? It is at once conceded that if the statute prohibits or interferes in any substantial manner with the free exercise of religion then it is void and of no effect. The first amendment to the constitution declares that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and in another place that "no religious test shall ever be required as a qualification to any office or public trust under the United States." These provisions are limitations upon the power of congress, but it is readily conceded that congress could not confer any authority upon a subordinate legislative body that it did not itself have and could not exercise. Therefore the inquiry will be confined to the one question. There is much general discussion of these constitutional inhibitions found in the books, but we have not been referred to any authority, nor do we know of any, upon the precise point involved in the case at bar. The authors, however, agree as to the object and purpose of the amendment, as well as to the causes which led to its adoption. "This amendment," says Judge STORY, "cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon, almost from the days of the apostles to the present age. The history of the parent country had afforded the most solemn warnings and melancholy instructions on this head; and even New England, the land of persecuted Puritans, as well as other colonies where the Church of England had maintained its superiority, would furnish out a chapter as full of the darkest bigotry and intolerance as any which could be found to disgrace the pages of foreign annals." Judge Cooley, in his valuable work on Constitutional Limitations, 576, says: "Whatever, therefore, may have been their individual sentiments upon religious questions, or upon the propriety of the state assuming supervision and control of religious affairs, under other circumstances, the general voice has been that persons of every religious persuasion should be made equal before the law, and that questions of religious belief and religious worship should be questions between each individual man and his Maker. Of these questions human tribunals, so long as the public order is not disturbed, are not to take cognizance except as the individual, by his voluntary action in associating himself with a religious organization, may have conferred upon such organization a jurisdiction over him in ecclesiastical matters." Authorities might be multiplied, but the result of all is that the government must not interfere with opinion, but may with conduct. Laws are made for the government of actions, and when the conduct and actions are criminal it is no excuse to say that these things, though forbidden by the law, are done in the name of religion. In *Reynolds v. U. S.* 98 U. S. 166, Mr. Chief Justice WAITE said: "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse

his practices to the contrary because of his religious belief? To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Governments could exist only in name under such circumstances."

Perhaps the constitutional provision of the state of New York, on this subject, is as sound a commentary as can be given of religious freedom. "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." But counsel for appellant strenuously argued that the oath here prescribed and required to be taken does in effect interfere with the rights of conscience in religious matters, and thereby with free exercise of religion. The most objectionable clause, and the one said to come within the inhibition, is as follows: "That you are not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization." This clause is undoubtedly open to criticism, but the intention of the legislature was to withdraw the right of suffrage from persons who encourage, aid, and abet those who are endeavoring, not by constitutional methods, but against all law, to overthrow a sound public policy of the government, and one that has existed from its foundation. In *Murphy v. Ramsey*, 114 U. S. 43, 5 Sup. Ct. Rep. 747, Mr. Justice MATHEWS, in construing the act of March 22, 1882, and speaking for the entire court, says: "Disfranchisement is not prescribed as a penalty for being guilty of the crime and offense of bigamy or polygamy; for, as has been said, that offense consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years by section 1044 of Revised Statutes. Continuing to live in that state afterwards is not an offense, although cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state, without cohabitation with more than one woman, he is in that sense a bigamist or polygamist, and yet guilty of no criminal offense. So that, in respect to those disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecuting for crime."

This case shows clearly that the test is not whether the persons excluded could be prosecuted for any crime, but whether the facts bring the parties within the scope of the act. The decision rests, however, upon the ground that congress may take from the people of a territory any right of suffrage it may have previously conferred, or at any time modify or abridge it, as it may deem best. It should be observed, however, that the right of suffrage is not a natural right, nor an unqualified personal right. The elementary writers do not include this right among the rights of property or persons. 2 Kent, Comm. 587. But, as applied to a territory, it is a right conferred by law, and may be modified or withdrawn by the authority which conferred it, without inflicting any punishment on those who are disqualified. Since the decision of the case of *Murphy v. Ramsey*, *supra*, the power of congress over this subject has not been disputed, and, if we are correct in the conclusion that the power of the territorial legislature is concurrent, we see no reason why it may not impose additional disqualifications, in so far as it acts within the scope of the authority committed to it. It has been well said that "every government ought to contain, in itself, the means of its own preservation." This, in our

judgment, enunciates the principle which lies at the foundation of this whole question, and that must finally determine and set it at rest. But the only question for us to determine is purely a question of power. The courts are not warranted, nor are they authorized, to abrogate laws merely because they may be deemed unwise or impolitic. These are questions entirely within the cognizance of the law-making branch of the government, and with which the courts have nothing to do. A statute will not be held void unless its invalidity is clear. If unwise laws are enacted the remedy is with the people, who must correct such legislation through the exercise of their political power. As applied to this case, if the law is impolitic or unjust, the legislature may repeal it, or the congress may abrogate it.

It will be conceded that if the statute is valid, as the plaintiff did not offer to negative all the disqualifications imposed, his vote was not wrongfully rejected. Test oaths are not new in this country. They have been prescribed at different times in our history, and were justified by some real or supposed public danger or public necessity. But our attention has not been called to any similar to the one before us. The nearest approach to it is the one prescribed by the registration officers of Utah, which will be found in the statement of the case of *Murphy v. Ramsey*, *supra*, 19. In that case the same objection was raised to the validity of the rule that is here insisted upon; but in that case the court held that the oath required was a proper mode of ascertaining the disqualifications imposed by the law, and that it did not interfere with the free exercise of religion. So we conclude in this case. If we are wrong in this, we congratulate ourselves that there is a court above us for the final adjudication of such questions, where our judgment may be corrected. To this we defer, confident that none will more cordially concur in the result. Judgment affirmed.

HAYS, C. J., and BUCK, J., concur.

(33 Or. 578)

SCHNEIDER v. LEE *et al.*

(Supreme Court of Oregon. February 29, 1888.)

1. GARNISHMENT—PROPERTY SUBJECT TO PROCESS—FRAUDULENT CONVEYANCES.

The defendant made a general assignment under the laws of Oregon, and his wife, claiming to be the owner of a half interest in certain chattels in his possession, to determine the ownership, brought suit against the assignee, and was found to be the owner, and the property having been sold under order of court, half of the proceeds of the sale were directed to be paid to her. *Held*, that a judgment creditor of defendant could not attach this money by garnishee proceedings on the ground that her claim as owner was fraudulent.

2. SALES—ON CONDITION—RIGHTS OF ASSIGNEE OF VENDEE.

A sale and delivery of chattels on condition that the title shall remain in the vendor until the goods are paid for, passes no title to the vendee; and his assignee has no claim to the property as against a purchaser of the vendor.<sup>1</sup>

Appeal from circuit court, Multnomah county.

In proceedings of garnishment in an action by plaintiff, H. Schneider, against Theodore Lee and F. Marx, defendants, W. M. Gregory, garnishee. Plaintiff appeals.

F. V. Drake, for appellant. Chas. H. Woodward, for respondents. W. H. Gregory, for himself.

THAYER, J. The appellant herein undertook to reach certain moneys in the hands of the respondent Gregory, by means of an execution issued upon a judgment recovered in his favor and against the said Theodore Lee and F. Marx, which money ostensibly belonged to Nellie I. Lee, wife of said Theo-

<sup>1</sup>Respecting conditional sales, see *McComb v. Donald's Adm'r*, (Va.) 5 S. E. Rep. —, and note.

dore Lee, and for whom said Gregory was acting as attorney. It appears that one J. M. Leonard formerly owned an undivided half of certain furniture, and that on the 1st day of August, 1883, he made a contract with said Theodore Lee, formally leasing the same to him. Said contract was in writing, and contained also a stipulation to the effect that, upon the payment of \$4,000,—\$2,000 of it in hand, and the remaining \$2,000 in two payments of \$1,000 each, payable, respectively, in six and twelve months from that time, with interest,—the property should belong to said Lee. It also appears that said Theodore Lee paid said \$2,000 in hand, and executed to said Leonard two negotiable interest-bearing promissory notes of \$1,000 each, payable in six and twelve months, respectively, and that thereupon said Leonard delivered to him said half interest in said furniture; that said F. Marx was at the same time the owner of the other half interest therein, and that he and the said Lee were partners under the firm name of Lee & Marks, and used the said furniture in their partnership business. That on the 28th day of July, 1884, the said Theodore Lee and Nellie I. Lee executed to one John Carson, the father of Nellie I. Lee, a chattel mortgage upon the half interest in the furniture delivered to the said Theodore; that on the 29th day of July, 1884, the appellant commenced the action against said Lee & Marx, in which the said judgment was recovered, and upon the same day sued out a writ of attachment, and had the same levied upon the said furniture; that on the 31st day of July, 1884, and while the said property was in the hands of the sheriff under the said writ of attachment, the said Lee & Marx made a general assignment of their property, under the insolvent laws of the state, to one J. Hass, as assignee, which property consisted only of said furniture; that in 1884, and prior to the maturity of the second promissory note executed by the said Theodore Lee to the said J. M. Leonard, which was due August 1, 1884, the said Leonard sold and indorsed the note to third parties; that said John Carson, on the 31st day of July, 1884, purchased the last note of the then holders, and that said Leonard, also on that day, in consideration thereof and \$150, paid by John Carson to Leonard on another account due him from Lee, at the request of said Lee and Carson, sold and assigned all of his (Leonard's) interest in the furniture and the notes and written contracts before mentioned to said Nellie I. Lee; that said assignee, Jacob Hass, claiming that the title to said property had passed to Theodore Lee under the said written contract to him from Leonard, and was transferred to him (Hass) as such assignee, by virtue of the said assignment to him from Lee & Marx, thereupon the said Nellie I. Lee brought a suit in said circuit court to establish her title to the said property, and to have partition thereof decreed; that such proceedings were had in the said suit that the said Nellie I. Lee recovered a decree therein for the relief claimed; which decree was affirmed on appeal to this court. By stipulation of the parties, and order of the court, the whole of said property was sold, and the proceeds thereof were paid into court to abide the result of said suit, and one-half of the same was directed by the decree in said suit to be paid to the said Nellie I. Lee. That said sale having been made, and the said money paid into court, the clerk thereof paid to the respondent Mr. Gregory, as attorney for Mrs. Lee, \$604.55, the one-half of such proceeds, in pursuance of the said decree; which is the money the appellant attempted to reach by means of his said execution, in the hands of the said attorney Gregory.

From these facts several important questions arise that are presented for our consideration; the first one of which is the nature and effect of the transaction between Leonard and Theodore Lee, regarding the interest of the former in the furniture. The appellant's counsel contends that it operated as a complete transfer of Leonard's title to the furniture to Lee, notwithstanding the conditions expressed in the written contract; that the effect of the said conditions merely reserved in the former a right in the nature of a security for the payment of a debt. The transaction belongs to a class of contracts under which

the rights of parties thereto, and their privies, have been frequently adjudicated upon by the courts, and different conclusions arrived at. It has been urged with much reason that where personal property is sold and delivered, upon condition that the title shall remain in the vendor until the purchase price is fully paid by the vendee, that a purchaser in good faith from the vendee, without notice of terms of the contract of sale, will acquire the title to the property unaffected by the condition. This court, however, in *Manufacturing Co. v. Graham*, 8 Or. 17, and in *Rosendorf v. Baker*, Id. 240, held that under such an agreement the title to the property did not pass to the vendee, and that a sale of it by him to a *bona fide* purchaser conveyed no title; that the latter at most took only a right by implication to the use of the chattel, until default in the stipulated payment. These decisions were in consonance with the later decisions of the courts of the state of New York; and yet it has been strongly insisted at the bar that the court should not adhere to that ruling. But more recently the supreme court of the United States in *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, has decided that in the absence of fraud, an agreement for a conditional sale of personal property, accompanied by delivery, was good and valid, as well against third persons as against the parties to the transaction. The facts in the latter case were somewhat analogous to those in the one under consideration, and the conclusion of the court, as mentioned, was reached after a review of a large number of authorities upon the question. In view of the decisions of this court in the cases referred to, and of the fact of their being sustained by such high authority as that of the supreme court of the United States, we would hardly be justified in making any different ruling, especially when we consider that it is a fundamental principal that a purchaser of a chattel only acquires the interest which his vendor had therein.

The next question presented is the effect of the assignment upon the rights of the appellant to resort to the property in order to satisfy his claim against Lee & Marx out of it. The appellant's counsel insist virtually that when a debtor has assigned his property for the benefit of his creditors, under the insolvent law of the state any one of his creditors has the right to seize the property upon execution in satisfaction of his debt, if a third party interposes a fraudulent claim to it, and obtains possession of it. It was in accordance with such alleged right the attempt was made to levy the execution upon the money in the hands of Mr. Gregory. Whether such right exists or not, the court does not deem it necessary to determine, as the court is satisfied that the question of Nellie I. Lee's claim to the furniture being fraudulent, especially under the circumstances of this case, cannot be tried in garnishee proceedings; that said property could only be reached by a suit on behalf of the appellant and the other creditors willing to join therein, and contribute to the expense thereof, —a suit in the nature of a creditor's bill. The furniture had been adjudged, in a suit between parties representing the legal title, to belong to Nellie I. Lee. The adjudication was conclusive at law of her right to its custody, and the appellant had no apparent right to have it applied in satisfaction of his judgment. Nor could he establish such right without delving beneath the proceedings had, and showing that notwithstanding them an equity existed in his favor entitling him to have such application made. This he could not do under proceedings of garnishment, as they are legal, and not equitable proceedings. The property, viewed from a legal standpoint, belongs to Nellie I. Lee. The court had already so adjudged in a suit which at least bound the legal title, and it was necessary for the appellant to go into an equitable tribunal in order to obtain a remedy, if he had any. He should have commenced a suit in which all persons interested in the matter could have been made parties, and have had their rights therein determined. The case was not like one where a debtor fraudulently disposes of his property in order to avoid the payment of his debts. There an execution may be levied upon the prop-

erty in the hands of the vendee by garnishment, as provided in the Civil Code; for the debtor, as respects the creditor, still has the legal title. But here the legal title to the furniture, if in Theodore Lee, was transferred to Hass, the assignee, and was divested out of him and invested in Nellie I. Lee, by force of the decree in the partition suit.

Other questions are presented by the said facts, but it is unnecessary to consider them, as the view already expressed determines the case. The judgment appealed from must be affirmed.

(10 Colo. 464)

### JONES v. BANK OF LEADVILLE.

(Supreme Court of Colorado. November 25, 1887.)

#### 1. CORPORATIONS—APPOINTMENT OF RECEIVER—EX PARTE PROCEEDINGS.

Neither Code Civil Proc. Colo. §§ 141, 142, providing for the appointment of a receiver in the cases therein specified "by the court in which the action is pending;" nor Gen. St. Colo. § 258, providing that, when suits may be brought against stockholders, "courts of equity shall have full power, on good cause shown, to dissolve \* \* \* the corporation, appoint a receiver therefor, \* \* \*,"—authorize the appointment of a receiver on an *ex parte* petition of an insolvent corporation asking to be dissolved, there being no action pending.

#### 2. SAME—INSOLVENCY—EQUITABLE LIEN OF CREDITORS—ATTACHMENT.

Under the Colorado statutes the equitable lien of creditors of an insolvent corporation is not superior to an attachment lien which was secured before the jurisdiction of a court of equity had been properly invoked and exerted.

#### 3. SAME—EQUITABLE CONTROL OF ASSETS.

An insolvent corporation cannot, upon its own motion, authorize a court of equity to assume administration of its assets.

#### 4. ATTACHMENT—VALIDITY—BOND—FAILURE OF CLERK TO APPROVE.

Under Code Civil Proc. Colo. § 121, providing that no writ of attachment shall be invalid by reason of any informality or insufficiency in the execution of the attachment bond, *held*, such bond, if unapproved by the clerk, and without justification by the sureties, makes the writ voidable only, and will be cured.

Commissioners' decision. Error to district court, Lake county.

On the 25th day of July, 1883, the defendant in error was, and had been, a bank doing a general banking business in the city of Leadville, and on that date presented to the Honorable L. M. GODDARD, judge of the Fifth judicial district of Colorado, its petition in the words and figures following:

"In the Matter of the Application of the Bank of Leadville to the Court to Dissolve its Corporate Existence, Close up the Business Thereof, and for the Appointment of a Receiver.

"*To the Hon. L. M. Goddard, Judge of the District Court:* The petition of the Bank of Leadville respectfully shows to the court that heretofore, and on, to-wit, the 21st day of August, 1878, the above-named petitioner became and was duly incorporated under the laws of the state, as a banking corporation; and thereupon, upon the filing of its said articles in the proper offices, entered upon the transaction of a general banking business. That since said time your petitioner has been largely engaged in said business, and to-day has upon its books, as due to depositors, upwards of the sum of two hundred thousand dollars. That said petitioner is also indebted to divers and sundry parties in large amounts, upon divers large and sundry accounts, in the sum of upwards of fifty thousand dollars; schedule of which several indebtednesses will be hereafter filed in court, and furnished to any receiver appointed herein. That in the transaction of such banking business heavy losses have been sustained by your said petitioner. That the nominal assets of the bank are very large, and are upwards of three hundred and fifty thousand dollars; but of said assets a large proportion, and a very considerable percentage, is of no present value, and quite a considerable percentage of no value whatever, if collection is to be forced. That a large percentage of the assets, and all the capital stock, of said bank, has been lost in the carrying on said banking operations, and that the losses have been so great that the said bank is no longer able to carry on

its said banking business, and that the funds of said bank are so far exhausted that the business of the bank, under its incorporation, can no longer be carried on. That the said corporation is wholly and entirely insolvent. That your petitioner desires to wind up its said affairs, close its business, and secure the ratable and equitable distribution of its assets among its creditors; to retire from business, surrender its franchise, and be dissolved; and to that end seeks the appointment of a receiver. Wherefore your petitioner prays that by decree of this court, duly entered, the said corporation, the Bank of Leadville, may be dissolved; that its business and affairs may, under the direction of this court, be duly closed and wound up; and that to that end a receiver of its affairs may by the court be duly appointed; and for such other relief as to the court may seem meet. And your petitioner will ever pray.

"J. B. BISSELL, Attorney for Petitioner."

—Which was sworn by George R. Fisher at follows:

"*State of Colorado, Lake County—ss.*: I, George R. Fisher, being duly sworn, on oath says that I am the cashier and principal stockholder of the petitioner; that I have read said petition, and know its contents; and that the same is true of my own knowledge. GEO. R. FISHER."

On the same day the said judge made the following order:

"In the Matter of the Application of the Bank of Leadville for a Receiver, etc.

"Upon the reading and filing of the verified petition of said corporation, and upon the application of counsel for said corporation, it is ordered that George W. Trimble be, and he is hereby, appointed receiver of all the estate, effects, and property, both real and personal, of the said Bank of Leadville, of every shape, form, and description, and wheresoever situate, with full power and authority to sue for, collect, and receive any and all sum or sums due to the said bank, and to collect and reduce to cash all the estate and assets of said bank, and, in so far as the same may be sufficient, to pay off, liquidate, and discharge the obligations of said corporation. That said receiver is appointed upon his executing and filing with the clerk of the court a bond in the penalty of fifty thousand dollars, with two or more sureties each qualifying in such sum that the total shall be double the above amount; such sureties to be approved by the clerk according to the statutes, and according to the practice of this court.

"*Done at Chambers at Leadville, July 25, 1883.*

"L. M. GODDARD, Judge Fifth Judicial District."

On the 3d day of November following, Jones, plaintiff in error, filed his complaint against the said bank, claiming \$44,222.98 as due him from said bank; and on the 27th day of the same month caused summons to issue upon his complaint, which was served on the same day upon George R. Fisher, as cashier, secretary, and stockholder of said bank. On the same 27th day of November, Jones made and filed his affidavit in attachment, and on the same day filed his attachment bond in the penal sum of \$90,000, executed by himself and 10 sureties, which is in the following form:

"Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the district court of the Fifth judicial district of the state of Colorado, in and for the said county of Lake, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from said defendant the sum of forty-four thousand two hundred and twenty-two and 98-100 dollars, lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of said defendant as security for the satisfaction of any judgment that may be recovered therein: Now, therefore, we the undersigned, residents of the state of Colorado, in consideration of the premises and of the issuing of said attachment, do jointly and severally undertake in the sum of ninety thousand dollars, and promise to the effect that, if the defendant re-

covers judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant, the Bank of Leadville, and all damages, which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of ninety thousand dollars.

*"Dated this 26th day of November, 1883.*

"C. A. JONES.	[Seal.]	NELSON HALLACK.	[Seal.]
"F. N. PIERCE.	[Seal.]	CONRAD HANSON.	[Seal.]
"C. F. DALY.	[Seal.]	CHAS. B. WING.	[Seal.]
"N. P. SEELEY.	[Seal.]	ROBERT B. ESTEY.	[Seal.]
"I. W. CHATFIELD.	[Seal.]	GEO. H. TAYLOR.	[Seal.]
"L. R. TUCKER.	[Seal.]		

There seems to have been no justification by the sureties, or any of them, nor any indorsement on said bond expressive of the clerk's approval thereof. The writ of attachment was issued on November 27th, and was served the next day by delivering copies thereof to George R. Fisher, as cashier, on George W. Trimble, as receiver, and S. J. Warfield, as a stockholder. Under the writ of attachment, divers persons were garnished as debtors of the said bank, and certain property was levied upon as the property of the defendant. On the 28th day of November, George W. Trimble, as assignee and receiver of said bank, filed his motion to dissolve the attachment, and discharge the garnishees thereunder, and release the property levied upon, for the following reasons: "Comes now George W. Trimble, assignee and receiver of the said defendant, and named and proceeded against by the plaintiff, as garnishee of said plaintiff, and as having in his possession property and assets belonging to said defendant, by Thomas & Lyles and J. B. Bissell, his attorneys, appearing specially for the purposes of this motion, and moves that he be discharged as garnishee, and as attachment debtor, and in all other respects and positions, and that all property levied on in his possession, or standing in his name, be relieved and discharged of such levy, and that the return of the sheriff as to such levy be wholly quashed, and held for naught; and for reason of said motion the following is alleged: *First.* The bond or undertaking, with the sureties thereon, has never been approved by the clerk of this court. *Second.* The sureties on said undertaking have never qualified as required by section 414 of the Code. *Third.* The said Trimble is, and since the 25th day of July, A. D. 1883, has been, the assignee of the Bank of Leadville aforesaid, and in charge of its property and effects, real and personal. *Fourth.* The said Trimble has since the 26th day of July, A. D. 1883, been the receiver of the said Bank of Leadville, and, as such, has been in possession, and has been and is entitled to the charge and custody, of the property, effects, and assets, real and personal, of the said Bank of Leadville. *Fifth.* The said property and effects, being so as aforesaid in the custody of the said Trimble, are not subject to levy by writ of attachment or by execution. And, in support of the third and fourth reasons assigned as hereinbefore, the affidavit of the said Trimble herewith filed is referred to.

"By J. B. BISSELL,

"THOMAS & LYLES,

"Attorneys for G. W. Trimble, Specially Appearing."

This motion was supported by the affidavit of said Trimble, which was in the words and figures following:

*"Charles A. Jones, Plaintiff, vs. The Bank of Leadville, Defendant.*

"George W. Trimble, first duly sworn on oath, deposes and says that he is the assignee of the Bank of Leadville, by virtue of a deed of assignment made and executed by the said Bank of Leadville on the 25th day of —, A. D. 1883; said deed of assignment being made by George R. Fisher, the cashier of said bank, pursuant to instructions of the board of directors to that end, at a meeting by them held for that purpose. That said deed of assignment trans-



ferred to this affiant, in trust for the benefit of the creditors of said Bank of Leadville, all and singular its property, real and personal, and was duly recorded in the office of the recorder of deeds of said county on the 26th day of July, 1883, in Book 103, page 189, of the records of said county. This affiant further alleges that on, to-wit, the 26th day of July, 1883, he was by the Hon. L. M. GODDARD, judge of the district court, appointed receiver of all the estate, effects, and property, both real and personal, of the said Bank of Leadville, of every description, wherever situate, and with full power and authority to collect or receive any and all sums due the said bank, and to collect and reduce to cash all the estate and assets of the said bank, and, in so far as the same might be sufficient, to pay off, liquidate, and discharge the indebtedness of the said Bank of Leadville. And this affiant further alleges that he did file the bond required by the order of said court, and according to the statutes of the state of Colorado in that behalf provided, and did immediately, and on, to-wit, the 26th day of July, A. D. 1883, as such assignee and receiver of said Bank of Leadville, take full and complete possession of all and singular the property, real and personal, of the said bank, into his custody and possession, and the same has so remained, in accordance with the limit expressed in the said deed of assignment, and the said appointment of himself as receiver, and for the purpose of both; that on, to-wit, the 28th day of November, A. D. 1883, the annexed copy of a writ of attachment and copy of the writ of garnishment were served upon him by the sheriff of Lake county, both entitled in this cause, and marked 'Exhibits A' and 'B,' respectively; and that the said sheriff, in virtue of the same, has levied upon the real estate in the custody of this affiant, and the title to which is, by virtue of said assignment and receivership, in this affiant, and is ordered by the plaintiff and his attorneys to take possession of all and singular the personalty in the custody of this affiant, as such receiver and assignee, and contrary to the terms of said deed of assignment and the said receivership. That this affiant's possession of said property, and all and singular thereof, was long prior to the beginning of this suit, and to the making of said levy; and that, unless the said plaintiff is restrained from making further levies upon said property, this affiant will be harassed, and put to trouble and expense, and his possession of said property seriously interfered with, to the detriment and disadvantage of the creditors of said Bank of Leadville, by means whereof the fund out of which their claims against the bank are to be satisfied, in whole or in part, will be materially diminished and reduced. And affiant further states that the said C. A. Jones is not, and has not been, a judgment creditor of the said Bank of Leadville, either by virtue of any claim directly due him from said bank, or by virtue of any claim which he holds as assignee or otherwise.

[Signed]

"GEO. W. TRIMBLE.

"Subscribed and sworn to before me this 26th day of November, A. D. 1883.

"CHARLES A. HINCKLEY, Notary Public, Lake County, Colo."

On the 16th day of February, 1884, this motion was sustained by the court, the attachment quashed, the garnishees discharged, and the property levied upon released; to which ruling Jones excepted; and afterwards, and on the same day, judgment was given for plaintiff against the defendant bank for \$45,242.50. Plaintiff sued out a writ of error to review the judgment of the district court in dissolving the attachment.

*Taylor & Buckford*, for plaintiff in error. *J. B. Bissell* and *C. S. Thomas*, for defendant in error.

MACON, C., (*after stating the facts as above.*) Of the eleven assignments of error, four challenge the judgment of the district court in dissolving the attachment, and seven the validity of the appointment of the receiver. Plaintiff in error contends that such appointment was void, and no control over the property of defendant ever vested in the receiver, and that the court, in its

action on the motion to dissolve the attachment, went solely upon the ground that George W. Trimble was a legal receiver, and that through him the property of the defendant bank was in *custodia legis*; while defendant in error as strenuously claims that the writ of attachment was void for want of sufficient and formal bond, and because the sureties therein did not justify, and the clerk did not approve the bond; and also that the appointment of the receiver was legal and valid, and he was entitled to the possession of all property of the bank, and the issuance of the attachment was a contempt of court, and void. Whether the attachment, because of the irregularities insisted upon by defendant in error, was or was not voidable upon motion of the defendant, may be passed for the present, to inquire whether Trimble, in his assumed character of receiver, could be heard to object to the validity of the writ and bond; for, if he could not, it was error to dissolve the attachment on his motion. If he was not a legal receiver, then he was a mere stranger to the suit, and had no standing in court.

This brings us to the examination of the propriety and legality of his appointment as receiver; and requires a construction of the provisions of subdivisions 1 and 3, § 141, and of section 142, Code Civil Proc. Subdivision 1 provides that a receiver may be appointed, "before judgment, provisionally on application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property, which is the subject of the action, and which is in possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired." Subdivision 3, that a receiver may be appointed "in such other cases as are in accordance with the practice of courts of equity jurisdiction." Section 142 provides that "the application for the appointment of a receiver shall be made by filing a petition, at any time, in the action in which a receiver is desired, setting forth the facts upon which the application is based; which petition shall be verified as complaints are required to be by this act. And the party opposing the appointment of a receiver shall do so by filing an answer to the petition, verified as answers to complaints are required to be by this act." If these provisions are anything more than a codification of the law and practice governing the appointment of receivers before this enactment, it is difficult to perceive where the difference lies; and, to determine to what facts the court will apply this statute, we are compelled to look to the practice and law as it was heretofore. Hitherto it has been the universally accepted opinion that courts have no jurisdiction to appoint a receiver, except in a suit pending in which the receiver is desired, unless in cases of idiots, lunatics, or infants, which as Lord HARWICKE says in *Ex parte Whitfield*, 2 Atk. 315, is "a particular jurisdiction." The doctrine is applied in *Baker v. Backus*, 32 Ill. 95; *Davis v. Flagstaff*, 2 Utah, 92; *Hardy v. McClellan*, 53 Miss. 507; *Hugh v. McRae Co.*, Chase, 466; *French Bank Case*, 53 Cal. 550; *Kimball v. Goodburn*, 32 Mich. 10; *People v. Jones*, 33 Mich. 303; and High, Rec. § 17, and cases cited in note. Our statute certainly contemplates the same thing. Its plain intent is that there shall be a controversy between two or more adverse parties in court, involving some conflicting and hostile claims to property that is, at least in part, the subject-matter of the litigation. It is evident that, in the mind of the legislature, it was necessary to this jurisdiction that there should be some party in all these proceedings who was adverse to the defendant, and whose rights to certain property were to be protected and adjudicated. It is impossible, by any process of reasoning, to construe the statute so as to make it apply to any case in which an action, in the ordinary definition of the term, is not pending. To hold that courts of equity can entertain jurisdiction to appoint a receiver of property, as the substantive ground and ultimate object and purpose of the suit, on the petition of the owner of the property to be controlled and protected, would be to make them the administrators of every estate where the owners thereof were incapable or unwilling

to administer them themselves. When Trimble was named by the court as receiver of defendant in error, no suit was pending against the bank; no one claimed to own or to have any interest in the specific property of the bank, except the bank itself; no one was before the court claiming a right to have the assets of the bank protected and preserved, until he could establish a right thereto adverse to that claimed by the bank. So far as is disclosed by the record, every one admitted the full and complete ownership of all the property claimed by defendant in error to be in it. But, apparently fearing suits and attachments, defendant asked the court to become the custodian of its effects and property; in fact, its assignee for creditors. The court accepted the trust through Trimble, as receiver. This it could not do. Such jurisdiction is not found in either the general powers of a court of equity, or in the statute referred to. If, therefore, there is no other warrant for this action of the court, the appointment of Trimble as receiver was void, and he had no authority in the premises, and no right to be heard to object to the attachment proceedings in this case.

Defendant in error, however, claims that section 258 of the incorporation act is warrant for the appointment of this supposed receiver. This section is as follows: "If any corporation, or its authorized agent, shall do any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned, 'No property found,' or to remain unsatisfied for ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay such debts or liabilities to the extent of the unpaid portion of his stock; and courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corporation, (giving the name,) to sue in all courts, and to do all things necessary to closing up its affairs as commanded by the decree of the court." We are unable to see how this statute can be made to authorize this action. In it is found an extension of the ordinary jurisdiction of courts of equity; which it is well known have no inherent power to dissolve corporations, and never exercise such jurisdiction unless it has been conferred by statute. The first part of the section provides a remedy for creditors, and specifies the contingencies upon which the remedies may be enforced; then proceeds to give the jurisdiction alluded to. But this enlarged jurisdiction to dissolve corporations is to be exercised only for "good cause," and upon such dissolution a receiver may be appointed, if there is any good cause for one. But what is good cause for dissolving a corporation? The statute is silent on this subject, and we must go to some other source of information for an answer to this inquiry. We do not find in our statute on corporations any specific grounds enumerated for a dissolution of a corporation. But it is unnecessary to go into that question here, for the district court did not dissolve, nor attempt to dissolve, the defendant corporation. The decree leaves the existence of the corporation untouched and intact, and makes the appointment of the supposed receiver the end and sole purpose of its decree. The position attempted to be maintained by defendant in error, that the appointment of a receiver is, *ipso facto* and *de jure*, a dissolution of the corporation, is utterly unsound. The appointment of a receiver does not dissolve a corporation, in either law or fact. *Taylor v. Insurance Co.*, 14 Allen, 353. Nor does the mere insolvency of a corporation, or placing it in insolvency, under statutes for that purpose, dissolve it. *Ang. & A. Corp.* § 770; *Coburn v. Manufacturing Co.*, 10 Gray, 243. If even it should be granted that the appointment of a receiver was a virtual dissolution of the corporation, we are brought back to the orig-

inal proposition,—that such appointment must be made in a suit pending, and, unless so made, is without jurisdiction, and void. The case is not affected by the fact that defendant in error applied to the court for a decree for its own dissolution. It is seen that the court did not so decree. Nor can the petition of defendant be treated as a surrender of its franchises, and extinguishment of its corporate existence; because, from the facts as shown in the case, no one attempted to make the surrender except George R. Fisher, in his official capacity in the company as cashier. The surrender of the franchises of a corporation is not an official act, but to be effectual must be the act of the stockholders as such. Ang. & A. Corp. § 772; *Smith v. Smith*, 3 Desaus. 575. In this case it is said: "Among the methods by which corporations may be dissolved, that of a surrender is enumerated in the law-books, and, doubtless, when the whole body of the corporation choose to surrender its rights, it is at liberty to do so, and it will be valid; but a majority must concur who have an interest or right; and officers of a corporation or an integral portion of it, as we have before stated, are not the corporation. They have no right to make the surrender, and, if they make the attempt by an act or declarations, it is an inefficient act. It is not obligatory on the corporation, which retains its full rights, existence, and legal character." The same doctrine is affirmed in *Railway Co. v. Harris*, 27 Miss. 517, and *Kean v. Johnson*, 9 N. J. Eq. 401. It nowhere appears in the record that any other member of the corporation than Fisher proposed a dissolution of this corporation. If, however, every member of the defendant company had joined in the petition to the district judge on this case, he could not have granted the prayer thereof, for the obvious reason that neither has the chancellor nor a court of equity in this state any jurisdiction to accept the surrender of corporate franchises, and administer on the estates of such decedents. Such a jurisdiction would leave the courts of the country no time to attend to the other business for which they are created.

If there was any defect in the proceeding for the writ of attachment, such defect made the writ voidable only, and the order of the court should have allowed such amendments as would have cured the defects. The bond is, in our opinion, sufficient, and the failure to take the justification of the sureties was at most but a misprision of the clerk, which by rule upon him could have been corrected. We do not think the omission of the clerk to indorse on the bond his approval was fatal. Civil Code, § 121.

The judgment should be reversed, and the cause remanded, with directions to proceed in the case according to law.

RISING, C., concurs. STALLCUP, C., dissents.

PER CURIAM. For the reasons assigned in the opinion of Commissioner MACON the judgment is reversed, and the cause remanded.

#### ON PETITION FOR REHEARING.

(March 9, 1888.)

PER CURIAM. In support of the jurisdiction of the district court to appoint a receiver for the defendant in error, it is earnestly argued that in the opinion filed the court mistook both the facts and the law. One of the errors of fact pointed out is the assumption that no one acted for the corporation in the matter of the application for a receiver "except George R. Fisher, in his official capacity in the company as cashier;" whereas the petition filed was the petition of the corporation, being only verified by its cashier. Another objection is that the opinion assumes a final decree was rendered in the equity proceeding, which did not dissolve, or attempt to dissolve, the corporation; whereas no final decree was rendered in that proceeding, but an interlocutory or provisional order, merely, appointing the receiver, so far as disclosed by the record before this court. The language of the opinion may be liable to

criticism in the instances referred to; but if the district court was without jurisdiction to either appoint a receiver for the bank, upon its petition, or to dissolve the corporation, and close up its affairs, no ground exists for a rehearing. Conceding, then, as we think the opinion in fact does, that the petition filed was the petition of the corporation, an essential prerequisite to the jurisdiction of the court or judge to appoint a receiver was that there should be an action pending. We think this prerequisite was lacking. The authorities agree that the general jurisdiction of courts of equity does not extend to the dissolution of corporations, and the administration of their affairs; but that such powers, where they exist, are statutory. Accepting this as the correct doctrine, the question is, do our own statutes sustain the jurisdiction assumed in the present instance? The corporation act (section 258, Gen. St.) confers power upon the state courts to dissolve or close up the affairs of corporations, to appoint receivers for them, and to do all things necessary to closing up their affairs. But this section, construed by the ordinary rules of interpretation, indicates plainly that an adversary, and not an *ex parte*, proceeding was contemplated by the legislature in its enactment. The only other statutory authority for the appointment of a receiver is found in section 144, Code Civil Proc., which authorizes the appointment to be made, in the cases specified therein, "by the court in which the action is pending, or by a judge thereof." It is not claimed that there was an adversary proceeding in the present case, but it is claimed that there was an action pending when the appointment was made. "The vital idea of an action," says Mr. Bouvier, "is a proceeding on the part of one person, as actor, against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law." We think this definition is in accord with the general understanding of the meaning of the term, and that, to constitute an action in court, there must be not only a petitioner or complainant, but a respondent or defendant. There being but one party to the proceeding in this case, it follows that the statutory jurisdiction could not be invoked.

Another objection to the jurisdiction in this case, mentioned by Commissioner MACON in his opinion, is that an insolvent party cannot come into a court of equity, and upon his own motion authorize the court to assume the administration of his estate. An attempt has been made to answer this objection in the petition for rehearing, and briefs filed in support thereof, but, in our judgment, without success. The authorities cited are not directly in point, while very respectable authority is adverse to the jurisdiction. Says Justice CAMPBELL in *Kimball v. Goodburn*, 32 Mich. 10 "It was also claimed that the assets were in the hands of a receiver who had never been discharged. \* \* \* The evidence of confirmation is wanting. But the order appears to have been made in a proceeding wherein the Bushwick Company itself appears to be complainant; and we are aware of no case where a corporation, in its corporate capacity and name, can apply to be put in the custody of a receiver." A similar application to the one made in the present case, except as to parties, was presented to Chief Justice CHASE, when sitting at the circuit in South Carolina in 1869. The State Bank of South Carolina filed a bill setting up that it was insolvent; that certain judgment creditors, who were made parties to the bill, were about to procure an inequitable preference over its other creditors by means of executions which they were enforcing; and praying an injunction; that receivers be appointed, etc. The chief justice dismissed the bill, saying, among other things: "The court is not aware of any case which will warrant its assuming the administration of the estate of a debtor simply on the ground of insolvency. \* \* \* A creditor in a proper case might come into a court of equity for the appointment of a receiver, but a debtor could not. This, therefore, is not such a case as calls for the intervention of the court, and the prayer of the bill cannot be granted." *Hugh v. McRae*, Chase, 466.

The further point is made in the petition for rehearing that the motion to dissolve the writ of attachment sued out against the bank by plaintiff in error, and levied upon the property in possession of Trimble, was not based alone upon the receivership of Trimble, but upon his appointment as assignee of the bank as well; which latter right to the custody of the property was ignored in the opinion filed. While the above statement is correct, as shown by the record, it does not appear that the deed of assignment was introduced in evidence on the hearing of the motion to dissolve the attachment, and to discharge the bank property. This claim of Trimble to the possession of the property was treated, therefore, as not being properly before the court, since the court was not able to judge of its validity, the deed of assignment not being introduced in evidence. The point decided in this connection was that the order appointing the receiver was without jurisdiction, and void.

Another doctrine urged in the original arguments, and strongly contended for upon the application for rehearing, is that the assets and funds of an insolvent corporation constitute a trust fund for *pro rata* distribution among all its creditors, and that an equitable lien thereon exists in favor of all the creditors superior to any liens which can be acquired by attachment proceedings in favor of individuals. After careful examination of the numerous authorities cited to the proposition, including, as well, the provisions of our own statute bearing upon the question, we are unanimously of the opinion that no such superior lien exists until the jurisdiction of a court of equity has been properly invoked and lawfully exerted for the protection of such assets, and the administration of the affairs of the insolvent. The writ of the plaintiff in error in this case having been sued out, and levied upon the property of the bank, before the equitable jurisdiction of the court lawfully attached thereto, he must be held to have acquired a prior and superior lien, so far as the judicial proceedings had for the appointment of a receiver are concerned. Whether Trimble was entitled to the possession of the property by virtue of an assignment to him for the benefit of the creditors generally is not decided. The petition for rehearing is denied.

(11 Colo. 97)

**BREENE v. MERCHANTS' & MECHANICS' BANK et al.**

(Supreme Court of Colorado. February 6, 1888.)

**1. CORPORATIONS—INSOLVENCY—EQUITABLE LIEN OF CREDITORS—ATTACHMENT.**

Under St. Colo., creditors of insolvent corporations, as those of other insolvents, have no equitable lien superior to an attachment, unless a court of equity lawfully assumes jurisdiction before such attachment; following *Jones v. Bank*, ante, 272.

**2. ATTACHMENT—ISSUANCE BEFORE APPOINTMENT OF RECEIVER.**

A receiver was appointed after attachment issued, and before an amended attachment affidavit was filed. Held, the attachment lien, as to the rights of the receiver, dates from the issuing.

**3. SAME—ACTION ON INSTRUMENT IN WRITING—CERTIFIED CHECK.**

In action on a certified check, with payment refused, an undenied statement in the affidavit that "the action is brought upon an instrument of writing overdue, and for the direct payment of money," shows a good cause of attachment.

**4. ERROR, WRIT OF—TO FINAL JUDGMENT—BRINGS UP ORDER DISCHARGING ATTACHMENT.**

A writ of error to a final judgment brings up for review an order made discharging an attachment.

Commissioners' decision. Error to district court, Lake county.

Attachment issued in an action on a certified check. Attachment was dissolved. Judgment entered for plaintiff below, plaintiff in error here.

*Markham, Patterson, Thomas & Lyles, J. R. Ewing, and Clinton Reed*, for plaintiff in error. *J. B. Bissell, J. W. Taylor, and L. S. Dixon*, for defendants in error.

**DE FRANCE, C.** The defendant bank, a corporation, engaged in the banking business at Leadville, suspended payment, and closed its doors to the pub-

lic, on the afternoon of the 30th day of January, 1884. For some time previous thereto it had been, and was then, in an insolvent condition, indebted, as afterwards appeared, over \$200,000, and having assets sufficient to discharge only about one-third of its indebtedness. In less than an hour after it closed its doors, the plaintiff, Breene, the holder of a certified check on said bank, calling for \$7,000, then overdue, brought suit in the district court of Lake county to recover the money due thereon, and procured the money and property of said bank to be attached as security. On the 6th of February, 1884, the stockholders of said bank instituted a suit against the same in said court, and applied for the appointment of a receiver thereof; and on the 15th day of February of that year the defendant, Talbot, was appointed receiver thereof. As such receiver, Talbot was afterwards made a party defendant to this action, and, on the 5th of May following, filed a petition therein, together with an affidavit in support thereof, representing, among other things, his appointment and qualification as such receiver; the insolvency of said bank; that a number of the creditors of said bank, besides the plaintiff, Breene, representing about \$75,000 of the indebtedness of said bank, had commenced actions against the bank prior to his appointment, and had also procured the property of said bank to be attached in aid thereof; that the remaining creditors had taken no action in the premises; and in order to secure the property and effects of said bank, or the proceeds thereof, for the benefit of all the creditors, to be distributed, *pari passu*, among them, giving to none a preference over the others, prayed the court to discharge the attachment writ herein, to award the costs of said attachment against the plaintiff, and to enjoin the plaintiff from securing, or attempting to secure, a preference in any manner over the other creditors as to the payment of his claim. This petition was granted as prayed, and final judgment was then rendered in favor of the plaintiff for the amount of his claim.

The only error assigned relates to the order of the court upon said petition. That this action of the court may be reviewed by this court on writ of error, see *Wehle v. Kerbs*, 6 Colo. 167. The proceeding had in the district court is somewhat anomalous. This petition cannot be considered a motion to discharge the attachment, on the ground that the writ was improperly issued; for such a motion must be based upon matter "appearing upon the face of the papers and proceedings in the action." Code, § 115. It may more properly be considered a petition of intervention. Code, § 103. But whether the receiver, who was already a party defendant to the action, was thus entitled to intervene, we need not stop to inquire, as no objection appears to have been taken to the petition. The objection made goes to the order of the court thereon. By the laws of this state corporations may sue and be sued the same as individuals. But it is contended that the insolvency of a corporation constitutes an exception to this rule. No statutory provision has been referred to which makes such exception, and we have no knowledge that any such provision exists. Insolvency alone does not prevent a corporation from transacting business. In *Mor. Priv. Corp.* (2d Ed.) § 786, it is said: "The insolvency of a corporation does not, *per se*, put an end to the power of the company to manage its assets, or fix the lien of creditors upon the specific property in hand." The creditors of a corporation are not deprived of their legal remedies against it, by reason of its insolvency. No action lies against a corporation, as such, after its dissolution. But before dissolution, and until some action is taken in court, which, in its nature and effect, may operate to restrain or defeat the right so to do, creditors of a corporation are at liberty, and have the right, to pursue the remedies provided by law for the collection of demands justly due to them from such corporation, unless they have in some way deprived themselves of such right. The remedy by attachment is one of the remedies so provided by law. In this case the attachment levy was made seven days before the suit was brought in which Talbot was appointed

receiver. This levy created a lien in favor of the plaintiff, which could not be destroyed by any subsequent proceeding, except the dissolution of the attachment, or some act or default of the plaintiff. *Emery v. Yount*, 7 Colo. 107, 1 Pac. Rep. 686; *Drake, Attachm.* § 224. "The general rule appears to be that, after the lien of an attachment has vested upon the property of a corporation, it will not be divested by subsequent proceedings for winding up the company, unless the contrary be expressly provided." *Mor. Priv. Corp.* (2d Ed.) § 864. There is no provision to the contrary in the statutes of this state. To the same effect are the following authorities: *In re Iron-Works*, 20 Fed. Rep. 674; *Hubbard v. Bank*, 7 Metc. 340; *Life Ass'n v. Fassett*, 102 Ill. 315; *High, Rec.* § 138. That the property and effects of a corporation constitute a trust fund in favor of creditors, upon which they have a lien in equity, or a right of priority of payment, in preference to the stockholders, is a principle well established in equity jurisprudence. Such principle, however, was not applicable to the facts of this case. It required the aid of equity to enforce such right or lien, and no such aid was invoked before the attachment lien in favor of the plaintiff was created. Under the facts here presented, this lien in equity of the creditors of said bank did not possess such force or character, at the time the attachment levy was made, as to prevent a lien from attaching in favor of the plaintiff by reason of his said levy. It was not a lien upon specific property, like that of an execution or attachment lien, but a right, simply, of said creditors to priority of payment out of such trust fund in preference to any of the stockholders. *Story, Eq. Jur.* § 1252. It was a right which without action, and without the aid of equity, lay, as it were, dormant. The hardship, if any exists, to those creditors who remained inactive, is one of their own creation or sufferance. The *pro rata* provision of the attachment act was then in full force, and open to them. The law rewards the diligent. Those who sleep upon their rights have their own laches to blame for that which follows.

The point made that the attachment lien, if any, in so far as it would affect the rights of the receiver, dates from the time of filing the amended attachment affidavit, is not tenable. It relates back to the date of issuing the attachment writ. There was personal services in this case on the corporation, and we see no good reason for disturbing the final judgment which was rendered in favor of the plaintiff. *Brown v. Tucker*, 7 Colo. 30, 1 Pac. Rep. 221; *Wehle v. Kerbs*, 6 Colo. 167.

The action is based upon a certified check, payment of which had been refused. One of the causes for attachment alleged in the amended affidavit, which has not been traversed or denied, is "that the action is brought upon an instrument of writing overdue, and for the direct payment of money;" and this constitutes a good cause for attachment. Counsel for defendants admit, in their argument on file in this court, that such cause existed, and that the same could not, in truth, be denied.

This cause is therefore reversed, and remanded, with instructions to permit the final judgment in favor of plaintiff to remain as it is; to vacate the order discharging the attachment, and enjoining the plaintiff, as likewise the order adjudging the costs of the attachment proceedings against the plaintiff; to award such costs in pursuance of law and of the practice in such cases; and to make any and all other orders in the premises which may be necessary, if any, to restore the attachment lien, and protect the rights of the plaintiff.

RISING and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to proceed in manner indicated in the opinion.



ON PETITION FOR REHEARING.

(March 9, 1888.)

PER CURIAM. This case involves the same point which, with others, has just been considered and determined upon a petition for a rehearing in *Jones v. Bank*, ante, 272; that is to say, whether the assets of an insolvent corporation constitute a trust fund for ratable distribution among its creditors, and whether an equitable lien thereon exists in favor of all the creditors, from the committal of the act of insolvency, which will protect the property from any liens afterwards attempted to be obtained by individual creditors. Our conclusion is that no such equitable lien exists, and that, until a court of equity has lawfully assumed jurisdiction of the insolvent estate, creditors have the same remedies for the collection of their respective demands as they might have against individuals. The rehearing is denied.

(11 Colo. 87)

DANIELSON *et al.* v. GUDE.

(*Supreme Court of Colorado*. February 4, 1888.)

1. CONTINUANCE—SICKNESS OF WITNESS—AFFIDAVIT.

An affidavit for a continuance which states that affiant's wife, a witness in the case, is expected to be confined in a few days; that when the case was called, two days before, affiant believed she could attend, but afterwards his family physician informed him it would be dangerous for her to do so; and in a general way what her testimony would be,—is insufficient.

2. TRIAL—ISSUES TRIABLE BY COURT.

In an action to construe a deed as a mortgage, and for foreclosure thereof, the only issue of fact upon the pleadings related to the amount of indebtedness between the parties. *Held*, that such issue, being one arising in an equitable action, was triable by the court, under Code Colo. § 154, providing that issues of fact shall be tried by the court, except in actions for the recovery of specific property, real or personal, with or without damages, or for money due on contract, or for damages for the breach thereof, or for injuries.

3. CHATTEL MORTGAGES—ACTIONS CONCERNING—WAIVER OF DEMURRER.

At the consolidation of three causes, there was a demurrer to one of the complaints, which alleged that the right of possession of certain property arose under a chattel mortgage, executed to secure a certain indebtedness of defendants to plaintiff, and, no answer being interposed, the defendants proceeded to trial upon the merits, without ruling upon the demurrer. In another of the causes the plaintiff was enjoined from selling the mortgaged property pending the other actions. In the other two causes the only issue of fact was the amount of indebtedness between the parties. *Held*, that the demurrer was waived, and the chattel mortgage admitted, and there were sufficient facts before the court to enable it to make a disposition of the mortgaged property according to the rights of the parties.

4. SAME—CONSOLIDATION OF CAUSES—FORECLOSURE—APPLICATION OF PROCEEDS.

Where two causes were consolidated, one to construe a deed for real estate as a mortgage, and the other carrying into effect a chattel mortgage, *held*, that in the decree of foreclosure the court should limit the amount to be made by the sale of the personal property to the sum for which such chattel mortgage was given.

Commissioners' decision. Appeal from district court, Chaffee county.

On the 5th day of August, 1884, appellee, Wilhelmine Gude, commenced an action in the district court of Chaffee county to recover the possession of certain personal property which had been on the 3d day of May, 1884, conveyed by appellants to appellee to secure the payment of a promissory note for the sum of \$2,298.72, made by appellants to appellee. Defendants demurred to the complaint, on the ground that it did not state a cause of action. This action is numbered 702 in said district court. On the 6th day of August, 1884, appellee commenced an action against appellants in said district court, in which action she sought to have a certain deed, made and executed by appellants to her, decreed to be a mortgage to secure the payment of certain notes, described in the complaint, made by appellants to appellee, and the foreclosure of said mortgage, and a sale of the mortgaged premises, and the application of the proceeds of said sale to the payment of said notes, and interest

due thereon. The defendants, answering the complaint, admit the making of said notes, but allege that, in making up the amount for which each of said notes was given, compound interest was included, without contract therefor, and, by reason thereof, the amount of each of said notes was largely increased, and that defendants were induced to sign said notes by the false and fraudulent representations of the plaintiff that only the rightful amount of interest was included therein. As to one of said notes, defendants further allege that, prior to the making thereof, one Lee made, in behalf of the defendants, an arrangement with plaintiff whereby, for a valuable consideration then paid by said Lee, plaintiff agreed to extend the time for the payment of the indebtedness owing by defendants to her for the term of three months, without interest; and that plaintiff, by fraudulently withholding from defendants knowledge of such agreement, induced defendants to make said note, in the amount of which was included interest on said indebtedness for said three months. By failing to deny the allegations of the complaint, defendants admit that they made the deed mentioned in the complaint, and that it was to have the effect of a mortgage to secure the payment of the amount due on the said several notes. The plaintiff replied to the answer, joining issue upon the defense set up therein. This action is numbered 703 in the district court. On the 22d day of August, 1884, appellants commenced an action against the appellee in said district court, in which action they sought to restrain the appellee from selling the personal property for which action 702 was brought to recover, during the pendency of said actions 702 and 703; and prayed that said injunction might be made perpetual upon the final hearing of the action, and for a decree that the chattel mortgage mentioned in the complaint in action 702, and the note it was given to secure, be delivered up and canceled and held for naught. Defendant answered, denying all the allegations of fraud, and want of consideration, in the making of said notes. This action was numbered 706 in said district court. The plaintiff in action 702 obtained possession of a portion of the personal property claimed; and on the 22d day of August, 1884, a temporary writ of injunction was issued and served, in action 706, restraining the sale by appellee of any of said chattel mortgaged property during the pendency of said action and action 703; and thereafter a stipulation between the parties was filed in action 706, whereby, among other things, it was stipulated that the property taken by the defendant in said action, under the writ issued in action 702, should be taken to plaintiff's ranch, and there be kept until the final hearing of said action, and that all of the mortgaged property should remain on said ranch until the further order of the court, except so much of the crops as might be sold to pay the expense of harvesting the same; and on the same day that said stipulation was filed an order was entered, by consent, consolidating actions 702 and 706 with action 703, and that the issues made in said causes 702 and 706 stand as issues in cause 703, and that all of said issues be tried therein. The case went to trial upon these pleadings.

*Taylor, Ashton & Taylor, and A. K. Vanatta, for appellants. S. D. Walling and C. C. Parsons, for appellee.*

RISING, C., (*after stating the facts as above.*) The first and second assignments of error question the ruling of the court in overruling defendants' motion for a continuance. This motion was based upon the affidavit of N. P. Danielson, one of the defendants. The material facts stated in said affidavit are that M. E. Danielson, the wife of affiant, and a defendant in said action, expected to be confined in a few days; that on the 29th day of September, when the case was called, affiant believed that his wife could attend the trial, but after said time his family physician had informed him that it would be dangerous for her to do so. Affiant also stated, in a general way, what the witness M. E. Danielson would swear to if present at the trial. This affidavit

is wholly insufficient as a showing for continuance. It shows that affiant, two days before he made the affidavit, believed his wife would be able to attend the trial; and the only showing made as to her being unable to attend the trial is the statement of affiant that his family physician had informed him that it would be dangerous for her to attend the trial. This will not do. The name of the physician is not given, nor any facts from which it is shown that the physician had any knowledge of the circumstances upon which he could base an opinion. If a motion for continuance is to be based upon the professional opinion of a physician, the proper course is to obtain the affidavit of such physician, and such affidavit should show the facts upon which such opinion is based. It does not appear from the affidavit but that the same facts desired to be proved by the witness could be proven by other witnesses, nor that he could not safely proceed to trial without the attendance of such witness. There was no abuse of discretion in denying the motion for continuance.

The twenty-third assignment of error questions the sufficiency of the evidence to support the decree; but counsel for appellants, in their argument, say that they do not insist upon this assignment. The other assignments may all be considered and disposed of in the consideration of the question whether the court erred in treating the case as an action in which the issues of fact are properly triable by the court. It is contended by appellants that having, by their pleadings, admitted that the deed set up in the complaint in case 703 was executed by appellants, and that it was to have the effect of a mortgage to secure the actual amount due from appellants to appellee, no issue was left for trial, except the issue as to the amount actually due from appellants, and that this state of the pleadings made the action triable as an action for the recovery of money due on contract. We think appellants' counsel are correct in assuming that the only question of fact raised by the pleadings relates to the actual amount of indebtedness due from appellants to appellee, and this issue arises upon the pleadings in case 703, and the determination of this issue in that case is the determination of the question arising upon the same facts, and presented by the pleadings, in case 706. Whether the issue of fact thus presented must be tried by a jury or by the court must be determined by the provisions of section 154 of the Code, which reads as follows: "An issue of law shall be tried by the court, unless it be referred, as provided in the title in regard to reference. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in the Code. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code." It is contended by counsel for appellants that when the sole issue of fact, arising upon the pleading in any case, is as to the amount of the recovery for money due on contract, such issue must be tried by a jury. We do not so construe the provisions of section 154 of the Code. The question whether an issue of fact must be tried by a jury or by the court is not to be determined from the nature of the issue, but from the character of the action in which such issue is joined. The Code abolished forms of actions, but did not undertake to do away with the distinction between legal and equitable causes of action. *Bank v. Ford*, 7 Colo. 314, 3 Pac. Rep. 449; *Smelting Co. v. Finch*, 6 Colo. 214-222. The Code provisions relating to the trial of issues of fact recognize the distinction which formerly existed between actions at law and bills in equity. *Conran v. Selleu*, 28 Mo. 320. The foreclosure of a mortgage was an equitable proceeding, under the practice before the Code, and has been so treated under Code practice. *Manufacturing Co. v. McAllister*, 6 Colo. 261. And it has been held by this court that the practice of trying chancery cases to the court without a jury is clearly established by the provisions of section 154. *Hall*

v. *Linn*, 8 Colo. 264-267, 5 Pac. Rep. 641. The case is one in which the issues of fact are properly triable by the court, and the court committed no error in so treating it.

It is further contended by appellants that the court erred in providing, in the decree rendered, that if the proceeds of the sale of the real estate are insufficient to pay the amount found due to the plaintiff, with costs and charges, then the plaintiff shall sell the chattel property according to the terms of the chattel mortgage, and apply the proceeds of such sale, according to the provisions of said mortgage, in payment of the balance appearing to be due to the plaintiff by the return of the sheriff of the sale of the real estate. This objection to the decree is based upon the fact that no mention is made of the chattel mortgage in the complaint in case 703, and upon the further fact that the demurrer in case 702 was not disposed of at the time of the trial, and that therefore the court could not properly consider any question or fact involved in that case, in rendering the decree in the consolidated cases. We do not think this objection well taken. On the 10th day of September, 1884, the following order was entered in case 706: "In this case the property replevied, to be disposed of according to the stipulation this day filed, to stand for trial with 703." And on the same day the following order was entered in case 703: "Nos. 702 and 706 having, by consent, been consolidated with this case, it is ordered that the issues made in said causes stand as issues in this case, and that all of said issues be tried herein." As we have seen, the only issue of fact for trial in cases 703 and 706 had reference solely to ascertaining the amount due from appellants to appellee; and the sole issue in case 702 was an issue of law, and this issue was pending and undetermined at the time the cases were consolidated, and at the time of trial. The defendants by entering upon and proceeding with such trial upon the merits, without demanding a ruling upon the demurrer in 702, thereby waived the same. *Anderson v. Sloan*, 1 Colo. 484. The demurrer being waived, and no answer to the complaint being interposed, every material allegation of the complaint must, for the purposes of the action, be taken as true. One of the material allegations of said complaint is that the ownership and right of possession of the plaintiff in and to the chattels and personal property described in the complaint arises from, and exists by virtue of, a chattel mortgage executed and delivered by defendants to plaintiff, conveying said chattels and personal property to plaintiff, to secure certain described indebtedness of defendants to plaintiff. By the consolidation of this case with 703, the fact that the personal property described in the complaint in 702 was given to secure an indebtedness from defendants to plaintiff became an admitted fact upon the trial of case 703. By the writ of injunction issued and served in case 706, the plaintiff in case 702 was enjoined from selling or disposing of any of the chattel mortgaged property during the pendency of said actions 703 and 706, and until the court should make other order to the contrary. From this statement of facts it is apparent that the court was in possession of all the facts necessary to enable it to make a disposition of the chattel mortgaged property in accordance with the rights of the parties as established upon the trial.

But it is contended by appellants that as the chattel mortgage was given to secure a certain note, and as the jury found that the consideration of that note was solely interest, and compounded, the plaintiff is not entitled to recover anything on said note, and therefore the property mortgaged cannot be held under the mortgage for the payment of the indebtedness for which said note was given; and this position is assumed upon the ground that the note is so vitiated by fraud as to render it void. The findings of the jury do not sustain the appellants' allegations of fraud. The jury, in reply to a question which the court instructed them to answer, say that the plaintiff did not represent to defendants, or to either of them, at any time, the amount of interest due. The court having obtained jurisdiction of the subject-matter through

the injunction proceedings instituted by appellants, it could retain such jurisdiction for the purpose of deciding the whole controversy. 1 Pom. Eq. Jur. § 236.

A question arises whether the decree of the court should order a sale of the chattel mortgaged property for the payment of such portion of the indebtedness from appellants to appellee as should remain unpaid after the sale of the real estate, and the application of the proceeds of such sale to the payment of costs and indebtedness, or should order such sale of the personal property to be made to pay such balance, or a portion thereof equal in amount to the sum which said chattel mortgage was given to secure. We think the decree should limit the amount to be made by a sale of the chattel mortgaged property to such sum as such mortgage was given to secure. It seems clear to us that there was not a total failure of consideration for the note secured by the mortgage, but that a good consideration existed to the extent of the amount of interest due upon the indebtedness at the time the note was given, less any deduction to be made on account of any payment made thereon. This was the view taken by the jury, and in accordance with that view they found the actual consideration of said note to be the sum of \$1,535.24; and this sum, with interest thereon at 3 per cent. per month from the 3d day of May, 1884, to the date of the decree, is the amount of the indebtedness for the payment of which the chattel mortgaged property may be held as security. The amount due on said note for principal and interest at the date of the decree is the sum of \$1,765.52, and the decree should be so amended as to provide therein that if upon the sale of the real estate to pay the amount of the indebtedness as found by the court below, with costs and charges, the proceeds of such sale should be insufficient to pay such indebtedness and costs, then the chattel mortgaged property may be sold to pay such balance of said indebtedness so remaining unpaid, not exceeding in amount the said sum of \$1,765.52, with interest thereon at 10 per cent. per annum from the date of said original decree.

The errors assigned upon the action of the court in refusing the several requests of appellants to submit certain questions of fact to the jury, and the error assigned upon the action of the court in submitting certain questions of fact to the jury, and the errors assigned upon the action of the court in giving, and in refusing to give, certain instructions to the jury, are each and all of them determined by the holding that the case was properly triable by the court. Whether any questions of fact, and what questions of fact, shall be submitted to a jury in such cases, is a matter resting wholly in the discretion of the court; and when the court, in such cases, submits to a jury certain specific facts, neither party has the right to ask the court to instruct the jury, because the court is not in any manner controlled by the verdict. *Thomp. Char. Jur.* § 95; *Van Vleet v. Olin*, 4 Nev. 592; *Freeman v. Wilkerson*, 50 Mo. 554. We do not think appellants have any grounds for complaint in relation to the questions the court submitted to the jury. The questions submitted covered every question of fact upon which the court was called upon to pass, and were such as to greatly aid the court in arriving at correct conclusions as to the matters upon which the court desired to be advised.

The decrees should be amended in accordance with the views herein expressed.

STALLCUP and DE FRANCE, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion it is ordered that the decree of the district court be modified as therein suggested, and that this cause be remanded to said district court, with directions to enter up said modified decree as the judgment and decree of said court.

(11 Colo. 126)

*McClellan et al. v. Hurd.*

(Supreme Court of Colorado. March 9, 1888.)

**NEW TRIAL—STIPULATIONS WAIVING RIGHT—ESTOPPEL.**

The plaintiff and one of several defendants in an action entered into a written agreement, which was filed with the clerk, to the effect that after the termination of a trial of the case on its merits neither party to the agreement should have the right to a new trial. *Held*, the agreement was binding as between the parties, and that such defendant was estopped by the stipulation from in any way questioning the validity of an order refusing to grant a new trial.

**Appeal from district court, Lake county.**

This was an action in ejectment. On the 24th of November, 1884, a stipulation was entered into between counsel for plaintiff, Hurd, and defendant Job C. McClellan, to the effect that judgment should be entered against Hurd, then vacated, and the cause tried on its merits; that, as between them, this trial on the merits should be final, save the right of review in the supreme court; that is to say, the right to a new trial by the successful party, upon the payment of costs, under the statute, (Code, § 274,) was expressly waived. This stipulation was in writing, and was filed with the clerk of the court. On the 27th of March following, trial was had and final judgment rendered in favor of Hurd. From this judgment McClellan appealed to the supreme court; the appeal being afterwards dismissed. At the succeeding (November) term, 1885, of the district court, however, the costs having been paid by either him or one of his co-defendants, the following proceedings were had and recorded: "Wednesday, November 4, 1885, being one of the judicial days of the November term, A. D. 1885, of said court, defendants moved the court to set aside and vacate the judgment heretofore rendered, and grant a new trial in the action; and it appearing to the court that all costs have been paid, pursuant to the statute, it is ordered that the judgment be vacated and set aside, and that the cause be reinstated on the docket of the court." Thus it is shown that, notwithstanding the stipulation mentioned, the judgment theretofore rendered was vacated, under the statute, and a new trial granted Job C. McClellan as well as the other defendant. During the March term, A. D. 1886, to-wit, on June 1st, counsel for Hurd filed an affidavit stating all these proceedings, calling the court's attention to the stipulation, and asking an amendment of the foregoing record entry in accordance therewith, so as to deny Job C. McClellan the privilege of a new trial under the statute. Upon investigation Hurd's motion was granted by the court, and an order entered amending the former order, the effect of which amendment is to deprive McClellan of the statutory retrial. From the order or judgment last above mentioned, the present appeal was taken.

*Rucker & Ewing, R. S. Morrison, and C. C. Post, for appellants. Wm. T. Hughes, for appellee.*

HELM, J. This appeal was perfected under the statute of 1885, and no objection is interposed on the ground that the record entry of June 1st did not constitute an appealable order. Hurd and McClellan had the undoubted power to make a valid stipulation, waiving the right to a new trial under the statute. This they attempted to do, and there is nothing in the record before us to show that any fraud was perpetrated by Hurd, or that McClellan was deceived or misled in the matter. The stipulation is mentioned, and sufficient of its substance given, in record entries. Whether actually made a matter of record *in hæc verba*, as stated by an affidavit included in appellants' transcript, and uncontradicted in this regard, is of little consequence. It was afterwards acted upon by the parties. First a judgment was taken against Hurd thereunder, *pro forma*, and set aside; then, as agreed, the cause was tried on its merits, the second judgment, however, being against McClellan.

The latter's right to a review in this court upon appeal or error was not interfered with, and he attempted to perfect an appeal. The stipulation was binding upon the parties. Had it been possible to repudiate its terms at any stage of the proceedings, McClellan's attempt so to do was made too late. The order of November 4th rightfully vacated the judgment as to De Lamar, and there is nothing unreasonable in Hurd's position that until the term had lapsed he was not aware that it did more. This order should not have allowed McClellan a new trial. It appears clearly that the failure to distinguish between him and his co-defendant in this matter was inadvertent; that it was an oversight. In view of the court's subsequent action we cannot presume that the stipulation, though previously frequently recognized, was remembered or called to its attention, or considered by it in announcing the order. Nor is Hurd chargeable with negligence in not referring to the recorded stipulation when the order was made. For the statutory right to a new trial in this class of cases, upon payment of costs before the first day of the succeeding term, in the absence of a contrary agreement, is absolute, and the corresponding order a matter of course. If notice to Hurd of the application was required, it does not appear to have been given, and neither he nor his attorney was present. Hurd relied upon the stipulation, and had a right to expect good faith thereunder on the part of McClellan. The court, at the succeeding term, simply amended its order, making the order what it should have been in the first instance under McClellan's agreement. The stipulation was still in force, and had McClellan appeared on June 1st, and consented to the action taken, the situation would not have been materially different. We shall hold that he is estopped by the stipulation from questioning the validity of the order appealed from. We do not follow counsel into a discussion of the rule prohibiting a court from altering or amending its judgment at a term subsequent to the entry thereof; nor do we consider the exceptions to this rule, created by the common law and by statute. The reason for the rule is not applicable, nor do the rule or the exceptions control in cases like this. The court having original jurisdiction of the subject-matter, has plenary power to carry out the legal stipulations of parties with reference to its orders and judgments; and so long as the cause has not been transferred, by appeal or otherwise, to some other tribunal, and the interest of innocent third persons is in nowise influenced, its right to act, upon proper notice, in the premises, is not affected by the lapse of a particular term.

The judgment is affirmed.

(11 Colo. 118)

HOCHSTADTER *et al.* v. HAYS *et al.*

(*Supreme Court of Colorado.* March 9, 1888.)

HUSBAND AND WIFE—LIABILITY OF MARRIED WOMAN—ACTION AT LAW.

Plaintiffs brought an action for the price of goods sold a firm, of which defendant, a married woman, was a member, in July, 1880, in Missouri. As the law then stood in that state, a married woman's contracts were valid only as against her separate estate in equity. *Held*, that this action, being in the nature of an action at law, and seeking a personal judgment, cannot be maintained.

Appeal from district court, Arapahoe county.

Suit commenced by Adolph F. Hochstadter *et al.* against Mary F. Hays *et al.* in the county court of Arapahoe county, July 23, 1881, by filing complaint, affidavit in attachment, undertaking, and cost-bond. Judgment for plaintiff, and appeal to the district court. Trial in the district court, judgment for defendant, and appeal to the supreme court. The plaintiffs complain of the defendants, partners under the firm name of Hays & Jones, and allege that the defendants were indebted to the plaintiffs in the sum of \$665.50, upon account, for goods sold and delivered by plaintiffs to defendants on July 31, 1880; that the same was due and payable January 15, 1881, but defendants have not paid the same or any part thereof except the sum of \$191.65, paid on

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February 7, 1881. Wherefore, plaintiffs demand judgment for the sum of \$465.85, with interest from January 15, 1881, to date of judgment. The defendant Mary F. Hays, in her answer, denies the alleged partnership and indebtedness. For further answer, she alleges residence in the state of Missouri at the date of the contract, coverture, and incapacity to contract under the laws of that state. The plaintiffs reply, alleging the defendant's ownership of a separate estate, and her capacity to contract with reference thereto. They plead the following section of the Missouri statutes:

"Sec. 3296. *Married Women to Hold Separate Personal Property, Separate from Husband—Liable for What.* Any personal property, including rights in action belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal rights, shall, together with all income, increase, and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This statute shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife: provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care, or protection thereof, but the same shall remain her separate property, unless by the terms of said assent in writing full authority shall have been given by the wife to the husband to sell, incumber, or otherwise dispose of the same for his own use or benefit."

They further allege "that the said store of general merchandise was owned by the defendants, and that the interest of said M. F. Hays therein was her separate property, under her sole control, and that her husband had no right or interest whatever therein. And plaintiffs say that the said defendant Hays bought the goods, for the price of which this suit is brought, of plaintiffs, for the purpose of carrying on said store with the intent of charging her separate property for the payment of the same." The defendant Jones was not served. The further facts in the case sufficiently appear from the opinion.

*John L. Jerome and E. O. Wolcott*, for appellants. *Patterson & Thomas and H. B. O'Reilly*, for appellees.

ELBERT, J., (*after stating the facts as above.*) We do not notice the cross-error assigned by appellee. If there were defects of proofs upon the part of the plaintiff, and the evidence offered by the defendant after his motion for nonsuit was overruled, supplied such defects, then error cannot be assigned upon the action of the court denying the motion for nonsuit. *Railway Co. v. Henderson*, 13 Pac. Rep. 911. We must determine the right of the plaintiff to recover upon all the evidence. The defendant Mary F. Hays was a married woman living in the state of Missouri at the date of the contract sued upon. She pleads her coverture and want of capacity to contract under the laws of that state as a defense. The plaintiff replies by way of avoidance, her capacity to contract with respect to her separate estate, and alleges the existence of a separate estate, upon the credit of which the goods of the plaintiff were sold and delivered. The question is presented, to what extent could a married woman rightfully contract in the state of Missouri at the date of the alleged transaction between the plaintiff and defendant. An examination of the decisions of the supreme court of that state discloses substantial uniformity in holding that the contracts of a married woman are of no validity, except as to her separate estate; that as to her separate estate she is treated in equity as a *feme sole*; that no *personal* judgment can be given against her; that the remedy given is an equitable proceeding, having for its object a decree against the separate estate; that her contracts in no way affect or bind her general estate; that it is not necessary that the debt should be evidenced



by a written instrument, or that the separate estate should be mentioned; that where she contracts for herself, in her own name, her intention to bind her separate estate is presumed, unless there is something to show the contrary. *Coats v. Robinson*, 10 Mo. 757; *Whitesides v. Cannon*, 23 Mo. 472; *Claflin v. Van Wagoner*, 32 Mo. 254; *Tuttle v. Hoag*, 46 Mo. 42; *Coughlin v. Ryan*, 43 Mo. 99; *Boal v. Morgner*, 46 Mo. 48; *Schafroth v. Ambs*, Id. 116; *Bruner v. Wheaton*, Id. 364; *Kimm v. Weippert*, Id. 535; *Miller v. Brown*, 47 Mo. 508; *Lincoln v. Rowe*, 51 Mo. 573; *Meyers v. Van Wagoner*, 56 Mo. 116; *Siemers v. Kleeburg*, Id. 200; *De Baum v. Van Wagoner*, Id. 347; *Bank v. Taylor*, 62 Mo. 340; *Morrison v. Thistle*, 67 Mo. 600. In *Davis v. Smith*, 75 Mo. 225, HENRY, J., declares what we regard as substantially the doctrine of the authorities which we have cited. He says: "As to the precise nature of the obligations of a *feme covert* who had a separate estate when it was incurred, the authorities are not agreed, but are in inextricable confusion. It is well settled in this state that if she execute a note, and nothing to the contrary is expressed, the creditor may, by a proceeding in equity, have it satisfied out of her separate property. *Whitesides v. Cannon*, 23 Mo. 472. But it is not a lien, or, strictly speaking, a charge upon the property, nor does it bind her personally. All that can be said of it is that it is an anomalous obligation, neither binding her nor her estate, general or separate, but only constituting a foundation for a proceeding in equity, by which her separate property may be subjected to its payment; and until a decree to that effect be rendered it is neither a lien nor a charge upon the estate. If she own, in addition to her separate property, other property in which she has no separate estate, even where a court of equity enforces payment of the obligation out of the separate estate, it will not, for any deficiency of the separate estate, allow a resort to her other property."

It remains to apply the foregoing principles to the facts. It appears from the evidence, with but little or no conflict, that the defendant Mary F. Hays was a member of the firm of Hays & Jones, doing business in 1880 in Nevada, Missouri; that she was the owner by purchase with her personal funds of the original stock of goods with which the firm commenced business; that she was also the owner of a farm a short distance from the town of Nevada, and of a hundred or more of cattle thereon,—whether the farm was her separate or general property does not appear; that Jones, her partner, was insolvent, having an interest in the profits of the firm as payment for his services; that her husband was also insolvent; that Mrs. Hays was, to some extent, in poor health, and intrusted the management of her business affairs largely to her husband as her agent; that she both verbally and in writing recognized him as her agent; that the property both real and personal was in the name of the wife, and was treated by the husband as the wife's separate property; that she signed all papers looking to its disposal or incumbrance; that in July, 1880, the plaintiff sold to the firm of Hays & Jones goods amounting to \$665.50, and that the sale was made to the firm upon the credit given the firm by the supposed responsibility of the defendant Mary F. Hays. The defendant Mrs. Hays testifies that she told her husband that she did not want her name used in the partnership with Jones, and that she intrusted her money and property to the management of her husband in order to preserve peace in the family. There is no ground to question her testimony, which shows her husband to have been entitled to but little respect. It is matter, however, with which the public has nothing to do from a legal stand-point. She in nowise repudiated his agency, or his acts as agent, but, on the other hand, recognized him fully and unequivocally as her agent. On this state of facts there can be no doubt, under the decisions to which we have referred, as to the legal *status* of the contract sued upon. Under the laws of the state of Missouri it was valid in equity, and enforceable against the separate estate specified in the plaintiffs' replication. Suit, however, is brought in the courts of this state, to which the de-

fendant Mrs. Hays has changed her domicile. It is in its nature an action at law, and contemplates a personal judgment against her which will reach her general property. It remains to consider whether the action can be maintained. We are of opinion that it cannot. Under the statutes of Colorado a married woman is no longer *sub potestate viri*, as at common law. She may contract, sue, and be sued as a *feme sole*. While this is true, it is a familiar principle that the nature, validity, obligation, and interpretation of contracts are to be governed by the *lex loci*, and we are of the opinion that there is a defect of obligation in the contract sued upon which forbids the judgment asked for. What the defendant undertook to do within her legal capacity to contract constitutes the obligation of her contract. She did not undertake to become personally liable to the plaintiffs for the price of the goods. Such an undertaking would have been void, as not within her capacity. Substantially she undertook that her separate estate then existing might be subjected to the payment of the debt in case of default. This was the extent of the obligation of her contract. And this is all that the plaintiffs are entitled to ask any court, whether in Missouri or elsewhere, to enforce. We cannot change the nature of the contract, or add to its obligations. A personal judgment cannot be given, as it presupposes and requires in the contract that which under the *lex loci* was impossible, viz., a valid personal obligation on the part of the defendant to pay out of her general estate. Story, Conf. Law, § 569 *et seq*; *Griswold v. Golding*, (Ky.) 3 S. W. Rep. 535. We are cited by counsel for the appellant to a large number of cases as supporting a different view, especially to *Smith v. Spinolla*, 2 Johns. 197; *White v. Canfield*, 7 Johns. 117; *Sicard v. Whale*, 11 Johns. 194; *Hinkley v. Marean*, 3 Mason, 89; *Titus v. Hobart*, 5 Mason, 379; *Woodbridge v. Wright*, 3 Conn. 528; *Wood v. Malin*, 10 N. J. Law, 211. We have nothing to say against the doctrine of these authorities. As we understand them, they presuppose and are founded upon what in this case is wanting,—a personal obligation in the contract authorizing a personal judgment. We are of the opinion that the defense of coverture interposed by the defendant was good, and that the matter alleged in the replication by way of avoidance was not sufficient. Had the verdict of the jury been in favor of the plaintiffs, the law would not have authorized a judgment thereon in their behalf. The judgment of the court below must be affirmed.

(11 Colo. 103)

#### LITTLE v. DOUGHERTY.

(Supreme Court of Colorado. February 13, 1888.)

#### 1. FRAUDS, STATUTE OF—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—WRITING—TELEGRAMS.

Defendant sent a telegram to plaintiff saying: "Will you accept [employment] on two years' guaranty at \$1,400?" Plaintiff answered by telegram saying that he accepted, and would be on hand to commence work January 10th. Defendant sent a telegram in response saying: "I will accept you January 10th." Held, that the contract of hiring for two years was reduced to writing, and signed, so as to take it out of the statute of frauds.

#### 2. MASTER AND SERVANT—WRONGFUL DISCHARGE—ACTION—GENERAL DENIAL—EVIDENCE.

Plaintiff alleged that he was wrongfully discharged by defendant. This defendant denied; and the parties, without objection to the state of the pleadings, went to trial. Held error for the court to exclude testimony showing misconduct of plaintiff in his employment a month prior to discharge.

Commissioners' decision. Appeal from superior court of Denver.

Action brought by W. H. Dougherty against C. W. Little, to recover damages for a breach of contract. Judgment for plaintiff, and defendant appeals.

*L. B. France*, for appellant. *C. S. Wilson*, for appellee.

STALLCUP, C. The appellee was plaintiff below. His action was for damages for breach of contract. He had entered into a contract with appellant

to serve him in his jewelry business in Denver two years, for \$1,400 per year. Commencing January 10th, he remained in the service in the store until June 16th following, when he was transferred to that of traveling salesman, where he served till in July, when he was discharged. The case was tried before a referee by consent. Upon his report judgment was entered for \$900 for appellee. Upon the record here, three questions are presented for our consideration.

*First.* For appellant, it is urged here that the contract of hiring was not in writing, and therefore void under our statute of frauds. From the evidence it appears that on December 14, 1882, appellant sent from Denver to appellee, at Philadelphia, Pa., a letter asking him at what salary he would come and work for him one year, commencing January 1, 1883, and requesting answer by telegram; that appellee answered the same by letter and telegram, stating that he would come for \$1,500. Appellee also received a telegram of date December 19th from appellant, stating he would give \$1,200 for one year. No answer was made to this telegram. Afterwards appellee received another telegram from appellant, saying: "Will you accept on two years' guaranty at \$1,400?" This was answered by appellee by telegram, saying he accepted, and would be on hand to commence January 10th; to which he received another dated December 27th, stating: "I will accept you January 10th. Bring all the pointers possible." Appellee kept no copies of his letters and telegrams sent to appellant, but produced those received by him. Those sent by appellee were not produced, though appellant had been duly notified to produce the same. We think the contract was, by means of the said telegrams and letters, reduced to writing, and signed by the parties, in compliance with the statute, so as to constitute a valid contract. *Trevor v. Wood*, 36 N. Y. 307.

The *second* question goes to the pleadings, and arises upon the rejection of certain evidence offered upon the trial by appellant. The chief controversy in the case was as to whether the discharge of appellee by appellant from his service before the expiration of the term for which he had employed him was wrongful or not. That he had discharged him before the expiration of the term of his employment was evident. The contract of employment was general in its terms, and did not limit the service thereunder to any branch of appellee's business. The court below held that the original contract continued after the transfer of appellee from the service in the store to the service as traveling salesman. There was evidence sufficient to warrant such holding. The cause of action was not definitely stated in the complaint. It was alleged therein "that the defendant on said 16th day of July, 1883, wrongfully discharged plaintiff." It was also, in effect, alleged that plaintiff was at the date of discharge ready and willing, and ever since has been ready and willing, and then offered, and has since offered, to continue in the service, and to perform the agreement. The appellant made no objection to this feature of the complaint, but answered thereto, and to the breach of contract so alleged, denied that he wrongfully discharged said plaintiff. Appellee made no objection to the answer, but replied to certain allegations thereof. The indefinite character of the issue in this regard was thereby waived by the parties. And plaintiff could not, after the admission of proofs tending to show compliance with the contract on his part, challenge defendant's evidence of non-compliance therewith. *Trustees, etc., v. Odlin*, 8 Ohio St. 293; *Marley v. Smith*, 4 Kan. 187; *Stevens v. Thompson*, 5 Kan. 311. Therefore the evidence offered to show appellee's misconduct while serving in the store was competent, and the rejection thereof was error. Appellee's right of recovery rested upon the alleged wrongful discharge, which appellant might defeat by showing a failure upon the part of appellee in the performance of his duties under the employment, sufficient to constitute a justification for the discharge. The fact that the evidence in question related to misconduct

a month prior to the discharge, and prior to the change in the service, did not render it incompetent. Appellant's final action may have been the result of appellee's long-continued misconduct. The judgment should be reversed.

DE FRANCE, C., concurs.

RISING, C. I concur in the reversal, for the reasons given in the foregoing opinion, and the further reason that the rule of damages adopted by the referee is erroneous.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(11 Colo. 130)

BASSICK MIN. CO. *et al.* v. DAVIS *et al.*

(*Supreme Court of Colorado. March 9, 1888.*)

1. EQUITY—JURISDICTION—COMPELLING CONVEYANCE.

A complaint which alleges that, in an action against defendants, plaintiffs were adjudged to be the owners of a portion of a mining claim; that defendants afterwards procured a patent for the whole of such claim, and refused to convey to plaintiffs their portion; and praying a decree compelling defendants to convey,—states a case for equitable relief.

2. SAME—DEMURRER—DEFENSE OF BONA FIDE PURCHASER.

A defendant, on demurrer to a complaint, praying for the conveyance of certain land, the ownership of which has formerly been adjudged to be in plaintiffs, cannot claim that he is an innocent purchaser, where that fact does not appear on the face of the complaint, but he must plead it as matter of defense.

Appeal from district court, Custer county.

The defendants in the court below demurred to the complaint of the plaintiffs on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, the defendants stood by their demurrer, and a decree was entered in favor of the plaintiffs. From this decree the defendants appeal to the supreme court. The following abstract sufficiently shows the character of the complaint. The above-named plaintiffs complain and allege "that they and defendant Edmund C. Bassick are native-born citizens of the United States, and are the owners of all (excepting the hereinafter mentioned portion, described as decreed to the defendants Smith, Buckley, Meredith, and Holmes) of the Queen Victoria mining claim, situated in Hardscrabble mining district, in said county of Custer, and state of Colorado; \* \* \* that in the year 1879, the defendants Smith, Buckley, Meredith, and Holmes made their application for a United States patent for and to the Nemeha lode mining claim, \* \* \* during the sixty days directed by law. The plaintiffs and said Bassick (one of the defendants) and one Benjamin F. Smith were the owners of all of said Queen Victoria claim, and duly filed in the United States land-office at Pueblo, Colorado, their adverse claim to, and were then the owners of, all that portion of the ground of said Queen Victoria mining claim embraced in said application for patent, which is thus described, to-wit: \* \* \* And that within thirty days after the said filing of said adverse claim, on September 29, 1879, said adverse claimants commenced their suit in the district court of said county of Custer in support of and to determine their said adverse claim; and then, on, to-wit, the date last aforesaid, said adverse claimants filed in the office of the recorder of the said county of Custer a notice of the pendency of their said action, containing the names of the parties to the said action, the object thereof, and description of the property affected thereby, to-wit, the same property which is above bounded and described; and therefore, in said district court, in said action, proceedings were had which on, to-wit, October 31, A. D. 1879, resulted in a decree, rendered and entered in said district court, as follows, that is to say: 'Samuel

*Davis, John W. Lawrence, Edmund C. Bassick, Benjamin F. Smith, and Robert J. Steger v. Lorenzo W. Smith, William Buckley, William Meredith, and William H. Holmes.* On this day come the said plaintiffs and said defendants, by their attorneys, and by consent of both parties, (plaintiffs and defendants,) the following judgment and decree is entered in this action; that is to say: It is considered, adjudged, and decreed by the court that the following described portion of the premises in dispute in this section, to-wit, \* \* \* be, and the same is, vested in the defendants. And it is considered, adjudged, and decreed that of the premises in dispute herein, described and bounded as follows, to-wit, \* \* \* be, and the same is, vested in the said plaintiffs. And the parties hereto shall pay their own costs in this action. And that by said decree there was vested in said adverse claimants the last above bounded and described premises, and the same became thereby and were declared to be the property of the said adverse claimants. And a certified copy of said decree, under the seal of said district court, and the hand of the clerk thereof, was thereafter duly filed in the said land-office, and the matter of said application for patent was proceeded with, and the same terminated in the granting of a patent by the United States to said applicants for the whole of their (claimed) Nemeha mining claim; and included in said patent was and is the whole of the premises by said decree vested in said adverse claimants. And that since the rendition and entry of said decree the said De Lano, Theodore H. Lowe, S. M. Carleton, the Bassick Mining Company, and O. E. Sperry have taken, or attempted to take, by deed, from said defendants, or some of them, interests in said premises, (mentioned in said decree,) and in those so vested as is aforesaid in the plaintiffs and said Bassick and Benjamin F. Smith. And that said Ophelia P. Lowe claims some interest in said premises so decreed to the adverse claimants, as is aforesaid, but whether by deed or otherwise, the plaintiffs are not informed, and are unable to state. And that after the rendition and entry of said decree, and on, to-wit, May 17, A. D. 1880, the said Benjamin F. Smith sold, for a valuable consideration, and by a sufficient deed of conveyance conveyed, to said Bassick, all his interests (being an individual eighth) in said Queen Victoria mining claim. And that, upon receiving information of the granting of said patent, the plaintiffs, on their own behalf and that of said Bassick, demanded, and caused to be demanded, of and from the defendants, conveyance of said (last above bounded and described) premises to them, and were met with a refusal on the part of the defendants to give such a deed; and the defendants (except said Bassick) neglect, and they do refuse, to make or give such a deed or conveyance for said premises, and hold, and claim the right to hold, the same as and for their own, free and clear from all claim of the plaintiffs and the said Bassick thereon, contrary to right and justice and the said decree. And that the said defendants (excepting said Bassick) are not entitled to hold or claim the premises (or any thereof) so decreed as is aforesaid to said adverse claimants, save and except in trust for the plaintiffs and the said Bassick; and they do, under said decree and patent, hold the title to the same in trust for the plaintiffs and said Bassick, and not in their own right, nor for their own use. And that the defendants and each of them, excepting said Bassick, are threatening and endeavoring to sell and dispose of said Nemeha lode claim and said premises, which were so decreed to said adverse claimants as is aforesaid, without protecting the rights therein of the said plaintiffs and said Bassick, and to their very great injury in the premises. And that the said Bassick is made a defendant herein because the plaintiffs cannot obtain his consent to join herein as plaintiff, and it is necessary that he be a party herein to fully protect the plaintiffs' rights. Wherefore the plaintiffs demand judgment—*First*, that this court require the defendants, (except said Bassick,) by a short day, to convey to the plaintiffs and said Bassick the premises so decreed to the adverse claimants as is in the foregoing complaint set out; and

that in default thereof a commissioner be appointed by this court to make, execute, acknowledge, and deliver such said conveyance; *second*, that the defendants pay the costs herein; and, *third*, that all proper, other, further, or different relief be granted and decreed as may be consonant to equity and justice in this action." On January 23, 1885, the appeal was dismissed by this court as to the Bassick Mining Company, and the cause is now prosecuted by and on behalf of John S. De Lano.

*A. J. Rising* and *G. C. Norris*, for appellants. *Blackburn & Dale*, for appellees.

ELBERT, J., (*after stating the facts as above.*) The demurrers of the several defendants were properly overruled. The bill of complaint stated a case for equitable jurisdiction and relief. When, through fraud, mistake, or for any reason recognized as a ground of equitable interference, the legal title to any portion of the public domain has been obtained by a party, when in equity and good conscience another was better entitled, a court of equity will treat the patentee as a trustee, and compel him to convey. *Filmore v. Riethman*, 6 Colo. 120; *Wells v. Francis*, 7 Colo. 396; *Johnson v. Towsley*, 13 Wall. 74; *Moore v. Robbins*, 96 U. S. 530; *Markquez v. Frisbee*, 101 U. S. 473. Counsel for the appellant De Lano contends that he was a *bona fide* purchaser for a valuable consideration, without notice. This was matter for defense, and should have been interposed by answer. Where the facts do not appear on the face of the complaint, so as to permit a demurrer, this defense must be pleaded in order to be available. 2 Pom. Eq. Jur. § 784, and cases cited. The decree of the court below must be affirmed.

(11 Colo. 143)

CANTRIL v. BABCOCK *et al.*

(*Supreme Court of Colorado. March 9, 1888.*)

REPLEVIN—JUDGMENT FOR RETURNS—MONEY VALUE—REVIEW IN ACTION ON BOND. In an action of replevin, judgment was entered for the return of the goods, or the payment of a certain sum of money, their assessed value, to the attaching officer from whose custody the goods were replevied. *Held*, that the amount of the money judgment, as fixed in the replevin suit, could not be reviewed in an action upon the replevin bond.

Error to district court, Boulder county.

Cantril, as United States marshal, levied two writs of attachment issuing from the federal court, in suits against Herman Bros., upon certain personal property belonging, as he asserted, to them. Babcock, who was not a party to the suits in the federal court, but claimed to own the property by purchase from the assignee of Herman Bros., brought his action of replevin in the district court of Boulder county, giving the usual replevin bond, with the other defendants above mentioned as sureties. The replevin action was decided upon demurrer in favor of Cantril, judgment being entered in the state court for a return to him of the property replevied, or, in case a delivery thereof could not be had, then for the sum of \$4,770.40, the value of the goods replevied. The goods were not redelivered, nor was the amount of the judgment paid. The present action was brought by Cantril upon the replevin bond. In this bond defendants undertook and acknowledged to the effect that they were "jointly and severally bound unto defendant Cantril \* \* \* in the sum of \$9,546.80, (being double the value of said property described in the affidavit,) for the prosecution of said action without delay and with effect, and for the return of said property to said defendant, if return thereof should be adjudged, and for the payment to the said defendant of such sum of money as might from any cause be recovered against said plaintiff, Babcock." Upon trial to the court, a jury being expressly waived, judgment was entered awarding Cantril \$1,778.13. To review this judgment the present writ of er-

ror was sued out by him. It appeared by the pleadings and evidence below that the amount of the judgment, viz., said \$1,778.13, represented the aggregate amount of the claims in suit before the federal court on account of which the writs of attachment aforesaid issued, and were levied upon the property mentioned. It in like manner further appeared that suit was afterwards brought in the federal court by other creditors against Herman Bros. for different sums aggregating more than the full amount of the alternative money judgment given by the state court in the action of replevin, and that writs of attachment issuing in such suits were placed in the hands of the marshal, who levied upon the same goods by serving copies of the writs upon Herman Bros., and making the proper indorsements thereon. Also, that Babcock, claiming ownership of the property, intervened in six of those suits, and that the ownership and right of possession were found against him in each of them. Judgments were duly recovered by the plaintiff in all the suits above mentioned pending before the federal court. Section 204 of the Civil Code, referred to in the opinion, reads as follows: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a recovery cannot be had, and damages for taking and withholding the same."

*George Rogers*, for plaintiff in error. *Decker & Yonley*, for defendants in error.

HELM, J. Plaintiff in error, Cantril, recovered the judgment to reverse which this proceeding was instituted. His position is that he was entitled to the full sum awarded in the state court by judgment in the replevin suit, and that that court could not, in the present action upon the replevin bond, review or re-investigate the matters then adjudicated. The replevin bond constituted a contract between Babcock and his sureties on the one hand, and Cantril on the other. Its terms are unequivocal. They stipulate for the payment, in case of defeat in the replevin action, of "such sum of money as may, from any cause, be recovered against the said plaintiff." It is clear that the court below did not render judgment at the trial of the present suit in accordance with this provision of the contract or undertaking. The property replevied was not redelivered, and by the condition of the obligation, defendants were to pay Cantril \$4,470.40, the value thereof as fixed by the judgment. It is asserted that defendant's money recovery, where he succeeds in a replevin suit and the property seized by the plaintiff is not returned, is measured by the extent of his (defendant's) interest therein. This legal proposition it is not necessary now to consider. If correct and unmodified by statute, it might have an important bearing were we trying or reviewing the replevin action. But the authorities are clear that the judgment rendered under statutes similar to ours, (section 204, Civil Code,) for the value of property in the replevin suit, is conclusive in a subsequent suit upon the replevin bond. The value of the property, together with plaintiff's interest therein, is supposed to have been fully determined in the replevin action. Therefore, these questions are treated in suit upon the bond as *res adjudicata*. 2 *Suth. Dam.* 51, and following. This rule of law is in our opinion decisive of the present case. To say that it shall not be, is to relieve parties from the stipulations contained in their solemn written obligations under seal. Besides, it appears from the judgment in the replevin suit now under consideration that the sum awarded in case of failure to return the property was the exact amount then fixed by stipulation of the parties as the value of the property replevied. No question is made concerning the accuracy of this stipulation, and hence no controversy exists as to this point. When property in the hands of the

United States marshal has been wrongfully seized under process from a state court, it (the state court) may properly render judgment for a return to the marshal of such property, or payment to him of the value if return be not made, though the merits of plaintiff's claim are not adjudicated. *Parks v. Wilcox*, 6 Colo. 489. As suggested in that case, this proceeding is necessary to place the marshal in the exact position he occupied before being wrongfully dispossessed, and to fully protect the lawful process under which he acted. By virtue of the replevin judgment, the property, or the value thereof, as the case may be, is restored to the custody of the federal court. And it seems to us that that court is the proper forum in which to litigate (so far as the law and procedure may permit of litigation) all claims of ownership or interest asserted by the plaintiff in replevin to the property returned, or to the money paid in lieu thereof. Babcock's intervention before that court in the attachment suits against Herman Bros., and the trial therein of his claim of ownership, were evidently based upon this theory; though he had neither redelivered the property nor paid its value to the marshal.

It should perhaps be remarked in passing that section 14, p. 540, Rev. St. 1868, has been repealed. The decisions of this court based upon that statute are therefore not authority at present. Besides, it is doubtful if the rule adhered to would be applied in cases like the one at bar, even were the statute still in force.

The judgment of the district court will be reversed, and the cause remanded, with directions to enter judgment in favor of the marshal for the full amount awarded by the court in the replevin suit, together with legal interest to the date of such judgment.

(11 Colo. 147)

**PEOPLE *ex rel.* ASPEN M. & S. CO. v. DISTRICT COURT, PITKIN CO.**  
(*Supreme Court of Colorado. March 9, 1888.*)

**1. CONSTITUTIONAL LAW—LEGISLATIVE POWERS—EMINENT DOMAIN.**

Rev. St. U. S. § 2338, (U. S. St. at Large 1866, p. 252,) which provides that the local legislature of any state or territory, in the absence of necessary legislation by congress, may provide rules for working mines involving easements, does not authorize state legislatures to pass laws in violation of their state constitutions; and Gen. St. Colo. § 2407, which was passed by the legislature of the territory of Colorado in 1874, which provides that all mining claims now or hereinafter located shall be subject to the right of way of any tramway which is now in use, or may be hereafter laid out across it, is abrogated so far as it is in violation of Const. art. 2, § 14, which provides that private property shall be appropriated for private purposes only for ways of necessity, reservoirs, drains, flumes, or ditches for agricultural, mining, milling, domestic, or sanitary purposes.

**2. EMINENT DOMAIN—INTERLOCUTORY DECREE—DISCRETION TO VACATE.**

When, in proceedings to condemn lands for a private railroad, the judge, under the eminent domain act, enters an interlocutory order granting the petitioners possession of the land pending the proceedings, it is not error for the court, when it sustains a general demurrer to the petition, to vacate such rule, as the statute referred to leaves the matter of granting such a rule, in the first place, entirely in the discretion of the court.

**3. SAME.**

Where, in proceedings under the eminent domain act to condemn lands for a private railroad, the judge vacates an order granting the petitioners possession of the land pending the proceedings, he cannot be said to have abused his discretion, when it appears that the right to condemn the land in controversy did not exist.

*Certiorari* to district court, Pitkin county; THOMAS A. RUCKER, Judge.

The relator is the owner of several mining claims situated on Aspen mountain, in Pitkin county; and in order to facilitate the transportation of ores therefrom to certain sampling works in the town of Aspen, known as the "Hewitt Sampler," laid out and constructed tramways from the mines to a common point in the vicinity, and laid out a main line extending from the point of convergence to the sampling works. This main line crosses a parcel of land severally claimed by three persons; by two of them as mining locations,



and by the third under a pre-emption location as agricultural land. "The strip desired for the tramway is 193 feet in length and 33 feet in width. Being unable to obtain the right of way over this tract from the several claimants, the relator filed a petition in the district court of Pitkin county praying that the strip described therein be condemned, under the eminent domain act, for the purpose mentioned, and that the petitioner be admitted into possession pending the proceedings, upon depositing in the court a sum of money, to be fixed by the judge, sufficient to pay a reasonable compensation for the land when the same should be ascertained. Upon filing the petition, together with affidavits in support of its averments, a summons issued to the parties claiming the land, and the court entered a rule authorizing the relator to take possession, on depositing with the clerk of the court the sum of \$200. This sum was deposited, possession taken, and the construction of the tramway across the track commenced before the return-day named in the summons. A general demurrer to the petition on part of the pre-emption claimant was subsequently filed, which was sustained by the court, and thereupon the rule for possession was vacated and set aside as to the said claimant, exceptions being reserved to the rulings. An appeal from the last-mentioned order was prayed and denied.

*Geo. J. Boal and C. S. Wilson* for petitioners. *A. Heims and T. C. McDevit*, for respondents.

BECK, C. J., (*after stating the facts as above.*) This is a proceeding to review, upon a writ of *certiorari*, an order of the court below vacating and setting aside a rule, previously entered by it, granting to the relator possession of a strip of land pending proceedings instituted for its condemnation, under the eminent domain statute, for the purpose of a tramway. The statute referred to permits the court or judge, at any stage of the proceedings, to enter a rule authorizing the petitioner to take possession and use the premises sought to be condemned on depositing in court a sum of money, to be fixed by the judge, sufficient to pay compensation for the land taken, when the amount thereof shall be ascertained. The proceeding was instituted by a private corporation, and the use for which the land was sought to be appropriated was a private use. The supposed errors complained of are—*First*, that the court, in vacating the rule for possession pending the proceeding for condemnation, exceeded its jurisdiction; *second*, that, in vacating the rule, it greatly abused its discretion.

There is nothing in the first alleged error. The rule granting possession pending the proceedings was discretionary, and might have been denied by the judge. In many cases instituted under this statute it is the duty of the judge to decline to enter such rule. If, therefore, the rule be granted, and the court subsequently ascertains that its discretion was improvidently exercised, an interlocutory order vacating and setting it aside cannot be impeached for want of jurisdiction. As declared by the court in *Templeton v. District Court*, 47 Cal. 70, the authority to set aside the order is as clear as the authority to enter it in the first instance.

In respect to the alleged abuse of discretion, it is a safe proposition that, if the right to condemn the strip of land for the purposes specified in the petition did not exist, the court did not abuse its discretion in rescinding the order granting possession. The right claimed is based upon the fifth section of the act of congress of July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," (U. S. St. at Large 1866, p. 252,) and upon the eleventh section of an act of the legislature of the late territory of Colorado, approved February 13, 1874, entitled "An act concerning mines," (Laws 1874, p. 188.) Neither of the sections mentioned has been repealed, but each has been embodied in subsequent revisions. The former now appears as section 2338, Rev. St. U. S.,

and is as follows: "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent." The other provision constitutes section 2407, Gen. St. Colo., and is in the following words: "All mining claims now located, or which may be hereafter located, shall be subject to the right of way of any ditch or flume for mining purposes, or of any tramway or pack-trail, whether now in use, or which may be hereafter laid out across any such location: provided, always, that such right of way shall not be exercised against any location duly made and recorded, and not abandoned prior to the establishment of the ditch, flume, tramway, or pack-trail, without consent of the owner, except by condemnation, as in case of land taken for public highways. Parol consent to the location of any such easement, accompanied by the completion of the same over the claim, shall be sufficient without writings: and provided, further, that such ditch or flume shall be so constructed that the water from such ditch or flume shall not injure vested rights by flooding or otherwise." It is not contended on part of the relator that the provision of the latter section, relating to tramways, is not in conflict with the state constitution; but it is argued that the foregoing provisions of the act of congress imposed upon the land in question, as a condition of sale, the easement mentioned in the territorial (now state) statute. Says counsel: "He who acquires mineral land from the general government cannot divest the grant of the conditions with which it passes. State constitutions can neither abridge the authority of an act of congress, nor strip it of the limitations and conditions it imposes. Congress is powerful, and may ignore, as it does, state constitutions, and, in broad terms, authorize local legislatures, regardless of the constitutions of the state, 'to provide rules for working mines;' rules 'involving easements' securing the necessary ingress and egress to one mine over another, or other mineral lands, in working such mine." The provision of the act of congress relates both to state and territorial legislatures. The power of congress to govern a territory of the United States is conceded to be supreme. It may authorize the organization of a local government, with authority to enact laws, and it may legislate directly for the government of the territory. *Bank v. County of Yankton*, 101 U. S. 129. But, upon the admission of a territory into the Union as a sovereign state, the right of local self-government passes to the state. The power of legislation thereafter resides in the people of the state, and is absolute and uncontrolled, save as to the enumerated powers reserved to the national government by the federal constitution, and the restraints upon state legislation imposed by that instrument. It is provided by the tenth amendment thereto that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." Other limitations upon the power of the legislative department of a state are to be found in the state constitution. *Cooley*, Const. Lim. 10, 206, and notes. Among the powers pertaining to a state, as an independent sovereignty, and necessary to enable it to perform its public functions, is the authority to make and enforce laws for its government, and for the welfare and protection of its citizens and their property. Subject to exceptions falling within the enumerated powers of the federal government, a state has the exclusive power to regulate its own domestic affairs. This includes the power to control private property within its limits, and to establish rules and regulations for its enjoyment and use. It may impose restraints upon the owners thereof as to the manner of its enjoyment: and in proper cases, and in a constitutional manner, may partially or wholly deprive them of its use, and appropriate it to other uses. *Sedg. St. & Const. Law*, 423-450; *Mills*, Em. Dom. § 9 *et seq.* One of the powers of state sovereignty which may be exercised in the regulation and control of private

property is termed the "right of eminent domain." Concerning this power, Judge Cooley says: "As, under the peculiar American system, the protection and regulation of private rights, privileges, and immunities in general belong to the state governments, and those governments are expected to make provision for the convenience and necessities which are usually provided for their citizens through the exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the government of the nation; and such has been the conclusion of the authorities." Cooley, Const. Lim. 650. Exceptions to the rule, in favor of the exercise of this right within a state by the federal government, are noted by the author, and well stated by Mr. Justice STRONG, in *Kohl v. U. S.*, 91 U. S. 367. They extend to appropriations by the United States of the property of citizens of a state for sites for post-offices, court-houses, forts, arsenals, light-houses, custom-houses, and other public uses. It was also held in *U. S. v. Bridge Co.*, 6 McLean, 517, that, while congress can make all needful rules and regulations relative to the disposition and protection of public lands within the limits of a state, beyond this it can exercise no other acts of sovereignty which it might not exercise over the lands of individuals. That, subject to such proprietary rights, the sovereignty of the state extends to all the territory within its limits, and in the discharge of the ordinary functions of sovereignty, the state may establish easements, as well upon the lands owned by the United States as upon lands owned by individuals.

The foregoing principles, declaratory of the sovereign powers pertaining to the federal and state governments, respectively, do not sustain the broad proposition of counsel that congress may ignore state constitutions; and authorize local legislatures, regardless of state constitutions, to pass laws providing rules for the working of mines, and involving easements upon mineral lands. It is the solemn duty of the courts of a state to enforce the state constitution as the paramount law, whenever an act of the state legislature is found to be clearly in conflict therewith. Assuming that the state constitution is itself a valid instrument, the authority of congress to authorize the state legislature to pass laws upon any subject in conflict therewith cannot be admitted. But congress has not assumed to exercise such a power. The rules and easements intended to be authorized by the fifth section of the congressional act of July 26, 1866, were evidently such as should be enacted in accordance with the fundamental law of the state or territory. Considered with reference to the territories, the section is unobjectionable in any view of the question, since, as we have seen, the power of congress to govern them is absolute; and it may either delegate the powers of government to the local authorities, or legislate directly for the government thereof. As applicable to the state governments, the provision may be regarded as authorizing them to supplement the act of congress with necessary and proper rules and requirements to be observed by citizens who have availed or might avail themselves of the privilege given to explore, occupy, and mine the mineral lands of the public domain, with a view to acquiring title thereto. In so far as the provisions of the act may be regarded as conferring power upon the state legislature to regulate the manner of using and operating mining claims, with a view to the protection of the rights of the several claimants, and to render available their respective locations, by imposing restraints on the mode of operating and using them, including necessary easements over the same, it would seem from the authorities cited that the states already possessed this power. Being comparatively a new question, however, at the date of the passage of the congressional act, this and the other permissive clauses were properly and wisely inserted. The opinion of Mr. Justice FIELD in *Jennison v. Kirk*, 98 U. S. 453-460, upon other portions of this act, shows that the intention of congress by the insertion of provisions of this character was not to grant easements upon mining claims, but to sanction such as might be regularly granted by the local authorities, and in order

that they might be perpetuated as property rights after the title had passed from the government. This precaution prevents any controversy in the future as to the power of either territory or state to impose easements on these lands while they belonged to the United States.

From these principles and considerations we arrive at the conclusion that, unless a state statute imposing an easement upon mining claims is in accord with the state constitution, it cannot be enforced by our courts. The provision of the statute in question (section 2407, Gen. St.) that all mining claims now located, or which may be hereafter located, shall be subject to the right of way for any tramway, whether now in use, or which may hereafter be laid across any such location, to be condemned as in case of land taken for public highways when consent of the owner cannot be obtained, deals with the subject of eminent domain, or the power of the sovereign to take and appropriate private property, on making just compensation therefor. In the exercise of this right the power of the legislative department is limited by the constitution to the taking of private property, without the consent of the owner, for public use, and for the following private uses, viz.: "For private ways of necessity, and \* \* \* for reservoirs, drains, flumes, or ditches \* \* \* for agricultural, mining, milling, domestic, or sanitary purposes." Const. art. 2, §§ 14, 15. The right to condemn and appropriate private property, in the present case, being for a private use, no argument is necessary to show that the taking of private property for the construction of a tramway does not fall within the exceptions specified, to which the legislative power is limited by the constitution. To this extent, therefore, the statute in question is inconsistent with the constitution, and must be held to have been repealed by it. Only the territorial laws in force not inconsistent with it were continued as laws of the state. But this ruling is limited to cases where no right of way for the use here claimed had accrued under the statute prior to the adoption of the constitution. Its validity as a territorial statute is not questioned.

Another statutory provision is cited in the briefs of relator's counsel, in connection with the one just considered, viz.: "Every miner shall have the right of way across any and all claims for the purpose of hauling quartz from his claim." Gen. St. § 2394. While the validity of the latter section is not involved in the present case, it was argued that the logical result of denying the right to condemn and appropriate private property for the tramway was to prevent the great majority of miners from marketing their ores, since they could not get them to market without trespassing on the claims of their neighbors. The argument is based on the assumption that, if the right of way across mining locations cannot be appropriated for private tramways for transporting ores, no right of way for hauling ores from the mines in any manner exists under the laws. No such result necessarily or logically follows. The constitution recognizes the right to appropriate private property for private ways of necessity, but not for the construction upon and over it of private railroads.

The writ must be dismissed, and it is so ordered.

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(11 Colo. 138)

PEOPLE *ex rel.* WILLIAMS *v.* REID.

(Supreme Court of Colorado. March 9, 1888.)

**1. OFFICE AND OFFICERS—TENURE OF OFFICE—QUALIFICATION OF SUCCESSOR.**

An appointment of a county treasurer by county commissioners by the aid of a vote of one of the commissioners, after his term of office had expired, but before his successor had qualified, is valid under Const. Colo. art. 12, § 1, providing that office holders shall exercise the duties of their office until their successors are duly qualified.

2. SAME—FILLING VACANCIES—POWER OF RESCISSION.

Where a vacancy in the office of county treasurer has been filled by the county commissioners, and the appointee has filed his bond duly approved, taken the oath of office, and assumed his duties, the vacancy cannot be re-created by a resolution of the commissioners attempting to rescind their action.

3. QUO WARRANTO—PROCEDURE—SUFFICIENCY OF PLEA.

In original proceedings, in the nature of *quo warranto*, in the supreme court, the plea of respondent denying "generally and specifically each and every allegation" contained therein, except such as by the plea are specifically admitted, being a substantial traverse of the matters not admitted, is sufficient.

Original proceeding in the nature of *quo warranto*.

The legislature, in 1877, adopted a law changing the beginning of the term of office of county treasurers in the state from the second Tuesday in January to the second Tuesday in July. The supreme court held, in response to a legislative question on the subject, that this act operated to create a vacancy in the office between the dates mentioned, upon the expiration of the terms of the present incumbents; which vacancy the county commissioners were authorized to fill. 9 Colo. 631. The term of office of respondent Reid expired on the 9th of January of the present year. He had, however, at the preceding election been re-elected to the same position. On the same day the term of office of May, one of the county commissioners, also expired, and Ordway was duly elected to succeed him. May, whose regular term of office expired at midnight preceding, met with the other two commissioners on the morning of January 10th, it being an adjourned meeting, and the board proceeded as usual to transact business. Among the matters considered and acted upon was the vacancy in the office of county treasurer. This vacancy was filled by a vote of two to one, the ballot of May and one of the other commissioners being cast for Reid. Reid thereupon filed his bond, which was approved, took the oath of office, and proceeded to discharge his official duties. At the afternoon session of the board, May retired, and Ordway, the new commissioner, took his place. Among the proceedings during this meeting were a resolution rescinding the action taken in the forenoon with reference to the treasurer, and appointing relator, Williams, to the office. Williams received two votes, while one was cast against him. He entered into bond, which was approved, and filed his oath of office as required by law. Respondent, Reid, refused to turn over the custody of the books, funds, and other property belonging to the treasurer when demand was made therefor by Williams. Thereupon this proceeding was instituted by the attorney general, at the relation of Williams, to test the respective rights of Williams and Reid to the office in question.

*Samuel P. Rose and Alvin Marsh, Atty. Gen., for complainant. Markham & Dillon, for respondent.*

HELM, J., (after stating the facts as above.) This cause is now submitted for consideration upon the following pleadings, to-wit, the information, plea, and a general demurrer challenging the sufficiency of the plea. The jurisdiction invoked is original, not appellate. It has been held that original proceedings in this court, by information in the nature of *quo warranto*, take place under the constitution, not under the Code chapter relating to the usurpation of offices or franchises. Also that the changes made by this chapter of the Code "in the form of remedies and in the practice, affect the district courts, not the supreme court." *People v. Curley*, 5 Colo. 417. Therefore the sufficiency of the pleadings before us must be tried under the common-law rules of practice, as well as the common-law principle, applicable to such proceedings. The plea of respondent denies "generally and specifically each and every allegation" contained in the information, except such as by the plea are specifically admitted. This denial is not in technical common-law language, but it constitutes a substantial traverse of the matters not ad-

mitted. Hence, at the present time, we cannot accept as an admitted fact the declaration of the information that Ordway filed his bond, took the oath of office, and duly qualified as county commissioner, prior to the afternoon of January 10th, when he first appeared and acted with the board.

Under the constitution, § 1, art. 12, May, as the outgoing incumbent, was clearly authorized to exercise the duties of his office until his successor had duly qualified. Therefore, at the meeting of the commissioners on the forenoon of January 10th, Ordway not having qualified, May was still clothed by law with power to discharge the duties of county commissioner. He was the *de jure* as well as *de facto* incumbent of the office, and his official acts were undoubtedly valid. These conclusions determine this controversy at the present stage of the pleadings. When the board met on the afternoon of January 10th, respondent had been selected by a vote of two to one to fill the existing vacancy in the office of county treasurer. He had filed his bond, duly approved, taken the oath of office, and was proceeding in the discharge of his official duties. There was therefore at the time of relator's alleged election no vacancy for the commissioners to fill. Their resolution attempting to rescind the proceedings of the morning session cannot be held to have re-created the vacancy.

The demurrer must be overruled.

(38 Kan. 436)

**BROWN v. BOARD OF CO. COM'RS OF RUSH CO. *et al.***

(*Supreme Court of Kansas. February 18, 1888.*)

**1. ELECTIONS—RETURNS—CANVASSING BOARD—AUTHORITY.**

Where election returns are regular in form, and genuine, a canvassing board has no authority to determine whether illegal votes have been received and included in said returns.

**2. SAME—EXCLUSION OF VOTES.**

Where, upon such investigation and determination, certain votes are excluded from such returns and canvass by said canvassing board, *held*, such exclusion erroneous, and such canvassing board may be compelled, by *mandamus* to reconvene and recanvass such returns.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Original proceeding in *mandamus*.

On the 27th day of December, 1887, an alternative writ of *mandamus* was issued out of this court upon a verified petition filed therefor on behalf of H. L. Brown, and directed to the board of county commissioners of Rush county, and J. R. Stock, A. C. Lippert, and J. E. Ruhl, members of said board, and L. K. Hain, county clerk of Rush county, commanding them to meet on the 31st day of December, 1887, at the office of the county clerk of Rush county, Kan., as a board of canvassers, and then and there to canvass the returns of an election held on the 8th day of November, 1887, in said Rush county, and to canvass the returns from the First commissioner district, and declare therefrom that H. L. Brown received 308 votes for county commissioner in said First commissioner district, in said Rush county, and that R. C. Jeffries received 303 votes for commissioner in said First commissioner district, and to declare that H. L. Brown received a majority of all the votes cast at said election in said First commissioner district in said county for county commissioner, and to duly issue to said H. L. Brown a certificate of election therefor. The petition alleged and charged that the First commissioner district of said county was composed of the townships of Center, La Crosse, Fairview, and Big Timber, and that at said election for county commissioner in said district plaintiff received in Center township 238 votes; in La Crosse township, 16 votes; in Fairview township, 37 votes; in Big Timber township, 17 votes; total 308 votes; that R. C. Jeffries for the office of county commissioner in said First commissioner district, received in Center township, no votes; in La Crosse township, 210 votes; in Fairview township, 40 votes; in

Big Timber township, 53 votes; making a total of 308 votes; and the election returns from said townships were duly made to the county clerk of said county. Plaintiff further alleged that on the 11th day of November said defendants met as a canvassing board, and proceeded to canvass the returns from said election, and said board threw out and refused to count 17 votes from Center township. And did determine that plaintiff received only 221 votes from said township, instead of 238, as shown by said returns, and that said board determined and declared that said Jeffries had received a majority of all the votes cast in said First commissioner district, and issued a certificate of election to him. On the 5th day of January, 1888, the defendants appeared and filed their motion to quash the alternative writ, and thereupon the attorneys for the plaintiff and defendants entered into the following stipulation: "It is now here stipulated and agreed that the motion to quash the alternative writ be passed for hearing until the February sitting of this court; that this cause be advanced for hearing at that sitting; that if said motion to quash is overruled, the answer of the defendants to be filed *instantly*, without delay, to the hearing thereon at that time." And thereupon said cause was continued until the February sitting of the court. On the 10th day of February the parties appeared, and the defendants, by leave of court, withdrew their motion to quash, and filed their answer. In their answer, among other things, they admitted all the allegations of the plaintiff's petition, but alleged that on the 11th day of November, as a canvassing board, they found and determined that at said election in said First commissioner district, in Center township, there had been 17 illegal votes cast, and that said votes were counted and returned in said returns from said township in favor of H. L. Brown for county commissioner of said First district; and that thereupon, and in the presence of said Brown, and by his consent, said votes were rejected, thrown out and not counted; and that the returns from the township were counted 221, instead of 238, as shown by the face of said returns. On the part of the plaintiff the certified returns from the said townships composing the First commissioner district of said county were offered in evidence. No evidence was offered on behalf of the defendants.

*Edwin A. Austin*, for plaintiff. *J. W. Ady, D. Rathbone, and Hargrave & McCormick*, for defendants.

CLOGSTON, C. (*after stating the facts as above.*) This is an action to compel the defendants by *mandamus* to convene as a board of canvassers, and to canvass the votes cast and returned from the First commissioner district in Rush county for the office of commissioner for said district. The only question raised is, did the board of county commissioners and county clerk, when convened as a canvassing board, have the right to determine and pass upon the question whether illegal votes had been cast and returned in said district for the office of county commissioner? It is admitted by the defendants that the returns from the townships in said district were regular in form, and genuine, and that upon the face of the returns it is shown that the plaintiff received 308 votes for county commissioner in said district, and that said 308 votes were a majority of all the votes cast in said district for commissioner. But they claim that they had the right, and that it was their duty, to throw out all votes illegally cast at said election, and that, in pursuance of such right, they threw out 17 votes returned from Center township, which, when so thrown out, left a majority for Jeffries, the opposing candidate to the plaintiff, and that if said votes had not been thrown out, plaintiff would have been entitled to a certificate. It was held, in *State v. Stevens*, 23 Kan. 456, that this court would not compel the canvassing board of a county to canvass the returns where it was shown that the returns were so grossly and manifestly untrue as to be of no value in ascertaining the will of the people. But that is not claimed in this case. Here it is shown that the returns were genuine; but

it is claimed that they included some illegal votes, and the board found the number to be 17, and refused to count them in the returns of the township. This, we think, the board had no authority to do. Where it is once determined that the returns are genuine, the board has no further right to investigate and declare which of the votes are illegal and fraudulent. They must count the votes as they find them. Their duties are simply ministerial; to declare the result from the returns so made. This question has been passed upon so often by this court that it is hardly necessary to say more. In *Lewis v. Commissioners*, 16 Kan. 102, it was said: "It is a common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election, it is apt to imagine that it is its duty to inquire into these alleged frauds, and decide upon the legality of the votes. But this is a mistake. Its duty is 'almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal.'" Also, see *State v. Stevens*, 23 Kan. 456; *State v. Commissioners*, Id. 268; *Hagerty v. Arnold*, 13 Kan. 367. From these authorities it will be seen that a board of canvassers has no such authority as is claimed by the defendants. To hold otherwise would be to transform such canvassing board into a tribunal, not only to canvass such returns, but to determine all contests arising therefrom. It is evident that the defendants have exceeded their authority, and have offered no excuse for so doing. It is therefore recommended that the peremptory writ of *mandamus* be awarded as prayed for; that the defendants be commanded to meet and canvass the vote for said commissioner district upon the face of said returns, and to determine that H. L. Brown has been duly elected county commissioner of said First district; and that said board issue a certificate of election to him therefor.

PER CURIAM. It is so ordered, all the justices concurring.

(39 Kan. 63)

WELD v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. March 10, 1888.)

1. RAILROAD COMPANIES—INJURIES TO EMPLOYE—DUTY OF ENGINEER—EVIDENCE.

In an action against a railway company to recover damages for injuries caused by the negligence of a co-employee, in which action it is alleged in the petition that it was the duty of the engineer in charge of a switch-engine to stop it, and the plaintiff, the injured party, swears on the trial that the engineer did stop the engine, it is not error for the trial court to exclude the evidence of experts that it was the duty of the engineer to stop the engine under such circumstances.

2. SAME—UNSAFE BRIDGE—KNOWLEDGE OF PLAINTIFF.

It is not error in the trial court, in such a case, to exclude evidence about the unsafe condition of the bridge upon which the plaintiff was injured, when the bridge had remained in the same condition for two years prior to the injury, and the plaintiff had crossed it nearly every day during that time, and knew its condition, and had, the day before the injury occurred, told the engineer in charge of the engine on which he was employed that it was unsafe, and that he would get off the engine at the west end of it thereafter, and would not get off the engine on the bridge any more.

3. SAME—REPAIR OF BRIDGE SUBSEQUENT TO INJURY.

It is not error, under the facts of this case, for the trial court to refuse to allow the plaintiff to prove that some time in the winter after the injury occurred the railway company planked the bridge, and made some other repairs to it.

(Syllabus by Stimpson, C.)

Commissioners' decision. Error to district court, Atchison county; DAVID MARTIN, Judge.

John T. Weld, aged about 31 years, a strong, healthy man, was, on the 31st day of October, A. D. 1880, and for some time prior thereto, in the em-



ploy of the Missouri Pacific Railway Company, as switchman or yardman in the yards of the company at the city of Atchison. His duty was to attend the yard-engine in switching and making up the express trains of the defendant railway company, that usually left the city of Atchison for the city of St. Louis daily, about the hour of three and a half o'clock, P. M. He alleges he was injured by the carelessness of a co-employee. The petition alleges the injury in the following words: "That in the doing of such work it was then, and for a long time prior thereto had been, his duty to go upon the yard-engine to the 'Y' or switch, where the railroad track, operated by the defendant, which is south of Utah avenue in said city of Atchison, connects with the railroad track operated and used by the defendant, running west of Third street in said city, and at a point where such last-named track passes over a bridge which spans White Clay creek, between Third and Fourth streets in said city; and in the performance of such work it was the duty of such person or persons operating such engine to stop the same at or near the west end of such bridge, and to there hold the said engine until plaintiff could cross over said bridge, and change or regulate the switch at such 'Y' before mentioned; and that on the 31st day of October, 1880, and while in the discharge of his duty, and under the instructions and directions therefor given to the plaintiff by the servants and agents of the defendant, this plaintiff stepped one foot off from the foot-board of said yard-engine, when and where the same was then stopped, for the purpose of crossing over a portion of said bridge and changing said switch, when the servant and agent of said defendant then in charge of and operating said engine, and before plaintiff had fully alighted, or had time to alight, therefrom, and without any signal or notice of the starting of such locomotive, negligently and carelessly started such engine, and this plaintiff, in stepping down from the engine, stepped upon said bridge, and by reason of the careless and negligent construction of such bridge, the plaintiff's foot was caught therein, and the plaintiff was then and there, without any fault or negligence on his part, thrown from such engine and upon such railroad track and under the tender of such engine, and greatly injured, crushed, and bruised, his ribs being broken, and his spine greatly injured, whereby the plaintiff became sick, lame," etc. The defendant, in its answer, alleged: (1) A general denial; (2) contributory negligence on the part of the plaintiff. Plaintiff, for reply, filed a general denial.

W. D. Webb and H. M. Jackson, for plaintiff in error. Everest & Waggener, for defendant in error.

SIMPSON, C., (*after stating the facts as above.*) The plaintiff in error was injured by one of the railroad company's locomotive tenders backing partly over him, on the 31st of October, 1880, at the city of Atchison, while he was in the discharge of his duty as a yard switchman. Shortly before the injury occurred he had stepped upon the foot-board of the tender, with the knowledge of the engineer in charge of the engine and tender that he was there, to be carried thereon to change a switch east of a bridge they were approaching. The engineer knew that Weld would have to get off the foot-board, and go to the switch on the opposite side of the bridge to change it. The engine, as it approached the bridge, was facing west, but backing to the east. Weld was on the foot-board of the engine, at the east end of the tender. On the day preceding the injury Weld told the engineer in charge of the engine on the day and at the time of the injury that the bridge was not safe, and that in the future, he (Weld) would not get off the engine on the bridge, but, when it became necessary, would get off at the west end of the bridge. Just before the injury occurred, and as the engine approached the west end of the bridge, the engineer checked the speed of the engine, so that when it approached near the west end of the bridge, it was moving at a slow rate of speed, not exceeding about two miles an hour. The engineer had reasons to

believe that Weld would step off the engine at the west end of the bridge, and not go on said bridge again until he had thrown the switch. He could have stepped off the engine near the west end of the bridge with perfect safety, and thus avoided any danger or risk from the bridge. After the engine had gone on the bridge, and had moved some feet thereon, and while it was still moving slowly, Weld stepped off the foot-board; his foot caught in the bridge,—his heel striking one of the ties. He stumbled, and fell under the tender. The bridge was not planked or covered in any manner. The ties upon which the track rested were about four inches apart. He had known for a long time previous to the injury the condition of the bridge. The trucks of the engine came in contact with him, the engine moving from two to five feet after he fell, turned him over, and doubled him up, and the foot-board, and possibly the rear trucks of the tender, passed over him. He suffered great pain in the head, shoulders, hips, and body. He did not sustain any permanent injury. The engineer did not know or have any reason to believe that Weld was in danger. When he did ascertain that Weld was off the engine, and was thrown on the bridge, he did everything in his power to avoid the injury. Weld was not thrown from said engine in any manner, and the servants and agents of the railroad company in charge of and operating said engine were not guilty of any culpable negligence which caused the injury complained of. The failure of Weld to exercise reasonable and ordinary care contributed to his injury. These are the facts as found by the jury in answer to particular questions. There was a general verdict for the railroad company.

Two causes for reversal are strongly urged here, and some others are suggested. The first is the exclusion of the answers to certain questions propounded to the witnesses Frank Chase, W. J. Hulse, and C. A. Day,—the first being by deposition; the other two were upon the witness stand. These questions are similar in language and import, and are each directed to the duty of a switch-engineer, as to stopping or not stopping the engine under such circumstances as occurred at the time of the injury to the plaintiff in error. The witnesses were all skilled engineers of large experience, and were competent to testify as experts, if that class of evidence was admissible. Objections were sustained to the questions; and the answer of Chase, as embodied in the deposition, was not permitted to be read to the jury. It is urgently insisted that this was error. The petition charges the negligence of a co-employee, in a very general way. There was no motion to make it more definite and certain; neither was the petition demurred to. If there was a particular act of negligence charged, it was that the engineer, while the plaintiff in error was in the act of stepping off the engine, without any signal or notice, negligently and carelessly started the engine, and the plaintiff in error, by reason of the careless and negligent construction of the bridge, caught his foot therein, was thrown from such engine and upon said track, and under the tender, and injured. He alleges that the engine was stopped both directly and impliedly; and in his own testimony he states that the engine had stopped, but before he had fully alighted it started again. With this allegation in the petition, and this evidence of the plaintiff in error, both, that it was the duty of the engineer to stop, and that he did stop, we fail to see how the exclusion of such expert evidence, showing that it was the duty of the switch engineer to stop before reaching the switch to allow the switchman to get off, becomes material, or its rejection can be regarded as material error.

The second is that the court below excluded evidence tending to show the unsafe condition of the bridge, by reason of its careless and negligent construction; and parts of the depositions of the witnesses Digan and Stein,—who were probably both skilled men,—bearing on that question, were ruled out. The plaintiff in error had stated to the engineer in charge of the switch-engine the day before the injury occurred that it was not safe. He had known the condition of the bridge for months before the injury complained of oc-

curred. He continued work with that knowledge, and, so far as the record shows, without protest to any one having authority in such matters. If he continued in the employment of the company with knowledge that the bridge was unsafe, and was injured thereby, he was guilty of culpable contributory negligence. *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. Rep. 582. He alleges that the bridge was constructed in a careless, negligent, and unskillful manner. With that knowledge, he had been engaged in a duty that caused him to cross the bridge every day for about two years. Only the day before he was injured, he had stated to the engineer that it was unsafe, and that he would not get off the engine on the bridge any more. The next day he does so, and is injured. Under these circumstances, it is not prejudicial error to exclude evidence tending to show the unsafe condition of the bridge. If it had been admitted it would not have relieved him of contributory negligence.

Another complaint is that the trial court ruled out the evidence offered to prove that the railway company made a change in the bridge, by planking it over; this being done in the winter after the injury occurred October 31st. The evidence was properly rejected, because, as the plaintiff knew the condition of the bridge at the time of the injury, and had known it for a long time previous thereto, and with that knowledge, and without protest, continued the employment, such additional evidence could not have resulted to his benefit. It was immaterial what change, repair, or alteration was made to the bridge after the injury. We do not regard the other objections as being well founded. The jury found specially every material fact against the plaintiff in error. Their verdict was amply justified by the evidence. The trial court refused a new trial, and any errors that may be found in the record are not of the weighty character that would justify a reversal. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 679)

WESTERN UNION TEL. CO. v. CRALL.

(*Supreme Court of Kansas. March 10, 1888.*)

1. TELEGRAPH COMPANIES—STIPULATION AGAINST LIABILITY FOR NEGLIGENCE.

A telegraph company cannot, by special contract, stipulate for immunity from liability for errors and mistakes in transmitting and delivering messages, when the errors and mistakes result from its own gross negligence; such a stipulation, being against public policy, would be void.<sup>1</sup>

2. SAME—MISTAKE IN TRANSMITTING MESSAGE—NEGLIGENCE—BURDEN OF PROOF.

Where, in an action against the company for damages resulting from an inaccurate transmission of a short message, it appears, from the comparison of the message delivered with the one sent, there were two mistakes, besides error in the name of the sender, the burden of proof is on the company to show that the mistakes were not the result of its own gross negligence.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Atchison county; DAVID MARTIN, Judge.

*Waggener, Martin & Orr*, for plaintiff in error. *Tomlinson & Eaton*, for defendant in error.

HOLT, C. On September 19, 1883, Jesse C. Crall, the defendant in error, by his son and agent, Graham Crall, delivered to the defendant company, at Atchison, Kan., the following message, leaving out printed matter, etc.: "To J. B. Smith, Esq., Eureka, Kansas: Ship Bones, sulky, and trap to Valley Falls, immediately. GRAHAM CRALL." The message received by Smith on the same day at Eureka, omitting printed matter, etc., was as fol-

<sup>1</sup>See note at end of case.

lows: "*To J. B. Smith: Ship Beons, sulky, and traps to Neosha Falls, immediately. GRAHAM CROLEY.*" "Bones" was the name of a trotting horse owned by Crall, and at that time in charge of Smith at Eureka. He immediately shipped the horse, sulky, and traps to Neosha Falls, where they remained several weeks before Crall ascertained where they were. Smith, being only temporarily in charge of the horse, left Eureka, and Crall had no communication from him, nor did he know his whereabouts until after the horse was found at Neosha Falls, although he made diligent inquiry for him. Trial was had at the January term, 1886, in the Atchison district court, and, a jury being waived, the court specially found that the message in the dispatch was very plainly written, in a large round hand, so that no word in it could have been mistaken for any other word, if examined even with the slightest care; that the weather was fair and pleasant on and during all of the day on which the said dispatch was sent, both at Atchison and Eureka, and that there was no evidence of any electrical disturbance at any place on the line between said points. The seventh finding of fact is as follows: "There is no similarity in the telegraphic symbols or characters, nor in the sound made by the instrument in forming said symbols or characters, between the words, "Valley" and "Neosha," and, there being no electrical disturbance, the three mistakes in the transmission of said message were the result of the gross negligence of the defendant's operators, or the gross negligence of the defendant in keeping instruments and appliances that were out of order, and not in proper condition for use." Crall brought his action against the telegraph company for the expense of keeping the horse, loss of its use, etc. Judgment was rendered for the plaintiff for \$136.10, and costs. The defendant company brings the case here for review. For a defense the defendant relied upon the contract printed above the message sent by Graham Crall. It is as follows:

"THE WESTERN UNION TELEGRAPH COMPANY.

"All messages by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes, or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the costs of such delivery. The company will not be liable for damages in any case where the claim is not presented, in writing, within sixty days after sending the message."

Immediately above the dispatch, in print, was: "Send the following message, subject to the above terms, which are hereby agreed to."

The defense the telegraph company interposed will require an examination of the legal effect of this contract to determine the liability, if any, of the defendant to the plaintiff. In the first place, it is well enough to consider the circumstances under which such contracts are usually made. The demand for haste and dispatch, upon which the business of telegraphy is based, virtually compel the sender of a message to accept the terms offered; often he has not choice in the selection of the company to do the work required; and then, a single message is of comparatively little interest to the company,—simply the remuneration for sending it,—while it may be of great importance to the sender. He would probably have his right of action against the company to compel it to make a reasonable contract with him, for, to a certain extent, telegraph companies are *quasi* public servants, and owe the public certain duties, as they can exercise the right of eminent domain, and receive franchises. But he does not wish to be forced to compel it to make a fair and reasonable contract; his object is to have his message sent promptly, and he would therefore accept hard conditions at the hands of the company, rather than delay his business, and seek redress in the courts. Under such circumstances the parties are not dealing on an equal footing. When the company has such an advantage, in consequence of the nature of its employment, it can easily dictate terms. It should not, however, be sustained in treating its patrons unfairly and unequitably, and supported in unconscionable contracts made under such circumstances. *Telegraph Co. v. Graham*, 1 Colo. 230; *Tyler v. Telegraph Co.*, 60 Ill. 421; Gray, Tel. § 48.

Was the contract itself a valid one? It is not claimed by the defendant in error that the telegraph company are insurers of a message sent, nor that they cannot make reasonable regulations for carrying on their own business, but it is urged that a telegraph company cannot by contract exempt itself from all liability that may arise by reason of its own negligence in providing suitable instruments, or from negligence of its operators and servants. He cites a long list of authorities that apparently support this contention. However, in disposing of this matter it is not necessary to pass upon the question urged; for, in this case, it is found by the court that the defendant company was guilty of gross negligence. The provision in the contract that the company will not be held liable for unrepeatd messages, happening by negligence of its servants, beyond the amount received for the sending of the same, is not valid to relieve it from liability against its own gross negligence. It is the duty of the telegraph company, when it receives a message, and the money therefor, from the sender, to exercise care and diligence in transmitting it promptly and accurately. No contract should be sustained by the courts which would excuse it from gross negligence or willful misconduct in performing a service undertaken for another for hire. The current of authorities to sustain this principle is unbroken. The interests are many and varied, depending upon the proper performance by it of the work it assumes, and it is against public policy that it should be allowed to stipulate for exemption from the exercise of care and diligence in this duty, which it has voluntarily taken upon itself. This rule does not make the telegraph company an insurer, but it does prevent it from evading its liabilities for its errors arising from gross negligence. *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Telegraph Co. v. Tyler*, 74 Ill. 168; *Sweatland v. Telegraph Co.*, 27 Iowa, 433; *Bartlett v. Telegraph Co.*, 67 Me. 460; *Telegraph Co. v. Graham*, 1 Colo. 230; *Candee v. Telegraph Co.*, 34 Wis. 471; *Ellis v. Telegraph Co.*, 95 Mass. 226; *Ayer v. Telegraph Co.*, 79 Me. 493, 10 Atl. Rep. 495.

Was the telegraph company guilty of gross negligence? It is so found by the court below, and we think the findings are abundantly supported by the evidence in the case. In a message containing nine words, besides the ad-

dress and signature of the sender, there were three mistakes. It was sent over defendant's own line, on a fair day, in which there were no electrical or atmospherical disturbances; and the court especially finds there was no similarity in the sounds, symbols, and characters used in telegraphy for the words, "Valley" and "Neosha." There is no good reason, in the absence of atmospherical or electrical disturbances, why the message should not have been transmitted exactly as it was received. The art of telegraphy has been reduced to comparative exactness and certainty, and it is only by the gross carelessness of the operator, or the culpable imperfections of the instruments and appliances of the company, that such a mistake could have been made in transmitting the message so short a distance upon a calm, fair day. There is no testimony introduced in this case by the defendant company, and we presume the mere production of the mutilated message would have been sufficient to establish gross carelessness of the defendant. It would have thrown the burden of proof upon the defendant to excuse or explain its mistakes. *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Rittenhouse v. Telegraph Co.*, 44 N. Y. 263; *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Telegraph Co. v. Carew*, 15 Mich. 525; *Telegraph Co. v. Meek*, 49 Ind. 53; *Turner v. Telegraph Co.*, 41 Iowa, 458; the plaintiff did prove in addition that the weather was favorable for the use of defendant's wires and instruments. We believe that the findings of the court are sustained by ample testimony, showing gross negligence on the part of the company, and that the contract, urged as a defense by the defendant, is of no legal force whatever, when it is attempted thereby to relieve the company of its gross negligence.

We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### NOTE.

**TELEGRAPH COMPANIES—LIMITATION OF LIABILITY.** Where telegraph companies are not charged with all the duties and responsibilities of common carriers, they cannot contract for a restriction of liability for damages occasioned by the culpable negligence or gross carelessness or willful misconduct of their employees. *White v. Telegraph Co.*, 14 Fed. Rep. 710. A stipulation limiting the liability of a company for any mistake or delay in the transmission or delivery of a message, unless the message is repeated at an additional expense, is held to be valid to exempt the company from liability beyond the amount named, for any cause except gross negligence or willful misconduct. *Hart v. Telegraph Co.*, (Cal.) 6 Pac. Rep. 637; *Becker v. Telegraph Co.*, (Neb.) 7 N. W. Rep. 368; *Jones v. Telegraph Co.*, 13 Fed. Rep. 717. See, also, *Akin v. Telegraph Co.*, (Iowa,) 28 N. W. Rep. 419. In an action for damages for the negligent transmission of a telegraph message, the evidence showed that plaintiff, suspecting an error in the message, went at once to the operator, and requested him to ask the sender whether it was "five six" or "five sixty," and that the operator said, "I have asked him." *Held*, that this amounted to a request by plaintiff to have the message repeated, and it was immaterial that the forms established by defendant for the repetition of messages were not complied with. *Telegraph Co. v. Landis*, (Pa.) 12 Atl. Rep. 467. Under such a contract, the exemption from liability is confined to such mistakes as are incident to the service, and which may occur where the employees of the company are culpable in only a slight degree. *Pegram v. Telegraph Co.*, (N. C.) 2 S. E. Rep. 256. The stipulation does not relieve the company from the duty of exercising ordinary care and diligence. *Marr v. Telegraph Co.*, (Tenn.) 3 S. W. Rep. 496; *Thompson v. Telegraph Co.*, (Wis.) 25 N. W. Rep. 789. See, also, *Telegraph Co. v. Richman*, (Pa.) 8 Atl. Rep. 171. When an agent of a telegraph company has been guilty of negligence and misconduct in not delivering a message, the company will not be exonerated from liability for the consequence of non-delivery by any terms which may be annexed to the message. *Stiles v. Telegraph Co.*, (Ariz.) 15 Pac. Rep. 712. A stipulation limiting the liability of the company for the negligence of itself or its servants, in case of a mistake or omission in transmitting the message, unless repeated at the expense of the sender, is void as against public policy. *Ayer v. Telegraph Co.*, (Me.) 10 Atl. Rep. 495. A telegraph company may make reasonable stipulations as to the time within which claims for damages shall be presented, failing to observe which, an action against the company cannot be maintained. *Heiman v. Telegraph Co.*, (Wis.) 16 N. W. Rep. 32; *Cole v. Telegraph Co.*, (Minn.) 22 N. W. Rep. 385. But a stipulation that the company would not be liable for damages for errors or delays, unless the claim for the same was presented within 30 days, is unreasonable and void. *Johnston v. Telegraph Co.*, 38 Fed. Rep. 363.

(38 Kan. 685)

## WESTERN UNION TEL. CO. v. HOWELL.

(Supreme Court of Kansas. March 10, 1888.)

## TELEGRAPH COMPANIES—NEGLECTENCE IN TRANSMITTING MESSAGE—EVIDENCE.

When a message is delivered to a telegraph company for transmission, very plainly written, and could not be mistaken by any person possessing ordinary eye-sight who would examine it with ordinary care, and there is a mistake in the transmission, and a mistake is feared by the person who received it, and, at his request, the agent at the place where it is received inquires at two relay stations if the message is correctly sent, and is assured from both stations that it is, and there is no explanatory or exculpatory evidence offered on behalf of the telegraph company, a finding of the trial court that the company is guilty of gross negligence is supported by sufficient evidence.<sup>1</sup>

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Atchison county; DAVID MARTIN, Judge.

This action was brought by George W. Howell to recover from the Western Union Telegraph Company damages for negligently and carelessly making a mistake in the transmission of a telegraphic message sent by Howell from Omaha, Neb., to Downs, Kan. The petition is as follows:

"The plaintiff, George W. Howell, for cause of action against said defendant, avers that said defendant is now, and for more than one year last past has been, a corporation duly organized, created, and existing according to law, and running and operating a line of telegraph wires between Omaha, Nebraska, and Downs, Kansas, through Atchison, Atchison county, Kansas, and Kansas City, Jackson county, Missouri, for the purpose of transmitting communications. That for several years last past this plaintiff has been engaged in the lumber business at Downs, Kansas; which said town of Downs is about 30 miles from the town of Salem, in Jewell county, Kansas, and about 85 or 90 miles from Salina county, Kansas. That this plaintiff's place of residence is at Downs, Kansas, where, at the time of the grievances hereinafter complained of, he kept a team of horses for his own use as driving-horses; said horses being of great value, to-wit, of the sum of \$800.00. That on the 8th day of April, 1885, and for several days prior thereto, this plaintiff was in the city of Omaha, Nebraska, on business, and desiring to reach his home at Downs, Kansas, as soon as possible, he sent a telegraphic message over the defendant's line from Omaha, Nebraska, to Downs, Kansas, writing out said message and depositing the same at defendant's regular office in the city of Omaha, and prepaying the charges thereon; a copy of which said message is hereto attached, Exhibit A, and made a part hereof. That it was the desire of the plaintiff to have his employees and servants in charge of his said team at Downs, Kansas, to bring the same with a carriage, and meet the plaintiff at Salem, Kansas, and convey him from thence to his home at Downs. That, instead of sending said message as written by plaintiff, the said defendant substituted the word 'Salina' for 'Salem' in said message, and delivered the same to the manager of Howell Bros.' business at Downs, Kansas, in the language and form as stated in Exhibit B, hereto attached, which is made a part hereof, the same being the original message delivered. That said message was transmitted by said company through Kansas City and Atchison to the manager of said Howell Bros.' business at Downs, Kansas. Upon the receipt of said Exhibit B, supposing there was some mistake therein, said manager requested defendant's operator at Downs, Kansas, to repeat said message; which he did, inquiring of the Kansas City and Atchison offices as to the correctness of the same, and said Atchison and Kansas City offices re-

<sup>1</sup>Respecting stipulations limiting the liability of a telegraph company, see *Telegraph Co. v. Crall*, (Kan.) ante, 309, and note.

ported that the language used in the message as contained in Exhibit B was correct. That said repeated and relay copies of said message are hereto attached, made a part hereof, and marked 'Exhibits C' and 'D,' respectively. That, by reason of the failure of said defendant to transmit said message in the language in which it was written and deposited by the plaintiff, the agent and servant of the plaintiff drove this plaintiff's horses from Downs to Salina, —a distance of about 85 or 90 miles,—at great speed, in order to arrive there on the 9th day of April by noon, and by reason of the long drive given said horses, the same were greatly abused, injured, and damaged, and this plaintiff was compelled to pay hotel and driver's bills for five days, at an expense of \$20; and that when this plaintiff arrived at Salem, expecting to meet his team, he was compelled to hire a team to convey him from Salem to Downs, at an expense of \$10; and that he paid out for telegraphing, growing out of said mistake of the defendants, and to recall his team sent to Salina, the sum of \$5.00; and that his horses, by reason of the hard and fast drive made from Downs to Salina, were injured and damaged in the sum of \$120.00; and that the plaintiff was compelled to pay out for the use of the carriage the sum of \$10.00. That a true and correct bill of the items of the damage resulting to said plaintiff by said wrongful acts of the defendant is hereto attached, marked 'Exhibit E,' and made a part hereof. That the failure to transmit said message, as originally written by plaintiff, was caused by the negligence and carelessness of defendant, and its agents, servants, and employes, and that said plaintiff presented this, his said claim, in writing to said defendant, and demanded payment thereof within 60 days after the sending of said message, as contained in Exhibit A. Wherefore plaintiff prays judgment against said defendant for \$200, and for costs of this suit."

## EXHIBIT A.

"April 8, 1885. To *Howell Bros., Downs, Kansas*: Have my team and a double carriage in Salem by Thursday noon. GEORGE W. HOWELL."

## EXHIBIT B.

"Received at 4:06 P. M., April 8, 1885. Dated Omaha, Nebraska. To *Howell Bros., City*: Have my team and a double carriage in Salina by Thursday noon. GEO. W. HOWELL."

## EXHIBIT C.

"From Kansas City. Relay copy. Duplicate. Received at 5:33. April 8, 1885. Dated Omaha, Nebraska. To *Howell Bros.*: Have my team and a double carriage in Salina by Thursday noon. GEO. W. HOWELL."

## EXHIBIT D.

"Received at 8:30 P. M. Duplicate. Dated Omaha, Nebraska. April 8, 1885. To *Howell Bros., Downs*: Have my team and a double carriage in Salina by Thursday noon. GEO. W. HOWELL."

## EXHIBIT E.

"DOWNS, KANSAS, 5-2-85.

"The Western Union Telegraph Company to George W. Howell, Dr.

Hotel and feed bills, (5 days,) - - - - -	\$ 20 00
Use of carriage, " - - - - -	10 00
Use of team, " - - - - -	25 00
Five days' wages of man to Salina and back. - - - - -	10 00
Team from Salina to Downs, - - - - -	10 00
Telegraph bill, - - - - -	5 00
Damage to team going to Salina and back, - - - - -	120 00

\$200 00

"I do solemnly swear that the above bill is true and correct in every particular. [Signed] GEORGE W. HOWELL.

"Subscribed and sworn to before me this 2d day of May, A. D. 1885. [Seal.] "W. H. VANDOREN, Notary Public."



The telegraph company set up the following defenses in its answer: "Now comes the said defendant, and, for answer to the petition of the plaintiff filed herein, says, (1) that it admits that it is a corporation, but denies each and every other statement and averment in said petition contained. (2) For further answer, this defendant says that by the terms and conditions of the contract entered into between the plaintiff and said defendant on the 8th day of April, 1885, and a pretended copy of which is attached to plaintiff's petition, it is agreed between the sender of said message and the defendant that the defendant should not be liable for mistakes or delays in transmission or delivery, or nondelivery of any unrepeatd message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same; and this said defendant says that the said message was an unrepeatd message, and the mistake in the message as delivered, if any, did not arise from the negligence of any of the servants or employees of the defendant in transmitting the same; and the said defendant here tenders to the plaintiff the amount of money paid by the plaintiff for the transmission of said message, to-wit, the sum of fifty cents. (3) This defendant, for further answer, says that the said message which was written by said George W. Howell to be transmitted, and a pretended copy of which is attached to said petition as Exhibit A, was written so blindly and carelessly that the word 'Salem' therein could be read 'Salina.' In fact and in truth, it was so written. That, in the exercise of reasonable and ordinary diligence, the said defendant had a right to assume and believe it was intended Salina, instead of Salem; and said defendant was not guilty of any negligence in the transmission of said message, as in said petition alleged. Wherefore defendant prays judgment for costs."

A reply was filed as follows: "Now comes the above-named plaintiff, and, for reply to defendant's answer herein, alleges that he denies each and every allegation, statement, and averment in said answer contained."

Trial at the June term, 1886, of the district court of Atchison county to the court, a jury being waived. The court made the following special findings of fact and conclusions of law:

"CONCLUSIONS OF FACT.

"(1) On and before and after April 8, 1886, the plaintiff was the owner of a team of horses of about the value of \$800.00, which team was then at his place of residence at Downs, Osborne county, Kansas, where he was engaged in the lumber business with Howell Bros. On said day he was at Omaha, Nebraska, and desired to reach his home at Downs, by way of Salem, in Jewell county, Kansas. He went to the transmitting office of the defendant at Omaha, and wrote upon a blank furnished by defendant a message, which, together with the printed matter thereon, reads as follows:

"THE WESTERN UNION TELEGRAPH COMPANY.

"Form No. 2.

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphing back to the originating office for comparison. For this, one-half of the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the

transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance a special charge will be made, to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

"THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

"Send the following message, subject to the above terms, which are hereby agreed to: April 8, 1885. *To Howell Bros., Downs, Kansas:* Have my team and a double carriage in Salem by Thursday noon. GEORGE W. HOWELL. (12.) Paid.

"Read the notice and agreement at the top."

"All of said matter was printed on said blank furnished by the defendant, except that commencing with the date, and ending with the signature of the plaintiff.

"(2) On the afternoon of the same day, the agent of the defendant at Downs, Kansas, delivered to the manager of the business of said Howell Bros. the telegraphic message in words and figures following, to-wit:

"Form No. 1.

"THE WESTERN UNION TELEGRAPH COMPANY.

"This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison; and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message. This is an unrepeatd message, and is delivered by the request of the sender, under the conditions named above.

"THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

Number	Sent by	Rec'd by	Check
MS.	Co.	Q.	12 paid.

"Received at 4:06 P. M., April 8, 1885. Dated Omaha, Nebraska. *To Howell Bros., City:* Have my team and a double carriage in Salina by Thursday noon. GEO. W. HOWELL."

"(3) Said manager, doubting the correctness of said dispatch, requested the defendant's agent at Downs to ascertain at Atchison and Kansas City if the message as delivered was correct; and said agent of the defendant telegraphed to the relay offices at Kansas City and Atchison on the same evening, and was informed from both of said offices that the body of the dispatch read as follows, namely: 'Have my team and a double carriage in Salina by Thursday noon. GEORGE W. HOWELL.'

"(4) Said manager thereupon hired a double carriage at Downs, and sent Charles Page, a colored man, who was in the employ of plaintiff at Downs, with said team and carriage to Salina, Kansas, with instructions to get there

if possible by noon of the next day to meet the plaintiff. Said Charles Page started the same evening, and drove as far as Beloit, in Mitchell county, Kansas. It rained that night, but next morning said Charles Page started with said team and carriage from Beloit to Salina, in Saline county, Kansas, and reached there about three o'clock in the afternoon of April 9th. The distance traveled from Downs to Salina was over a hundred miles, and the team was very much injured by the overwork upon said journey. The distance from Downs to Salem is about thirty miles.

"(5) Said Charles Page having been informed of the mistake after reaching Salina, he remained there four and a half days for his team to recuperate, and he then drove back to Downs by easy stages.

"(6) The message as delivered to defendant's agent at Omaha was plainly written, and the word 'Salem' was very plainly written. It could not have been mistaken for 'Salina,' nor for any other word than 'Salem,' by any person possessing ordinary eye-sight who would examine it with the slightest care. The plaintiff prepaid the defendant's charge for an unrepeatd message, and no more. Neither Howell Bros., nor their manager, nor the defendant's agent at Downs nor at Kansas City nor at Atchison, inquired of the defendant's agent at Omaha whether the message as received at Downs was correct or not.

"(7) The hotel and feed bills incurred by said Charles Page on said trip was fully \$20. The use and hire of said carriage was \$10, and the wages of said colored man on said trip was fully \$7. The team was so much injured by the drive that they were not fit for use for two or three months, and one of said horses has never recovered from the injury. The damage to said team by said excessive drive was at least \$120.00.

"(8) On May 12, 1885, the plaintiff caused to be duly served upon the defendant, through the manager of its business at Atchison, Kansas, a demand in writing for damages, by reason of the foregoing acts, giving a full statement of the items of the plaintiff's claim; which items correspond with those set forth in Exhibit E, annexed to plaintiff's petition. Said demand also contained an intelligent statement of the nature of the plaintiff's claim, and of the difference between the message as delivered by plaintiff at Omaha for transmission, and as delivered to Howell Bros. at Downs, Kansas, after transmission; but the defendant has not paid said claim, nor any part thereof.

"(9) The items of damage referred to in conclusion of fact 7 are such as may reasonably be supposed to have been in the contemplation of both parties to the suit at the time the message was sent, as the probable result of a failure of the defendant to properly transmit it, as to where the plaintiff was to be met with his team.

"(10) The only evidence of negligence is such as arises from the foregoing facts; but the failure of the defendant to properly transmit the message as to the place where the plaintiff was to be met with his team was, under the circumstances, gross negligence of the defendant.

"CONCLUSIONS OF LAW.

"(1) The printed conditions upon said blank do not relieve the defendant from the payment of damages resulting from the negligence of its agents and operators, nor limit the recovery to a nominal amount.

"(2) The defendant is liable to the plaintiff, and the plaintiff is entitled to judgment for the sum of \$157.00.

"(3) The defendant is also liable for costs of suit."

*Wagener, Martin & Orr*, for plaintiff in error. *Smith & Solomon*, for defendant in error.

SIMPSON, C., (*after stating the facts as above.*) The main features of this case are similar to that of *Telegraph Co. v. Crall*, 38 Kan. —, ante, 309. All that is said in that case denying the power of the telegraph company to

limit its liability by contract, so as to relieve itself against acts of gross negligence committed by its agents and employes, applies with equal force to the facts appearing in the record of this case. The point most vigorously contested, however, in this case, not arising in the other, grows out of the finding of the court that "the only evidence of negligence is such as arises from the foregoing facts; but the failure of the defendant to properly transmit the message as to the place where the plaintiff was to be met with his team was, under the circumstances, gross negligence of the defendant." The other or foregoing facts found, were that "the message as delivered to the defendant's agent at Omaha was plainly written, and the word 'Salem' was very plainly written. It could not have been mistaken for 'Salina,' nor for any other word than 'Salem,' by any person possessing ordinary eye-sight who examined it with the slightest care." And the further finding: "Said manager, [meaning at Downs,] doubting the correctness of said dispatch, requested the defendant's agent at Downs to ascertain at Atchison and Kansas City if the message as delivered was correct; and said agent of the defendant telegraphed to the relay offices at Kansas City and Atchison on the same evening, and was informed from both of said offices that the body of the dispatch read as follows, namely: 'Have my team and a double carriage in Salina by Thursday noon. GEORGE W. HOWELL.'" It is said by counsel for plaintiff in error that the only evidence of negligence as found by the court below is the mere fact that said message was delivered reading "Salina" instead of "Salem;" and, inasmuch as the message was not a repeated message, the burden was upon Howell to show negligence other than such as might be inferred from the mere error in the transmission of the message. The cases of *White v. Telegraph Co.*, 14 Fed. Rep. 710, and *Becker v. Telegraph Co.*, 11 Neb. 87, 7 N. W. Rep. 868, are cited and relied on to establish the proposition. The authorities on the other side are numerous, and are collected in the opinion of Judge HOLT in the *Crall Case*. Counsel are mistaken in their supposition, however, that the only evidence of negligence is the mere fact of mistake in the word "Salina" for "Salem." There are two other facts found that demonstrate the negligence of the telegraph company. The first is that the word "Salem" was very plainly written; so plainly written that it could not have been mistaken for "Salina," or any other word, by any person possessing ordinary eye-sight who would examine it with the slightest care. This is equal to a finding that the operating agent at Omaha did not exercise the slightest care in the transmission of the message. In the absence of the finding that the word "Salem" was very plainly written, it might with some propriety be urged that the words are similar in appearance when hurriedly written, and the mistake might easily occur in a press of business. But the finding disposes of all such theories. There is a mistake; but the message is very plainly written, and the mistake could not occur with the slightest care. Here is something in addition to the mere fact of mistake. Then, again, the manager at Downs feared a mistake, and had the agent of the company ask both at Atchison and Kansas City for a verification of the message. This was notice to the company that a mistake was feared; but from both places came assurances that the message as delivered was correct; that Salina was meant, and not Salem. This was an additional act of gross carelessness upon the part of the company. It may be that they were not obliged to repeat the message, or to give additional assurances of its freedom from mistake; but, having done so, they were obliged to ascertain just what the original message was, and report accordingly. If they were content to rely on a report from the relay stations, and not to inquire at the office from which the message was sent, they ought to be held responsible for an omission of duty in that respect. So the case stands thus: There is the fact of mistake; the fact that the words were very plainly written; the fact that a mistake was feared, and their attention called to it, and, after inquiry, they persisted in the mistake,—and

these are sufficient to support the finding of gross negligence on the part of the company.

It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 87)

BARNES v. MAHANNAH.

(Supreme Court of Kansas. March 10, 1888.)

SALE—MISREPRESENTATIONS BY PURCHASER AS TO MARKET PRICE—RESCISSION.

A misrepresentation made by a purchaser to a seller as to the market price of an article of general commerce, to induce a sale more advantageous to the purchaser than he otherwise could have accomplished, and relied upon by the seller, will not avoid the contract of sale when there are no circumstances making it the special duty of the purchaser to communicate the knowledge he possesses of the state of the market, and none giving him peculiar means of ascertaining such market price.<sup>1</sup> *Graffenstein v. Epstein*, 28 Kan. 448, cited and approved. VALENTINE, J., dissenting.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Reno county; L. HOUK, Judge.

Action commenced in the Sedgwick county district court in September, 1881. The petition is as follows: "The plaintiff states that on the 13th day of August, 1881, plaintiff and defendant entered into a contract in writing, in and by the terms of which defendant agrees to sell to plaintiff his entire crop of corn in Sedgwick county, Kansas, at the estimated price of fifteen cents per bushel, said crop to be averaged, and the amount of bushels determined on or before the 1st day of October, 1881. A copy of said contract is hereto attached, marked 'No. 1,' and made a part of this petition. That said corn was standing in the field in Union township, Sedgwick county, Kansas, and comprised ninety acres. That on said 1st day of October, 1881, and at numerous and divers times before said date, the plaintiff, by himself and his agents and servants, went to said defendant for the purpose of having L. D. Dotson and S. Corcal, the parties mentioned in said contract, average said corn, in pursuance of the terms of said contract, but at each of said times the defendant absolutely refused and neglected to have the parties last above mentioned, to-wit, the said L. B. Dotson and S. Corcal, or any other person whatever selected by the defendant, to average said corn. That said defendant, ever since about the 1st day of September, 1881, has neglected and refused to allow or permit the plaintiff to take possession of any part of said corn, all of which is now standing upon the real estate now owned and in possession of said defendant; but has at divers times since said 1st day of September, 1881, threatened said plaintiff, his agents and servants, with great bodily harm, if they should attempt to take possession of or gather any part of said corn. That on the 1st day of October, 1881, and ever since said date, said corn has been worth and of the value of forty cents per bushel, on the premises where the same was situated at the time of the making of said contract, and has been ever since. That there was at the time of the making of said contract, and ever since has been, ninety acres of corn. That the same will average forty bushels per acre. That the whole quantity of said corn covered by said contract, and being of said ninety acres of land, and which, by the terms of said contract, defendant agreed to sell to plaintiff, was and is thirty-six hundred bushels. That defendant neglects and refuses to deliver any part of said corn to plaintiff, or to allow him to take possession thereof. The said defendant now threatens and is about to remove said corn

<sup>1</sup>On the general subject of fraud and false representations, see *Grindrod v. Wolf*, (Kan.) 16 Pac. Rep. 691, and note

from the premises where the same is located, and sell and dispose of the same, for the purpose and with the intent to cheat and defraud this plaintiff. The said defendant has not sufficient property out of which to make such judgment as plaintiff is entitled to obtain by reason of defendant's failure to perform said contract, but is insolvent. That the said plaintiff expended large sums of money, to-wit, the sum of \$200, in erecting cribs in which to put said corn, and which are useless to him for any other purpose. Plaintiff paid defendant under said contract the sum of \$250 by note, and \$50, making the total sum paid under said contract for part payment of said corn, the sum of \$300. Plaintiff is now, and ever since the 1st day of September, 1881, has been, entitled to said corn under said contract, and pay the full price of corn. The plaintiff demands judgment against defendant for the sum of \$900, his damages sustained as aforesaid, by reason of plaintiff's refusal to perform said contract, or deliver said corn, or allow plaintiff to have possession thereof, which, by the terms of said contract, he was bound to do. Plaintiff further demands that by an order of this court the said defendant may be restrained and enjoined from disposing of any part of said corn until the final determination of this action, and the payment of any judgment which may be obtained against him herein, and such other and further relief as equity may require.

" (No. 1.)

UNION TOWNSHIP, August 13, 1881.

" Contract made and entered into between William Burns of the first part, and J. Mahannah of the second part. Wm. Burns, of the first part, agrees to sell his crop of corn for fifteen cents per bushel to J. Mahannah of the second part. The crop to be averaged by L. B. Dotson and S. Corcal on or before the 1st day of October, 1881. The corn, if not dry enough to be measured, to be averaged.

WM. BURNS.

" JACOB MAHANNAH."

" This contract made and entered into the 13th day of August, 1881, Sedgwick county, Union township."

The answer is as follows: "Now comes the above defendant, Wm. Burns, and, for his answer to plaintiff's petition herein, denies each and every material allegation therein contained except such as hereinafter expressly admitted. And further answering said defendant saith that said plaintiff ought not to have and maintain his said action against this defendant, because he saith that the contract set forth in plaintiff's petition herein was obtained by said plaintiff from said defendant by fraud and misrepresentation in this, to-wit, that said plaintiff, early in the morning, and before the defendant had an opportunity of seeing any other person, on the day of making said contract, to ascertain the price of corn, came to the house of defendant and told said defendant that he, the plaintiff, was going to feed a large number of cattle for market, as beef cattle; and that he did not have corn enough to feed them on; and that he wanted to buy his crop of corn to feed to his cattle. That he had been to the city of Wichita the preceding day, and there learned that corn was selling on the market at from 18 to 22 cents per bushel, delivered in Wichita; and said plaintiff thereupon urged the defendant to sell to him, the said plaintiff, all of his corn at 15 cents per bushel, as stipulated in said alleged contract. That said statement and representations were made by said plaintiff to induce the defendant to sell his corn to said plaintiff at said price, said defendant wholly relying on the representation and statements of said plaintiff, and, believing the same to be true, agreed with said plaintiff to sell him his corn, and executed the contract mentioned as aforesaid; and said plaintiff thereupon paid to said defendant the alleged sum of \$50, and delivered to said defendant his promissory note for \$250, as alleged in said petition. That the city of Wichita is the market town of and for the community in which defendant resides and said corn was situated, and the market price of corn in said city of Wichita regulates the value of corn in said community; that said

statements and representations of said plaintiff were false and fraudulent, and made for the purpose of deceiving said defendant. That said plaintiff did not intend to feed a large number of cattle, and did not want to buy said corn to feed said cattle, but for the purpose of speculation. That corn was not selling on the market for from 18 to 22 cents per bushel, delivered in Wichita, but was selling for prices ranging from 25 to 40 cents per bushel, all of which said plaintiff well knew when he so falsely, fraudulently, and knowingly made such representations and statements to induce said defendant to enter into said alleged contract. That on the 14th day of August, 1881, and immediately after, defendant discovered that said representations and statements of said plaintiff were fraudulent and untrue. This defendant went to said plaintiff and tendered to him his said promissory note, and the said sum of \$50 received as aforesaid, and demanded of said plaintiff that said contract be annulled and rescinded, and that he be released from the obligations of the same. That defendant hath ever since been and still is ready and doth now bring into court and tender to said plaintiff the said sum of \$50 and the said promissory note for \$250, and both now, and the same ready to be delivered to said plaintiff, whenever he will accept them. Wherefore said defendant prays that said contract may be set aside and be held for naught; and that he be wholly released from any and all obligations under and by virtue of the same; and that he be allowed to go hence without delay; and that he have judgment for his costs in this behalf laid out and expended."

Plaintiff replied as follows: "And now comes the above-named plaintiff, by his attorneys Stanley and Wall, and for reply to the defendant's answer herein, denies each and every material allegation therein contained."

The case was sent to Reno county, and tried at the December term, 1885, to a jury. Verdict for the plaintiff. A motion for a new trial filed for the reasons—*First*, that the verdict is not sustained by the evidence; and, *second*, error of law occurring at the trial, and excepted to. This motion was overruled, on the condition that the defendant in error would remit \$138.60 of the verdict. This was done, and judgment rendered for the defendant in error for \$545 and costs.

*Jones & Montague and Whiteside & Hutchinson*, for plaintiff in error. *W. E. Stanley*, for defendant in error.

SIMPSON, C., (*after stating the facts as above.*) The motion for a new trial assigned two reasons for setting aside the verdict of the jury; and one of these—that with reference to the verdict not being sustained by the evidence—comes within a rule that has been stated so often that its repetition has become monotonous. The other is for errors of law occurring at the trial; and while there is some general criticism as to some of the instructions given by the court the vigorous fight is confined to the action of the court in refusing to allow the plaintiff in error to prove that corn had very suddenly advanced in price, on Thursday and Friday, October 1 and 2, 1881; and that the defendant in error knew that fact, and the plaintiff in error did not; and that the defendant in error had told the witnesses that he was going to buy the corn of the plaintiff in error. In the course of the examination of the plaintiff in error as a witness he had testified that before he made the contract for the sale of corn, he had inquired of the defendant in error what the price of corn was at Wichita, his place of market, and had been told by the defendant in error that it was 18 to 22 cents per bushel; and that in making the contract he had relied on that statement. Taking this statement of the plaintiff in error, together with the offer to prove the other facts, and they raise this question, stated in the strongest possible manner for the plaintiff, "whether a false and fraudulent statement or representation as to the market price of a commodity of general commerce, made by a purchaser who knows, to a seller who does not know, to induce a sale more advantageous to a purchaser than

he could otherwise get, the representation being relied on by the seller to his damage, avoids the contract of sale." This question is answered in the negative by this court in the case of *Graffenstein v. Epstein*, 23 Kan. 443. This is a well-considered case, as shown by an elaborate opinion reviewing many authorities, and stating every phase of the question, and in our judgment is controlling as to the contention presented here. There is a remarkable similarity in the two cases. Both hinge on the representation made by the purchaser to the seller, and the reliance of the seller on the truth of the statement as to the market price of the commodity at the time the contract of sale was entered into, and the purchaser's knowledge of the advance in prices, and the seller's ignorance of it. This case clearly comes within the principal announced in the reported case, and that is sustained by the weight of current authority on the question. We have considered this question as if the representations as to the market price of the corn had been made by the defendant in error, as claimed by the plaintiff in error; but the jury evidently took the other view in arriving at their verdict, and this, eliminated from consideration, would leave only the ruling as to the offer to prove about the sudden rise in the price, that was known to the purchaser, and not to the seller. But in any view to be taken on the state of facts recited in the record, we discover no material error that will justify reversal. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; HORTON, C. J., and JOHNSTON, J., concurring; VALENTINE, J., dissenting.

(38 Kan. 675)

#### WICHITA & W. R. CO. v. KUHN.

(Supreme Court of Kansas. March 10, 1888.)

#### EMINENT DOMAIN—DAMAGES TO PROPERTY—EVIDENCE—OPINION OF WITNESS.

Upon an appeal from commissioners' award of damages in condemnation proceedings, the court allowed a witness to answer the question, "How much less, in your opinion, is this farm worth after the railroad company had established their track through it, irrespective of any benefits from any improvements proposed by the railroad company to be derived from said track, taking into consideration all incidental loss, inconveniences, and damage, present and prospective, which may be reasonably expected or shown to exist from the maintaining of said railroad track, to be continued permanently?" Held error, calling for a new trial, the question virtually asking the witness to decide the case for the jury, and to advise them what their verdict should be.

Error to district court, Reno county; L. HOUK, Judge.

Application for rehearing. For former opinion see 16 Pac. Rep. 75.

*Geo. R. Peck, A. A. Hurd*, and *Houston & Bentley*, for plaintiff in error.  
*John R. Parsons*, for defendant in error.

PER CURIAM. On December 10, 1887, this case was decided, and the judgment of the court below was to some extent modified. 16 Pac. Rep. 75. Immediately thereafter the plaintiff in error, defendant below, moved for a rehearing, upon the ground that the court below erred in the admission of evidence, and that this court misconstrued such evidence. After a re-examination of the case we are inclined to think that the plaintiff in error is correct. Among the evidence complained of is the following: The plaintiff below introduced the deposition of Rufus J. Razey, which deposition contains the following question and answer, to-wit: "Question. How much less, in your opinion, is this farm worth after the railroad company had established their track through it, irrespective of any benefits from any improvements proposed by the railroad company to be derived from said track, taking into consideration all incidental loss, inconveniences, and damage, present and prospective, which may be reasonably expected or shown to exist from the main-



taining of said railroad track, to be continued permanently? *Answer.* About \$2,100." This question and answer the court below permitted to be introduced, over the objection and the exception of the defendant below. The court below certainly should not have permitted this evidence to be introduced. It involved substantially everything that the jury were called upon to determine; and left nothing for the jury to decide. It invaded the province of the jury. It really amounted to letting the witness himself determine by his own opinion what the plaintiff's damages were, and the amount which the plaintiff should recover in the action. It had no reference particularly to the market value of the land either before or after the right of way was taken, nor any reference to any specific fact which might tend to show what such market value was, or to increase or diminish the same; but it involved all these things and a great deal more. Upon the questions involved in this case we would refer generally to the following authorities: 3 Suth. Dam. c. 16; *Railroad Co. v. Moore*, 5 Amer. & Eng. R. Cas. 352, note, and cases there cited; *McReynolds v. Railway Co.*, 14 Amer. & Eng. R. Cas. 175, note, and cases there cited; *Neilson v. Railway Co.*, 14 Amer. & Eng. R. Cas. 244, note, and cases there cited; *Railroad Co. v. Foreman*, 20 Amer. & Eng. R. Cas. 225, note, and cases there cited. We shall also refer to some other authorities. Where the whole of the owner's land is taken in condemnation proceedings, the measure of his damages is the actual value of his land; but where only a portion of his land is taken, as in this case, the measure of his damages is generally the difference in the value of the land before it was taken and afterward. This rule, though generally correct, is not always so in Kansas, for in Kansas, where the land of another is taken by a corporation for a right of way, the damages recoverable under section 4 of article 12 of the constitution can never be less than the actual value of the property taken. That section reads as follows: "Section 4. No right of way shall be appropriated to the use of any corporation; until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation." The above question is objectionable for several reasons. It has no particular reference to values or to specific facts, but in effect calls for an opinion of the witness as to what the final determination upon all the facts should be. It is simply permitting the witness to answer what only the jury can properly answer. This cannot be allowed. A witness should not even be allowed to state his opinion with reference to the damages to be recovered. *Roberts v. Commissioners*, 21 Kan. 248, 253; *Water Co. v. Knapp*, 33 Kan. 753, 7 Pac. Rep. 568; *Railroad Co. v. Ball*, 5 Ohio St. 568; *Railroad Co. v. Burkett*, 42 Ala. 83; *Railroad v. Senn*, 73 Ga. 705, 27 Amer. & Eng. R. Cas. 304; *Railroad Co. v. Whalen*, 11 Neb. 585, 10 N. W. Rep. 491; 5 Amer. & Eng. R. Cas. 364. Also by this question all benefits to the plaintiff's land are to be excluded from the witness's computation or estimate of the amount of damages to be recovered. Whether the jury in rendering their verdict should exclude all benefits or not, it is not necessary to consider in this case. The weight of authority, however, would seem to be, under constitutions and statutes similar to ours, that all benefits should be excluded in estimating the value of the land actually taken, but that all proper benefits might be considered in estimating the damages to the remainder of the land which is not taken. Some of the decisions in Kansas, however, would seem to favor the exclusion of all benefits in cases like this. *Railroad Co. v. Orr*, 8 Kan. 420; *Hunt v. Smith*, 9 Kan. 137; *Reisner v. Railroad Co.*, 27 Kan. 382. But passing from this question, without deciding it, we come to the further question, whether a witness, without testifying either as to specific values or as to specific facts, may estimate damages, by "taking into consideration all incidental loss, inconveniences, and damages, present and prospective, which may reasonably be expected or shown to exist from the maintaining of said railroad track to be continued perma-

nently." No rule of law will sustain such a question as this. In the first place, a witness is never allowed to testify in the lump with reference to "all incidental losses, inconveniences, and damages, present and prospective," to occur in all future time, or that has occurred, or may occur in any particular time, as before stated, a witness is not even allowed to testify as to damages, and generally even juries are not allowed to assess damages for "all incidental losses, inconveniences, and damages, present and prospective," which have occurred or which may occur. See authorities above cited. Generally the damages assessed must be only such as are direct, special, and proximate, and not such as are speculative, remote, or problematical, or such as affect the public in general, and not the plaintiff in particular. See authorities above cited, and *Railroad Co. v. Andrews*, 30 Kan. 594, and cases there cited; *Railroad Co. v. Kregelo*, 32 Kan. 609, 5 Pac. Rep. 15; *Village of Hyde Park v. Dunham*, 85 Ill. 570. The judgment of this court heretofore rendered will be set aside, and the judgment of the court below will be reversed, and cause remanded for a new trial.

(39 Kan. 1)

HANNIBAL & ST. J. R. CO. v. KANALEY.

(Supreme Court of Kansas. March 10, 1888.)

1. RAILROAD COMPANIES—FOREIGN COMPANY—ACTION AGAINST—WHERE BROUGHT.

Where a railroad company, incorporated under the laws of another state, regularly runs its passenger trains into and out of a county of this state, receiving passengers at a union depot in the county for transportation over its road; and landing its passengers from its cars at such depot; and has operating arrangements to run its passenger cars over the tracks of other corporations in the county to and from such union depot,—*held*, that an action may be brought against the railroad company in the county of this state where it runs its trains and receives and lands its passengers, for any injury to persons or property upon its road. Sections 50-68a. Civil Code, (Comp. Laws 1885.)

2. SAME—ACTION AGAINST FOR INJURIES—NEGLIGENCE OF TRAIN DISPATCHER—EVIDENCE.

In an action to recover for personal injury, brought against a railroad company, where the issue was whether the train dispatcher was negligent in giving an order to a conductor to meet another train composed of two sections; and to establish the negligence of the train dispatcher, the conductor testified in his direct examination that, until he saw the second section of the train he had orders to meet, he had no knowledge the said section was on the road,—*held*, that upon cross-examination it was competent to ask of him if he understood the signals carried by the first section; if, with the information conveyed by those signals, he knew there was a second section following, which had the right to the road, regardless of him; if, with the signals carried, he had the right to leave the station in face of the signals; and also similar questions.

3. SAME—MANNER OF DIRECTING MOVEMENT OF TRAINS.

The law does not require a railroad company to direct the movement of its trains by orders from the train dispatcher alone, nor by a system of signals only; nor does it require the company to adopt any particular form of orders, or any particular system for communicating them; but the company has the right to direct the movement of its trains by train orders alone, or by train orders of any form and signals, or by signals alone, or by time-card alone; provided that the means adopted are brought to the knowledge of its employees, and they are reasonably well calculated to secure the safety of the men, if obeyed by them.

4. SAME.

A railroad company is not required to change its orders or signals for the movement of its trains because some other railroad has adopted a different system of orders or signals; and a railroad company may even have in use a system of orders or signals shown to be less safe than that adopted upon another railroad, without being liable to its employees for the consequences of the use of such orders or signals, if the orders and signals in use are reasonably well calculated to secure the safety of the employees of the company, if obeyed by them.

5. SAME.

Whether a railroad company has been guilty of negligence in the use of certain orders and signals for the movement of its trains, cannot be determined by proof that another railroad has adopted a different order for the operation of its trains.

## 6. SAME—MEASURE OF CARE TOWARDS EMPLOYEES.

Between the railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its road. *Railroad v. Wagner*, 83 Kan. 660, 7 Pac. Rep. 204.

## 7. SAME—CONDUCTOR'S DISREGARD OF SIGNALS.

In an action brought by an injured employee of a railroad company to recover for personal injuries caused by a collision between two trains upon a railroad in Missouri, where the rule of the common law as to the relation of master and servant is in force, the issue was whether the collision occurred by the negligence of the train dispatcher, or the conductor, who was a fellow-servant with the injured employee. Upon the trial there was evidence tending to show negligence on the part of the conductor, in disregarding the signals carried by a train he was to meet; and that his train collided with the second section of another train on account of his misunderstanding the words of a conductor, as his train was passing. *Held*, that the railroad company was entitled to an instruction to the jury that the conductor had no right to disregard his orders, and the directions conveyed to him by the signals, on account of the information he supposed he was receiving from the conductor of the meeting train.

(Syllabus by the Court.)

Error to district court, Atchison county; DAVID MARTIN, Judge.

Action by John Kanaley against the Hannibal & St. Joseph Railroad Company, to recover for personal injuries. Judgment for plaintiff, and defendant brings error.

*Strong & Mosman* and *B. F. Stringfellow*, for plaintiff in error. *Thomas P. Fenlon* and *Tomlinson & Eaton*, for defendant in error.

HORTON, C. J. In 1884, the Hannibal & St. Joseph Railroad Company, a corporation organized under the laws of the state of Missouri, operated its passenger trains to and from the Union depot at Atchison. It also received and discharged passengers at the depot. The Union Depot Company owns the tracks from the bridge over the Missouri river to the depot. The Chicago & Atchison Bridge Company owns the tracks upon the bridge. The tracks of the Union Depot Company connect with the tracks of the bridge company. The Hannibal & St. Joseph Railroad Company owns one-seventh of the stock of the Union Depot Company. The employees of the depot company are paid by the company, and the company renders an account to each railroad company for its proportionate share. The railroads, as stockholders, pay back the amount of operating expenses for each month. The proportion of the expenses paid by the Hannibal & St. Joseph Railroad Company for the employees of the Union Depot Company for 1884 was one-seventh. John Kanaley, in September, 1884, was a fireman in the service of the Hannibal & St. Joseph Railroad Company. On the evening of September 21, 1884, two extra freight trains of that company left Brookfield, Mo., going east to Hannibal, Mo. These trains were designated and known by the engines pulling them as "Nos. 67 and 68." Homer was conductor, Gilday, engineer, and Kanaley, fireman on No. 67. The running of all trains upon the road was supervised and directed by a train dispatcher, in connection with a system of signals in use upon the road. Homer and Gilday, the conductor and engineer of train No. 67, upon leaving Brookfield, received the following order from the train dispatcher at that place:

"Order 85.

BROOKFIELD, September 21st.

"C. & E. Eng. 67 and 68—Eng. 67 will meet No. 11 at Lingo, and engines 57 and 51 at Macon. Engine 68 will meet No. 11 at Bucklin, and No. 57 and 51 at Macon; both running to Hannibal, and avoiding other regular trains.

"2 T. S. B."

[Signatures.]

At Lingo there was a side track, and No. 67 backed on this track, and remained there some 10 minutes or more. The first section of No. 11 passed, going west, while No. 67 was on the side track. Number 67 then pulled out, and, after going about three-quarters of a mile, a collision occurred at or near

a place called "Brush Creek," by No. 67 running into the second section of No. 11, which was following the first section of No. 11. At the time, Kanaley was shoveling coal. He dropped his shovel, and jumped from the engine. He claims he received severe personal injuries in jumping, to avoid being killed in the collision between the two freight trains. Subsequently, in an action brought by him in Atchison county, in this state, against the Hannibal & St. Joseph Railroad Company, he recovered judgment for \$5,000 for his injuries. The railroad company complains of this judgment.

It is contended that the trial court had no jurisdiction of the subject-matter of the action. The statute provides: "An action against a railroad company, or an owner of a line of mail stages, or other coaches, for any injury to persons or property, upon the road or line, or upon a liability as a carrier, may be brought in any county through or into which said road or line passes." Section 50, Civil Code, (Comp. Laws 1885.) "Every railroad company, or corporation and every stage company doing business in the state of Kansas, or having agents doing business therein for such corporation or company, is hereby required to designate some person residing in each county into which its railroad line or stage route may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record or justice of the peace of such county may be served." Section 68a., Civil Code, (Comp. Laws 1885.) It is clearly established by the evidence that the railroad company had arrangements with the Chicago & Atchison Bridge Company, owning the tracks upon the bridge over the Missouri river; and with the Union Depot Company, owning the tracks upon the Kansas side of the river, in Atchison county, for operating purposes. It run its passenger cars into and out of the county of Atchison, receiving and leaving passengers at the Union depot, in that county; and it is immaterial whether its possession and operation of the road or tracks in that county was as owner or lessee. Within the meaning of the law, its road or line passed into Atchison county; therefore this action was properly brought in that county, and the district court of that county had full jurisdiction. *Railroad Co. v. Fletcher*, 35 Kan. 236, 10 Pac. Rep. 596.

It is conceded in this case, as the collision occurred in Missouri, and as Kanaley was injured in that state, that the rule of the common law, with reference to the liability, or rather the non-liability, of the master to one of his servants, for the negligence of a fellow-servant or co-employee, prevails; and, therefore, that the railroad company is only liable for its own negligence, or for the negligence of some officer or agent, who amounts to a vice-principal, or a substitute for the company. The jury were instructed that Homer, the conductor, Gilday, the engineer, and the crew of the train drawn by engine No. 67 were fellow-servants of Kanaley, engaged in the same common employment; and, therefore, that the negligence of any one of these towards Kanaley would not be the negligence of the railroad company. It is claimed, however, upon the part of Kanaley, that the collision of the freight trains near Brush Creek, Mo., on the night of the 21st of September, 1884, was caused by the negligence of the train dispatcher, in failing to notify the conductor and engineer of No. 67 that there was a second section of No. 11 following; that on account of this negligence of the train dispatcher, No. 67 moved from Lingo before the second section of No. 11 passed. On the part of the railroad company it is contended that the collision was the direct proximate result of the negligence of Homer, the conductor of No. 67, and a fellow-servant of Kanaley. It claims that there was a system of signals adopted and in use upon its road, by means of which its conductors, engineers, and other employees were informed that trains carrying such signals have following them other trains; that No. 11 carried these signals, and thereby indicated that a second section was following as part of it, and entitled to the same rights to the track as the first section of No. 11; that Homer disre-

garded these signals; and, therefore, that the collision and injuries were the necessary consequence of his negligence. It is admitted that the dispatcher is a vice-principal, or substitute for the company, and not a mere fellow-servant, in common employment with the firemen, or train-men; and, therefore, that if the train dispatcher was negligent, the company was also negligent.

The principal question in this case is whether the train dispatcher was negligent in giving the order that "Engine 67 will meet No. 11 at Lingo, and engines 57 and 51 at Macon." Homer, the conductor, was introduced as a witness by Kanaley. His testimony was very conflicting, contradictory, and unsatisfactory. Among other things, he testified that until he saw the approaching engine and train of the second section of No. 11 he had no knowledge that that train was on the road; that he drew out from Lingo with his train, because he had orders to meet 57 at Macon, and that Macon was 20 miles distant. He also testified as follows: "*Question.* Did you have any knowledge of the condition of number eleven, whether it was in two sections or not? *Answer.* Yes, sir; I did. *Q.* Why? *A.* Because they had a red light on. *Q.* Before you left Lingo? *A.* Yes, sir. *Q.* Now, having seen the red lights on them, what did they communicate to you—indicate to you? *A.* Indicated another train following them." On cross-examination he testified: "*Q.* How long had you known this method of signals to be in use on the road? How long had you known this system of following trains to be in use on the road? *A.* I think it was on the time-card at the time I went there, which was six years ago. The engineer and conductor of engine 68 had the same order that I had, and they were following me." On further cross-examination, the railroad company asked the following question of Homer: "With the information conveyed to you by those signals, had you the right, with that information alone, to leave that station, in the face of those signals? *A.* No, sir; I had not." The court struck out the question and answer. Thereupon the railroad company asked the following questions: "*Q.* I will ask you this question: Under the information given and conveyed to you by those signals, did you know that there was a train coming into Lingo following this first No. 11, which you had no right to go out in the face of? *Q.* Did you, by the signals which you saw carried by No. 11, know that another train was immediately following No. 11, which had the right to run into Lingo, regardless of you?" The plaintiff below objected to these questions, and to any answers thereto, which was sustained by the court. Gilday, the engineer, was also introduced as a witness on the part of Kanaley. He testified, in his direct examination, that the first intimation he had of the second section of No. 11 train approaching was seeing the head-light. Upon cross-examination, he testified: "The engineer of No. 11 whistled five times, which was the signal prescribed by the rules to call my attention to the fact that he was carrying red lights—that he was carrying signals for another train. This was done to draw my attention to the fact that he was carrying signals. I answered his signal of five blasts by blowing one blast on the whistle of my engine. This was to let him know that I heard his signals. These red lights conveyed to me the information that the following train had the same right to the track as the first No. 11—the same rights as the train carrying the signals; that is, they had a perfect right to the road against my train, and had the right to run to Lingo regardless of my train." Thereupon this question was asked of him: "With the information conveyed to you by those signals, had you any right, with that information alone, to leave that station in the face of those signals? *Answer.* No, sir; I had not." This question and answer were struck out by the court. Thereupon the company asked the following questions: "*Question.* I will ask you this question: Under the information given and conveyed to you by those signals, did you not know that there was a train coming into Lingo, following this first No. 11, which you had no right to go out in the face of? *Q.* Did you, by the signals which you saw carried by No. 11, know

that another train was immediately following No. 11, which had the right to the track to run into Lingo, regardless of you?" The plaintiff below objected to these questions as irrelevant and incompetent, and these objections were sustained. Both of these witnesses were important and material witnesses for Kanaley; they had been with the railroad company a long time; were familiar with their respective duties; understood fully the system of conveying information on the road, by means of signals carried on trains; and upon cross-examination should have been permitted to have answered the questions above referred to; and the court erred in striking out the questions and answers above stated, and also in refusing to permit the other questions to be asked and answered. All of these questions concerned the alleged negligence of Homer, the conductor, and fellow-servant of Kanaley. The direct testimony of Homer and Gilday laid the foundation for the questions propounded.

The court also erred in refusing to permit the railroad company to show that at the time Homer received his written orders from the train dispatcher, the train dispatcher verbally said to him that there was a second section of No. 11 following immediately after the first, which was pulled by engine 56. That information was not in conflict with the written orders given Homer, or the signals carried by the train, but in full accord with the same.

The railroad company offered evidence tending to show that a time-card fixed the meeting points of all regular trains upon the road, and fixed the time at which all regular trains would arrive and depart from each station; that the time-card fixing the time of all regular trains at each station would give all the information necessary to enable them to avoid regular trains; that in addition to the time-card and the orders given directly by the train dispatcher, a system of train signals was in use on the road, and two red flags by day, and two red lights by night, carried on the front end of an engine, indicated (1) that another train was following the train carrying the red lights; (2) that such following train had the same rights to the track that the train carrying the signals had; that, by the rules of the road, the engineer carrying these signals was required, on meeting any train, to sound his whistle five times as a signal, to call the attention of the train he was meeting to the fact that he was carrying signals for a following train; and that it was the duty of the engineer of the meeting train to answer this signal by one blast of his whistle, as a token that he saw the signals the other train was carrying; that when a conductor met a train carrying signals, it was his duty to remain on the side track until all the sections of the following train arrived, even if it had to wait 24 hours; that wherever a train was to disregard the signals thus carried on the front of an engine, a specific order was given, directing them "to run regardless of signals carried by No. 11" (or whatever the train number might be;) and the order would read, for instance: "Meet number — at Macon, and run to [whatever point you wanted] regardless of signals carried by No. —;" that two-thirds of all the railroad companies in the United States use the same train order in making a meeting point for trains as was used on the Hannibal & St. Joseph Railroad; that this order, or double system of orders, had been in use upon the "Hannibal" road since 1876; that Homer had been a conductor upon that road for two years prior to the collision of September 21, 1884; and had been in the service of the company six years prior to that time.

On the part of Kanaley, C. P. Cochran testified that he was a train dispatcher at Atchison; that he had been engaged in that business something over 12 years; that he had been employed as a train dispatcher on the Central Branch Railroad, the A. & N. Railroad, and the Missouri Pacific Railroad; that he did not know, of his own personal knowledge, of the methods in use in other quarters of the country for moving trains; that his places of service had been in Kansas; and that, in giving an order to a train to meet one or more sections of another train at a given point, it was always the practice to

designate the train and engines necessary for them to have orders against; and that if a certain train contained two sections, that information ought to be stated in the dispatch. On the part of Kanaley, Samuel McDonald, also, testified that he lived at Atchison, and was a telegraph operator; that he worked at the Union depot for all roads; and had been engaged in such business for over six years; that he had been a train dispatcher in 1885 on the Nashville & Chattanooga Railroad; and that it was about the rule of all roads to give the number of sections you wanted another train to meet. Upon cross-examination, he changed his evidence by saying that the rule applied to the railroads that he had worked for; they were the Missouri Pacific Railroad, the Chicago, Burlington & Quincy Railroad, in Iowa, the Kansas City, St. Joseph & Council Bluffs Railroad, and some others. He had no knowledge what system was in use for moving trains upon the Hannibal & St. Joseph Railroad in 1884, or at the time of the trial.

The railroad company asked the court to give the following instruction: "The fact that upon another railroad a different form or wording for the order is used, or the fact that another train dispatcher, in issuing train orders directing the movements of a train which is to meet another train composed of two or more sections, would ordinarily specify the number of sections composing said train, does not justify the jury in coming to the conclusion that the train order introduced in evidence in this case, which was intended to be used on defendant's road, was insufficient, and not reasonably well calculated to advise Homer of the fact that there was a second section of train No. 11, and provide for the safety and security of said train." This was refused, and no other instruction similar was given. We think this material error.

In *Railroad v. Wagner*, 33 Kan. 660, 7 Pac. Rep. 204, Mr. Justice VALENTINE, speaking for the court, said: "We think the following principles are deducible from the authorities, and are sound law: (1) An employe of a railroad company, by virtue of his employment, assumes all the ordinary and usual risks and hazards incident to his employment. (2) As between a railroad company and its employes, the railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad. (3) As between a railroad company and its employes, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its railroad. (4) It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty." The law does not require a railroad company to direct the movement of its trains by orders from the train dispatcher alone, nor does the law require it to adopt any particular form of orders, or any particular system for communicating them; but a company has the right to direct the movement of its trains by train orders alone, or by train orders and signals, or by signals alone, or by time-card alone. The law only requires that the means adopted shall be brought to the knowledge of its employes, and that they be reasonably well calculated to secure the safety of the employes, if obeyed. Again, a railroad company is not required to change its orders or signals for the movement of its trains, because some other railroad has adopted a different system of orders or signals. A railroad company may even have in use a system of orders or signals, shown to be less safe than that adopted upon another railroad, without being liable to its employes for the consequences of the use of such orders or signals. If the employe thinks proper to continue in the service of the company with the knowledge of the orders or signals in use, it is at his own risk, and all that he can require of the company is that he shall not be deceived as to the degree of danger he incurs. As before decided: "Between the railroad company and its employes, the railroad company is re-

quired to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its road." It was proper for the trial court to admit any evidence tending to show that the orders and signals adopted by the Hannibal & St. Joseph Railroad Company were not reasonably well calculated to secure the safety of its servants and employees; but evidence that the Missouri Pacific Railroad, and some other railroads, use a different system, did not tend, of itself, to show that the defendant below was guilty of negligence in the use of the orders and signals adopted by it; in other words, whether the Hannibal & St. Joseph Railroad Company was guilty of negligence in the use of a certain system in the movement of its trains, cannot be determined by the fact that several other roads use a different system. *Smith v. Railroad Co.*, 69 Mo. 32; *Muirhead v. Railway Co.*, 19 Mo. App. 634. If Cochran and McDonald had been train dispatchers upon the Hannibal & St. Joseph Railroad, and had testified that the order given to Homer at Brookfield was not the usual and customary order given upon that road, their evidence would have been competent; or, if these witnesses had testified that under the system of train signals and orders in use upon that road, various accidents had occurred attributable to the form of train orders and signals in use, their evidence would have tended to show that the orders and signals adopted on the road were not reasonably well calculated to secure the safety of the employees, even if obeyed; but nothing of this kind was shown, or attempted to be shown.

Noah Northcut testified, on the part of the railroad company, that he was the conductor of the first section of train No. 11, on September 21, 1884; that it was composed of two sections, and that he had orders that day to meet engine 67 at Lingo; that he was carrying signals for the second section of his train; that the second section of his train, which he was flagging, was pulled by engine 56; that as his caboose passed train 67 at Lingo, he said to Homer—who was within 14 feet of him—"that he was carrying signals for engine number 56;" and also "halloed to the men on engine 67, as he passed them, that he was flagging 56." Homer testified that as the first section of No. 11 reached Lingo, "he understood them to say they were flagging 57, when they passed him." Upon this and the other evidence, the following instruction, which was refused, ought, also, to have been given: "If you find from the evidence that conductor Homer saw the red lights carried by the engine pulling the first section of train No. 11, as said train passed him at Lingo station, and by seeing said lights, knew that a second section of train No. 11 was following the first, which was entitled to the same rights to the track as had been given to the first section of said train No. 11, by the train dispatcher, in the order which he [Homer] had received, for the running of his own train, then the court instructs you that the said Homer was in duty bound to obey the signals so seen and understood by him. He had no right to speculate as to the number of the engine or train following the first section of train No. 11, nor would he be justified under his orders in disregarding the directions conveyed by said signals, by any information he might receive from the conductor of the first section of train No. 11." As is well said by counsel of Kanaley, "the first law of nature—self-preservation—would have prevented Homer from running the risk of his life in the disobedience of orders, which notified him that another train was on the track;" and from these premises they argue that the jury had the right to conclude, because Homer pulled out and went on with his train, after the first section of No. 11 passed Lingo, that the train dispatcher was negligent in not notifying him that No. 11 consisted of two sections. If, however, Homer understood the conductor of the first section of No. 11 to say "he was flagging engine 57" this explains Homer's disregard of the signals on first section of train No. 11, and his failure to remain at Lingo until both sections of that train had passed his train. If he acted upon a misunderstanding of the words of the conductor of the first



section of train No. 11, then he had no thought that he was risking his life, or putting himself in peril in disregarding the signals carried. For the errors heretofore referred to and commented upon, the judgment of the district court will be reversed, and the cause remanded for a new trial.

All the justices concurring.

(39 Kan. 90)

BRIGGS *et al.* v. LABETTE COUNTY.

(*Supreme Court of Kansas. March 10, 1888.*)

1. HIGHWAYS—ESTABLISHMENT—AWARD OF DAMAGES—APPEAL.

On an appeal from an award of damages for the laying out of a public road, the only question the court has jurisdiction to determine, or submit to the determination of a jury, is the amount of damages the appellant is entitled to.

2. SAME.

Where on the trial of such appeal it is shown that the plaintiff had, before the laying out of such road, erected cattle-sheds and other improvements across the section line on which the road was afterwards located, *held*, that the good faith in the erection of such improvements on the section line cannot be questioned or inquired into on such trial.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Labette county; GEORGE CHANDLER, Judge.

Appeal by F. H. and A. A. Briggs to the district court from an allowance of damages by the board of county commissioners of Labette county on account of the establishment of a public road over plaintiffs' land. Trial at the November term, 1884, of the district court by jury, and verdict and judgment for plaintiffs for \$72.50. Plaintiffs now bring the case here for review.

*Case & Glasse*, for plaintiff in error. *T. C. Cory*, for defendant in error.

CLOGSTON, C., (*after stating the facts as above.*) On an appeal from an award of damages for the laying out of a public road, the only question the court has to determine or submit to the determination of a jury is as to the amount of damages the owner of the land is entitled to, if any; and no question of the previous laying out of a road over the same route, or whether there had been a prior dedication of the land to the public, and acceptance as a public road, enters into the inquiry. The proceedings before the board of commissioners were the regular proceedings to lay out and establish a public road. Plaintiffs, with other land-owners, were notified to present their claims for damages. The plaintiffs presented their claim, and some amount was allowed, and they were also allowed damages. Not deeming the allowance sufficient to compensate them, they appealed. The question of the utility or practicability of the road was determined by the commissioners, and on that question their decision was final. The appeal was taken on the question of damages alone. See *Commissioners v. Bisby*, 37 Kan. 253, 15 Pac. Rep. 241. In that case the court sought to show that years before a public road had been laid out over the same route, and therefore that the plaintiff was not entitled to damages, and it was held that such testimony was not competent, and was properly excluded. In this case dedication is sought to be shown. This ought also to have been excluded; but the court admitted the evidence, and, having admitted it, the court ought to have instructed the jury to disregard it.

It appears from the record that a certain cattle-shed and corral had been erected by the plaintiffs, and that a short time thereafter steps were taken to have this road laid out. The evidence shows that the shed was completed about January, 1884, and the petition for the road was filed April 11, 1884. This shed and corral were located directly across the line on which this road was afterwards laid out, the shed being 280 feet long, and standing immediately on the line. This improvement was shown to have cost plaintiffs about \$500, and part of the damages claimed by them was for the tearing

down and removal of this shed and corral. Evidence was also given to show that this shed and corral were erected by the plaintiffs at that particular point for the purpose of preventing a public road being located on that section line and across that line, and upon such testimony the court gave the jury the following instruction: "If he built the shed in question across the line of the road intentionally, and for the purpose of preventing the laying out of the road, such improvements as he made with that object in view and for that purpose he would not be entitled to the full damages which he might sustain on account of his own act, or, in other words, that may be taken into consideration by you for the purpose of determining what damages he should have for such improvements, if any. While he had the right to put his shed upon his own premises at any place he saw fit, and if he in good faith placed that where he did, he ought to recover such damages as he sustained on account of the laying out of the road; yet if he built the shed with the full knowledge that steps were being taken for the purpose of laying out the road, and for the purpose of preventing the laying out of this road he made any of these improvements, that matter may be taken into consideration by you for the purpose of determining what damage he has sustained in that connection, and such as he put there purposely and intentionally for that object (if you should find that to be a fact) he ought not to be permitted to take advantage of his own wrongful act in that particular, and fully recover therefor. Whether he did so, I express no opinion whatever; and that is for you to determine from the evidence in this case." The evidence upon which this instruction was given was improperly admitted, and the instruction erroneous. This land was the property of the plaintiffs, and they had a right to erect their corral and shed and such other improvements as they saw fit upon the land, and it could make no difference what their purpose was in so locating it. They may have placed it there for the purpose of preventing the laying out of a road, and this they might properly do, if they saw fit, and their motives could not be questioned by the county or by the people who might afterwards desire the location of a road across that land. We are therefore of the opinion that this case was tried upon a mistaken theory, and that the instructions of the court on the question of dedication and the measure of plaintiffs' damages were erroneous. It is recommended that the judgment of the court below be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 734)

GRAHAM v. SHAW.

(*Supreme Court of Kansas.* March 10, 1888.)

1. REPORT AND CASE MADE—POWER OF COURT TO AMEND.

Neither the judge of the district court nor the supreme court can amend or add to a case made for the supreme court after it has been settled, signed, and attested.

2. REPLEVIN—TO RECOVER GOODS TAKEN FROM ATTACHING OFFICER—PROOF.

To sustain a judgment in replevin in favor of an officer who claims the right of possession by virtue of a seizure in an attachment action, the proof should show his official character and the proceedings and process under which he acted and claims possession.

(*Syllabus by the Court.*)

Error to district court, Russell county; S. O. HINDS, Judge.

H. G. Laing, for plaintiff in error. W. G. Eastland, for defendant in error.

JOHNSTON, J. This is an action of replevin brought by J. B. Graham against Thomas Shaw for the recovery of nine sacks of wool, alleged to be worth \$300. The nature of the case and the rights of the parties thereto cannot well be determined from the record before us. It seems that the sheep from which the wool was shorn were owned by G. Mills Graham and John

Graham, partners as Graham Bros., who were engaged in the live-stock business in Kansas. It is said that they borrowed a large sum of money from J. B. Graham, which was used in conducting their business. Subsequently John Graham died, and an administrator was appointed on the motion of his widow, and G. Mills Graham gave the required bond and continued the business of Graham Bros., as the surviving partner. Later, and while he was in Chicago, an action was commenced against him in the superior court of that place by J. B. Graham for the recovery of the money loaned to Graham Bros., and after a contest a judgment was obtained by J. B. Graham. This judgment was reviewed in the appellate court of Illinois, and affirmed. J. B. Graham then brought an action on that judgment in the circuit court of the United States for the district of Kansas against G. Mills Graham, as surviving partner of Graham Bros., and the defendant in that action waived service of summons, and empowered F. D. Mills, as his attorney in fact, to confess judgment for the amount claimed, and judgment was accordingly entered on the 18th day of December, A. D. 1885. An execution was then issued upon the judgment under which, and on February 25, 1886, the goods and chattels of Graham Bros. were seized and sold. J. B. Graham purchased a flock of sheep at this sale, and the wool in controversy in this action was shorn from them. Subsequently, and on May 7, 1886, the judgment rendered in the United States circuit court for the district of Kansas was vacated on the motion of Mollie Graham, the widow of John Graham deceased, and she was permitted to answer; but it is stated in the argument that in September, 1886, a demurrer was sustained to her answer and the judgment restored, and that the purchase price of the sheep sold at the judicial sale was credited thereon and execution issued for the balance. What lien, interest, or right of possession Thomas Shaw has in the property, if any, is not disclosed by the record. The argument is made on the theory that the wool was seized by Shaw, as constable, in an attachment action in which Mary Rice was plaintiff and G. Mills Graham, surviving partner of Graham Bros., was defendant, and Shaw sought to show in this action that the Illinois and Kansas judgments in favor of J. B. Graham were collusively and fraudulently obtained, and that therefore the purchaser at the judicial sale acquired no title to the sheep which he bought or the wool shorn from them. The record, however, does not show the nature of the claim of Mary Rice, nor when it accrued, nor whether she was in a position to contest the validity of either the Illinois or Kansas judgments. It is shown that the Kansas judgment was vacated for a time on the motion of Mollie Graham, but the grounds for the motion are not stated, nor does it appear that she had any standing in court to question the judgment. The property in question, however, was purchased by J. B. Graham before the judgment was vacated, and he was in possession of the same; but just how Thomas Shaw obtained possession of it we can only surmise from the argument. No writ of attachment nor any of the proceedings in the Rice case were either alleged in the pleadings nor introduced in evidence in this action. Shaw was not examined as a witness, and there was no competent testimony to show that he had any claim in or right to the possession of the property in controversy. Notwithstanding this, judgment was rendered in favor of Shaw, and Graham contends here that the findings and judgment of the court are not sustained by the evidence.

The judgment cannot be upheld. The defendant in error realizes the insufficiency of the testimony written in the record, and when the case was submitted asked to amend and change the case made brought to this court so that it will show the official character of Shaw, and that he took and held the property in controversy by virtue of a writ of attachment regularly issued in an action in favor of Mary Rice against G. Mills Graham, surviving partner of Graham Bros. We are asked to consider a certified statement to that effect, made by the judge of the district court long after the case brought to this

court had been made, settled, and signed. It is well settled that neither the district judge nor the supreme court can amend, change, or add to a case made after it has been settled, signed, and attested. When the judge of the district court "has certified the case made, it passes beyond his control, and cannot thereafter be amended, altered, or changed by any order of his." *Lewis v. Linscott*, 37 Kan. 379, 15 Pac. Rep. 158. After it has been brought to the supreme court "such case made cannot be amended or supplemented in this court by inserting anything therein or attaching anything thereto which did not belong to the case made and constitute a part thereof when it was originally settled and signed by the judge and attested by the clerk of the court below." *Snively v. Buggy Co.*, 36 Kan. 106, 12 Pac. Rep. 522; *City of Fort Scott v. Deeds*, 36 Kan. 621, 14 Pac. Rep. 268; *Transportation Co. v. Palmer*, 19 Kan. 471; *Parker v. Machine Co.*, 24 Kan. 31; *Building Ass'n v. Beebe*, Id. 363. As the record cannot be amended, and as the testimony contained therein is insufficient to sustain the judgment, it follows that the judgment must be reversed, and a new trial granted.

All the justices concurring.

(38 Kan. 673)

**BURLINGTON, K. & S. W. R. CO. v. GILLEN.**

(*Supreme Court of Kansas*. March 10, 1888.)

**REPORT AND CASE MADE—FAILURE TO SERVE CASE.**

Where, on error, the record does not show that the case was served at any time on the opposing party, or within which time it should have been served, as required by Code Civil Proc. Kan., §§ 548, 549, nor that service was waived, or any amendments were suggested to the case, errors alleged cannot be considered.

Error to district court, Decatur county; LOUIS K. PRATT, Judge.

*W. W. Guthrie, J. W. Deweese, and J. D. Hayes*, for plaintiff in error. *Wilson & Decker*, for defendant in error.

**PER CURIAM.** This proceeding was brought to reverse a judgment rendered against the Burlington, Kansas & Southwestern Railroad Company. The record is challenged upon the ground that "the case" was never served; and therefore it is claimed that this court has no power to consider the errors alleged. It appears that the judgment was rendered April 30, 1886. Ninety days were given by the trial court to "make a case." Nothing was said in the order about the time within which "the case" was to be served. Civil Code, §§ 548, 549. It does not appear from the record that the case was ever served at any time; and there is nothing presented in the record, or otherwise to show that service of the case was ever waived. Prior to July 24, 1886, notice was given to the defendant in error at the time when the case would be presented for settlement. It does not appear, however, that the defendant in error, or his attorney, was present when the case was settled and signed by the district judge, or that there was any waiver of appearance. No amendments to the case were ever suggested, and therefore the validity of the record is successfully challenged, as it fails to show affirmatively the previous steps necessary to the settlement of the case. *Weeks v. Medler*, 18 Kan. 425; *Railway Co. v. Roach*, Id. 592; *Gimbel v. Turner*, 36 Kan. 679, 14 Pac. Rep. 255.

The judgment of the district court will be affirmed.

(38 Kan. 674)

**BURLINGTON, K. & S. W. R. CO. v. PETERS.**

(*Supreme Court of Kansas*. March 10, 1888.)

Error to district court, Decatur county; LOUIS K. PRATT, Judge.

*W. W. Guthrie, J. W. Deweese, and J. D. Hayes*, for plaintiff in error. *Wilson & Decker*, for defendant in error.

**PER CURIAM.** The record in this case is the same as in *Railroad Co. v. Gillen*, ante, 334, (just decided.) The record is challenged, also, in this case as in that case, and for the same reasons. Upon the authority of that case we cannot consider or review the errors alleged. The judgment must therefore be affirmed.

(39 Kan. 69)

WOODS v. HAMILTON *et al.*

(*Supreme Court of Kansas. March 10, 1888.*)

1. BAILMENT—DEMAND, WHEN NECESSARY.

Where money is sent by G. to W., with instructions to pay the same over to the bank on a note due by G. & H., but W. fails to pay the same over to the bank as directed, and suit is brought on the note against G. & H. by the bank, and where, on said trial, W. claims that he paid said money to the bank as directed, and refuses to pay the same, *held*, in an action by G. & H. against W. to recover such money, no demand is necessary to be alleged in the bill of particulars.

2. SAME—PAYMENT BY BAILEES—EVIDENCE.

Where it is claimed that certain money has been paid into a bank for the benefit of another, but such payment is in dispute, and the testimony of the person who acted as cashier and book-keeper of the bank is admitted, showing that he made all the entries of money received at the bank, and had made an examination of the bank books, and that the books showed no such payment, *held* not error.

3. TRIAL—ADMISSION OF INCOMPETENT EVIDENCE—ERROR CURED.

Where the court permits incompetent testimony to go to the jury, but afterwards directs the jury to disregard such evidence, and the jury returns a verdict in accordance with said instructions, *held*, that generally the error in the admission of the evidence is cured by the instructions and verdict.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Sumner county; J. T. HERRICK, Judge.

This action was commenced by the defendants in error against plaintiff in error to recover \$112.25, which plaintiffs alleged was paid to the defendant under the following circumstances: Plaintiffs had executed a note for the sum of \$217.15, due May 1, 1884. Said note, before due, became the property of the Moline Plow Company, and was by that company placed with the Wellington National Bank for collection. Some time before the maturity of said note, M. L. Hamilton, one of the said plaintiffs, sent the defendant, plaintiff in error, \$112.40, directing that the same be paid on said note, which was by said defendant received and duly paid and indorsed on the note. Afterwards, and on May 7, 1884, the plaintiff, John M. Gormly, sent to said defendant, by express, \$112.25, with a letter of instructions, directing the money to be paid on said note and the note lifted and returned to him, which money was received by defendant and retained by him and appropriated to his own use. Afterwards suit was brought against said plaintiffs on said note for the balance of \$112.25 and interest, and judgment rendered against them for that sum. Defendant claimed to the plaintiffs that the money so received by him was by him paid over to the Wellington National Bank, to be applied on said note, and refused to again pay the amount to the Wellington Bank or to the plaintiffs. The question in controversy was whether or not defendant had so paid the Wellington Bank the money so received by him from plaintiffs. Judgment was rendered for the plaintiffs for \$112.25, with interest at 7 per cent. Defendant brings the case here on error.

*Isaac G. Reed*, for plaintiff in error. *Ray & Grider*, for defendants in error.

CLOGSTON, C., (*after stating the facts as above.*) The errors complained of are: *First.* That the bill of particulars failed to show or state that a demand was made on the defendant for the money claimed before the commencement of the action. *Second.* That the action was improperly brought in the name of the firm of Hamilton & Gormly. *Third.* That the court permitted evidence to be given to the jury of the amount of the judgment, costs, and

attorneys' fees paid by plaintiffs in a suit by the Moline Plow Company against said plaintiffs. *Fourth.* The cashier of the Wellington National Bank was permitted to testify to his examination of the bank's books, and to give the result of that examination. We think none of these objections are well taken. It is true that the bill of particulars did not show that a demand had been made upon the defendant before bringing the action, but it did show a state of facts which, in our judgment, made a demand unnecessary; and if a demand was necessary, then the defect was cured by the evidence. The defendant admitted in his examination that a demand had been made upon him, and that he refused to pay the money a second time. We think the action was properly brought in the name of the firm. The note was a firm note. The judgment was paid by the firm. It is true, Mr. Gormly testified that the money now sought to be recovered was sent by him to Woods, but that he sent it for and on behalf of the firm. It was immaterial to the defendant whether this money was the individual money of the plaintiff Gormly, or partnership funds; it was sent to him on account of the firm; to be used in the firm's business; and to pay an indebtedness of the firm; and now the firm seeks to recover that payment. The court improperly permitted the plaintiffs to show the amount of costs and attorneys' fees paid by them in the case of the plow company against them. None of these items were proper elements of damage in connection with this action, and the court so instructed the jury, and all such evidence was thereby taken from them, and the jury returned a verdict for the amount that was admitted to have been received by defendant, with interest at 7 per cent. The verdict being correct, the error in the admission of testimony was immaterial. H. E. Frantz was called as a witness on behalf of the plaintiffs, and testified that he was cashier of the Wellington National Bank; that at the time of the alleged payment of money by Woods to said bank on behalf of the plaintiffs he was a book-keeper in said bank, and made all the entries of money received in the books of the bank; and that at the time of said alleged transaction he was requested to make an examination of the books to ascertain if such a sum had been paid in by Woods for the plaintiffs. He was then asked: "What was the result of your examination?" *Answer.* I found that no such amount had been paid in at that time, nor at any time, by Judge Woods." Witness was also asked if he made an examination of the books of the bank at that time to see whether or not there was an amount of money paid in about that time that had not been credited to any source. He was then asked: "What was the result of your examination?" *Answer.* There was no money over in our cash at that time. These questions were objected to by defendant, and objection overruled by the court. It was in the testimony of H. E. Frantz, who was cashier of the Wellington National Bank at the time of this alleged payment by the defendant to said bank, that the defendant made the request that the books of the bank be examined to ascertain whether or not he had paid that sum into the bank, and was informed of that examination. Perhaps this evidence was not very material. In any event, its admission could work no great hardship to the defendant. It was not proving the contents of the books of the bank, but simply the evidence of the book-keeper who kept the books, and who made the examination, that the books failed to show certain facts, and that no entry of that kind was to be found upon the books. We think no material error was committed in the admission of this testimony.

It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(4 N. M. [Ghd.] 405)

## UNITED STATES v. SAN PEDRO &amp; CANON DEL AGUA CO.

(Supreme Court of New Mexico. January Term, 1888.)

## 1. PUBLIC LANDS—PATENTS—VACATION FOR FRAUD.

In 1844, one R. petitioned for and was granted by the Mexican government certain vacant lands, describing them, and juridical possession was given in accordance therewith. In 1859 he filed an application in the United States surveyor general's office in New Mexico for a confirmation of such grant, and the surveyor general approved the claim according to the original papers, and in 1866 the grant was confirmed by congress. About that time a company was organized to purchase the land, and, pending the negotiations, the surveyor general at Washington sent out his chief clerk to go upon the land and locate the marks; and the clerk, accompanied by the parties interested in the company, and traveling at their expense, went upon the land, took some *ex parte* evidence, and located the land east of a spring, which was described in the original papers as the east boundary of the land. Three days afterwards the land was conveyed by R. to the company by the new description, in which every call of the original description was changed. On the return of the clerk, the surveyor general directed a man who had accompanied the clerk and his party as a notary, to make a survey, which he did, locating it according to the new description. The survey was suspended by the commissioner as not corresponding with the application, and the surveyor general was ordered to give notice by publication, and take testimony. No notice was given. The testimony taken by the clerk, and also of certain witnesses produced "by the gentleman acting as agent for the claimants," was forwarded, and the commissioner approved it, directing the surveyor general to publish notice of such approval, allowing adverse claimants 60 days to appeal; which notice was not given. None of the calls in the new description correspond with the original, all of which could have been located on the ground, and none of the land in the new description was included in R.'s application, or held by him under his juridical possession and title from the Mexican government. *Held* sufficient evidence of fraud and mistake to authorize the cancellation of the patent.

## 2. SAME—INNOCENT PURCHASER—CORPORATIONS—NOTICE TO OFFICERS AND STOCK-HOLDERS.

A corporation was organized to purchase a grant of land. Upon the making of the contract to purchase, and before all the money was paid, the president and two stockholders were sent to investigate the grant. They went upon the land claimed to be conveyed; talked with persons claiming interests in the land adverse to the patent. The patent itself called for an entirely different tract than that held by the original owner, who held under the Mexican government, and every call for courses and distances in the patent was different from those in the Mexican title, application to congress for confirmation, and the act of confirmation. The patent also recited that the surveyor general had no authority to adjudicate on claims to mines. *Held*, that the corporation took the land with constructive notice of all the facts, and was not entitled to the rights of an innocent vendee, in an action to vacate the patent for fraud and mistake, and to enjoin the company from working the mines on the land.

## 3. SAME—MEXICAN TITLES—MINERAL LANDS.

An act of congress confirming to a claimant his title to a tract of land granted to him by the Mexican government under the colonization laws of Mexico and Spain, and a patent issued in accordance therewith, conveys no title to the mineral lands included in such grant.

HENDERSON, J., dissenting.

Appeal from district court, First district.

Action by the United States against the San Pedro & Canon del Agua Company for the cancellation of a patent to land. Judgment for defendant, and plaintiff appeals.

Thomas Smith, U. S. Atty. for New Mexico, Francis Downs, (special counsel,) and Fiske & Warren, for appellants.

When, by the rules of law, the legal title must prevail, the action of the land department is conclusive. But courts of equity, both in England and this country, have always had the power, in certain cases, to correct injustice, both in judicial and executive action founded in fraud or mistake. The liability of the land-office to be imposed upon by fraud and false swearing exemplifies the necessity for this jurisdiction. *Johnson v. Towsley*, 13 Wall. 84. The patent is but evidence of a grant, and the officer issuing it acts

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ministerially, and not judicially. Equity will relieve against the patent, not only in cases of fraud by the patentee, but where the patent is issued unadvisedly, by mistake; the officer having no authority in law to grant it. *U. S. v. Stone*, 2 Wall. 535; *Hughes v. U. S.*, 4 Wall. 236; *Meador v. Norton*, 11 Wall. 458; *Mowry v. Whitney*, 14 Wall. 440; *Field v. Seabury*, 19 How. 332. The fraud has been practiced upon the government, and it is the proper party to assert the remedy. *Mowry v. Whitney*, 14 Wall. 440. Patents for lands reserved from sale, or appropriated, are void. *Morton v. Nebraska*, 21 Wall. 660. The government is not estopped by the laches of its officers. *U. S. v. Kirkpatrick*, 9 Wheat. 736; *U. S. v. Hoar*, 2 Mason, 311; *U. S. v. Williams*, 5 McLean, 133; *Gibson v. Chouteau*, 13 Wall. 92; *U. S. v. Thompson*, 98 U. S. 486; *Gausson v. U. S.*, 97 U. S. 584; *U. S. v. Iron Co.*, 18 Fed. Rep. 273; *U. S. v. Land-Grant Co.*, 21 Fed. Rep. 19. In establishing the fraudulent combination alleged in the bill, all the circumstances are to be considered. *Com. v. McClean*, 2 Pars. Eq. Cas. 368, 369; *U. S. v. Cole*, 5 McLean, 513. Fraud may consist in concealment by a party of a fact within his own knowledge which he ought to disclose. It is not necessary that all the representations be untrue. 2 Pom. Eq. Jur. §§ 873, 875, 901. In pleading the defense of innocent purchaser, the deed, date, parties, and contents; that vendor was seized, and in possession; the consideration, with a distinct averment that it was *bona fide* and truly paid,—must be alleged, and, where notice is specially charged, the denial must be of all facts from which notice can be inferred. *Boone v. Chiles*, 10 Pet. 212, 213. Evidence will not be permitted of matters not set out. *Id.*; 2 Pom. Eq. Jur. § 785. A purchaser of a title derived from the general government by patent, which contains recitals affecting the title in the hands of a purchaser, however remote from the original patentee, takes subject to such recitals, although ignorant both of such recitals and the facts recited when he purchased the title. *Brush v. Ware*, 15 Pet. 93; *Bonner v. Ware*, 10 Ohio, 465; *U. S. v. Iron Co.*, 18 Fed. Rep. 273. A party is charged with notice of such facts as could have been readily ascertained had he made inquiries; the facts within his knowledge being such as would lead an honest man using ordinary caution to make such inquiry. *Wade*, Notice, p. 9, § 11; *Hankinson v. Barbour*, 29 Ill. 80; *Lewis v. Bradford*, 10 Watts, 67; *Williamson v. Brown*, 15 N. Y. 354; *Fiske v. Potter*, \*41 N. Y. 70. A purchaser who sees or might see or know of visible material objects upon or connected with land is chargeable with constructive notice of any easement or similar right, the existence of which would be suggested by the appearance of such objects. 2 Pom. Eq. Jur. § 611; *Denise v. Ruggles*, 16 How. 244.

*Thomas Smith*, U. S. Atty.

In England, grants are construed favorably to the grantor, and, if it is shown that the king is deceived in his grant, it will not include a subject not expressed. *Attorney General v. Hospital*, 17 Beav. 366; *Attorney General v. Almshouse*, 22 Law J. Ch. 846; *Bridge v. Bridge*, 7 Pick. 344; *Church v. Beach*, 26 Conn. 355. Public lands are to be construed favorably to the grantor, and no alienation should be presumed that is not clearly expressed. *Railroad Co. v. Litchfield*, 23 How. 66; *Bank v. U. S.*, 1 G. Greene, 553; *Taylor v. Galland*, 3 G. Greene, 17; *Green's Estate*, 4 Md. Ch. 349; *Townsend v. Brown*, 24 N. J. Law, 80. If the government discovers that in its location of lands claimed under a Mexican grant an erroneous result is obtained by imposition or fraud, it may institute proceedings to vacate its patent. *Leese v. Clark*, 18 Cal. 535. Where a doubt arises as to the measuring of a grant as to the quantity ceded, reference may be had to the juridical possession. *U. S. v. Pico*, 5 Wall. 536. The juridical possession is conclusive as to the boundaries and extent of the land granted. *Graham v. U. S.*, 4 Wall. 260. The survey must conform reasonably to the boundary lines in the decree.



*U. S. v. Halleck*, 1 Wall. 445; *Chinoweth v. Haskell*, 3 Pet. 96; *Blake v. Doherty*, 5 Wheat. 359; *Mine Case*, 2 Wall. 649; *Dehon v. Bernal*, 3 Wall. 774; *Ex parte Milligan*, 4 Wall. 104; *Castro v. Hendricks*, 23 How. 438; *Mahoney v. Van Winkle*, 21 Cal. 552. A survey, to be good, must be in pursuance of an entry, (*Lindsay v. Miller*, 6 Pet. 666,) and cannot appropriate without authority outside the calls of the entry, (*Hastings v. Stevenson*, 2 Ohio, 8.) Lines of survey actually marked, if traced and identified as calls of the grant, will control courses and distances, but these will not be controlled by a survey entirely inconsistent and repugnant to the calls of the grant. *Booth v. Upshur*, 26 Tex. 64. When a given quantity of land is to be run off on a given base, it must be included within four lines, those from the base proceeding at right angles, and the line opposite the base parallel to it, unless this form is repugnant to the entry. *Massie v. Watts*, 6 Cranch, 148; *Kerr v. Watts*, 6 Wheat. 550; *Shipp v. Miller's Heirs*, 2 Wheat. 316.

*Henry L. Waldo*, *William Breeden*, and *Catron*, *Thornton & Clancy*, for appellee.

Where there is any conflict between monuments and landmarks named in the description, and the courses and distances given, the former control. *Ayres v. Watson*, 113 U. S. 594, 5 Sup. Ct. Rep. 641; *Barclay v. Howell*, 6 Pet. 498; *Preston v. Bowmar*, 6 Wheat. 580; *Land Co. v. Saunders*, 103 U. S. 316. The surveyor having followed the directions of the surveyor general, the court will not vacate the patent, even though there be a mistake in location, in the absence of positive proof of fraud. *U. S. v. Flint*, 4 Sawy. 61; *U. S. v. Throckmorton*, 98 U. S. 61; *U. S. v. Tin Co.*, 23 Fed. Rep. 280. If it would be inequitable, from lapse of time and changed condition of the parties, and from the difficulty in obtaining evidence, the relief will be refused, even though the United States be the suitor. *U. S. v. Flint*, 4 Sawy. 43, 3; *U. S. v. Tin Co.*, 23 Fed. Rep. 280; *U. S. v. Beebe*, 17 Fed. Rep. 36; *U. S. v. Fossatt*, 21 How. 450; *U. S. v. Barker*, 12 Wheat. 559; *Mitchel v. U. S.*, 9 Pet. 711; *U. S. v. Bank*, 96 U. S. 36; *U. S. v. Bostwick*, 94 U. S. 66; *U. S. v. Smith*, 94 U. S. 217; *The Siren*, 7 Wall. 159; *People v. Clarke*, 10 Barb. 120; *U. S. v. Tichenor*, 8 Sawy. 155, 156; *U. S. v. White*, 9 Sawy. 131. Fraud, and not mistake, having been alleged in the bill, complainant can only succeed upon proof of fraud as charged. *Boone v. Chiles*, 10 Pet. 209. Before the court can vacate the patent it must be fully and absolutely convinced that the survey is incorrect. *U. S. v. Land-Grant Co.*, 7 Sup. Ct. Rep. 1015.

LONG, C. J. The complainants, the United States, by Wayne MacVeagh, then attorney general, and Sidney M. Barnes, at the time United States attorney for the territory of New Mexico, on the fifteenth day of September, A. D. 1881, filed in the First judicial district court of said territory a bill of complaint. Later, Francis Downs, Fiske & Warren, and Thomas Smith, United States attorney, appeared as solicitors for the complainant. The San Pedro & Canon del Agua Company, a corporation, was made defendant, and appeared by William Breeden, Henry L. Waldo, Catron, Thornton & Clancy as solicitors.

It was charged in the bill of complaint that the United States, by virtue of the treaty with the republic of Mexico of 1848, known as the "Treaty of Guadalupe Hidalgo," and the cession thereunder, acquired the title and ownership of a certain tract of land in the territory of New Mexico commonly known as the "New Placers," or "Tuerto Mountains," situated in Santa Fe county, and of certain mineral lands and mining regions in that locality, and also other lands in the vicinity adapted to stock-raising and agriculture; that as early as 1842 there was upon said lands, while the same were subject to the republic of Mexico, a large and flourishing town of many thousand inhabitants, known as "Real de San Francisco," which had for many years prior to that time ex-

isted as a Mexican town, with the rights and privileges under that government pertaining to such places, and, among other, with the right to the lands so occupied for such purpose, and the common grounds immediately adjacent thereto for pasturage, all of which rights are conceded by the bill; that such town has continued to exist ever since to the filing of the bill of complaint, with the rights aforesaid, and, among them, the right to the commons for a league distant from the town; that upon the said lands for many years there had been mining camps, and many rich and valuable mines of gold, silver, iron, copper, and lead, both near the town and distant therefrom, and that such mines had been, prior to the date of said treaty, occupied and worked by citizens and subjects of the Mexican republic, who thereby acquired rights which they held at the time of said treaty, and who after the cession became citizens of the United States, and with rights to protection in their said property under the treaty; that among such mines is one discovered and located by Mariano Barela in the year 1844, which it is now averred is now claimed and owned by Antonio Jaques, Mariano Barela, and the heirs of Jose Antonio Otero. It is averred that Jaques and Barela worked and operated said mine until the occupation of the territory of New Mexico by the American forces during the war with the republic of Mexico, and by the Oteros after that period for a long time; and that this particular mine, among others, is within the limits of the survey sought to be vacated by this proceeding. It is further averred that within the limits of said survey, long before the same was made, citizens of said town, and also other citizens of the United States, had, by virtue of continuous work upon and development therein, acquired rights to valuable mines of ore, both as to old mines, and new ones alleged to have been discovered, opened, and continuously occupied. It is alleged that the lands within the lines of said survey, since the said treaty, have been generally and publicly understood to be a part of the public domain of the United States, and not private property; and that, so understanding, many persons have entered thereon, and opened mines, and developed mineral veins, and occupied the same, intending to acquire legal title thereto under the mining laws of the United States, and under the mining laws, usages, and customs relating to mineral lands in said territory. It is alleged, further, that in February, A. D. 1844, one Jose Serafin Ramirez petitioned the then governor of the department of New Mexico for a certain tract of land described in his petition, and also described in the bill in this case; that said land was vacant land, and did not include any part of said town, but was over a league distant therefrom; that on the thirteenth day of February, A. D. 1844, the said governor granted said petition of the said Ramirez, and that the departmental assembly ratified and approved the same, and he was afterwards given actual juridical possession of the same; that the grant so asked for and so given was afterwards presented to the surveyor general of New Mexico; that it received his approval, and afterwards was confirmed by the congress of the United States; that a survey thereof was made, and a patent thereon was issued by the president of the United States. It is averred the present defendant claims title under and through mesne conveyances from the said Ramirez, by virtue thereof, and by virtue of the confirmation, survey, patent, and mesne conveyances. It is further averred that in the petition by Ramirez to the governor, in the grant by the departmental assembly, in the petition by Ramirez to the surveyor general for confirmation, that the land was described by terms slightly different in phraseology, but to the same legal effect; that, as so described, the said land could be easily found, and marked out on the earth's surface; that all the monuments and landmarks named in said description were well known, and easily ascertainable, and entirely consistent with the courses and directions named in said descriptions; that the words of description used in the petition filed before the surveyor general asking confirmation of the grant gave its description, with the following boundary lines: "Bounded

as follows: On the north, by the Placer road that goes down to the yellow timber; on the south, the northern boundary of the San Pedro grant; on the east, the spring of the Canon del Agua; on the west, the summit of the mountain of the mine known as the property of your petitioner." It is further averred that the Canon del Agua spring is and always was a well-known point, and that the true east boundary of said tract of land would be a line drawn directly north and south through said spring. It is averred further, in effect, that the whole of the land is west of such line drawn through the said spring; that there is a road leading from the town of San Francisco nearly south, which at a point about one league below said town turns to the west, and goes thence nearly west to the Palo Amarillo, or yellow timber; that this road existed there at the time of the original grant, and that it is the one described in the grant boundary; and that at the point where said road turns to the west a line should be drawn east and west for the north boundary of the Ramirez grant. It is contended by complainant that these points are easily found; that both the Tuerto mountain and mine lie west of the spring; that, by making the lines named boundaries, the whole of the land described in the grant will lie west of the spring, and its northern line be at least a league south of the town, and exclude, as outside of its boundaries, both the town and the league for commons. It is averred that such is the true and honest location of the land, and the one which should have been made in the survey complained of. It is further averred that instead of the line for the north boundary being so located, there is no north boundary as surveyed, but the lines extend a league north of the true point, and so take in and include a large part of the town of Real de San Francisco, with its public chapel; that instead of making the spring the eastern boundary and throwing all the land west of it, the survey disregards the true and honest boundary, and extends a long distance to the east of the spring, so as to take in and include the Jaques mine, and a large and very valuable mineral region, rich in the precious metals, east and north-east of the spring, which it is averred does not properly belong to the grant as confirmed, but which it is alleged does belong to the United States. It is thus contended by complainant that by the extension of the line east of the spring, and north of the place where the Palo Amarillo road makes a turn to the west, a great wrong is done to a large number of individuals inhabiting the town of San Francisco, whose rights the government is bound to respect, under the treaty, and to others who, within the limits of the alleged wrongful extension, have opened and worked mines; and also that a great wrong has been done to the United States by appropriating, under color of the alleged wrongful survey and patent, a large region of the public domain to which neither Ramirez, nor any one claiming through him, was entitled, and which is alleged to be valuable, not only for pasturage and timber, but also by reason of the abundance and richness of its minerals. The bill asks to set aside this survey, and to set aside and vacate the patent made under it, so far as it affects the lands embraced therein lying east of the spring, and north of said point where the road turns west.

The complainant predicates the right to such relief on the allegations of fraud and mistake in the bill. These allegations are full and specific, and may be abbreviated and stated as to the following effect: That John A. Clark, then surveyor general of New Mexico, David J. Miller, his clerk, W. W. Griffin, deputy-surveyor, Serafin Ramirez, the owner of the claim, Carey, Cooley, Kitchen, and Denman, conspired together to defraud the United States out of all the lands lying east of said spring, and north of the said Palo Amarillo road, and to defraud the inhabitants of San Francisco out of their property, and the mine owners and claimants located on such alleged fraudulent extension; and, as a means to that end, they fraudulently agreed among themselves to locate the lines of said grant at a place other than that called for in the grant description, to-wit, north the said Palo Amarillo road where it turns

west, and east of the said spring, to thereby acquire said property, and get a patent therefor, and, under its color, to eject the true owners; that, as a part of such fraudulent conspiracy, they falsely pretended, knowing the truth to be otherwise, that there was no mountain, and especially none known as "El Tuerto," west of the spring, and no mine there which would answer the call of the grant, but that such mountain and such mine were far to the east of said spring, and were only named in the grant papers as being west by mistake, when they were intended to be named as lying east of the said spring; that they agreed to and did procure false and fraudulent affidavits to give color to such pretense, and that, well knowing the truth to be otherwise, they pretended and represented to the commissioner of the general land office that there was such a mistake in description, and, by means of such false representations and fraudulent affidavits, induced him to believe the El Tuerto was east, and not west, of the said spring, and that under a misapprehension and mistake as to the true boundaries, induced in that way, that he approved a survey, and ordered a patent to Ramirez, which afterwards issued, containing such incorrect and fraudulent survey and extension. Substantially the same averments are contained as to the northern extension. It is further alleged that the defendant bought with notice of the alleged fraud, and also under such circumstances and with such knowledge as to put it on inquiry, and that inquiry would have shown the facts alleged; and so it is claimed the defendant should be bound to the same extent as Ramirez would be if he held title in his own name. There is no pretense, either in allegation or proof, that the commissioner of the land-office was a party to the alleged fraud, but that he was imposed upon, and induced by it to issue the patent complained of, or to cause it to be done. The fraud charged is set out at length, and with particularity; but enough only has been stated to show the question at issue, and how it arises. The defendant denies all these averments, and also pleads that it is an innocent purchaser for value, without notice; and thus an issue is made which was presented to the lower court for determination.

Another contention was also raised by the complainant upon the averments of the supplemental matter in the bill of complaint, by leave of court, without objection, and to which his original bill was attached, and which was answered, partly by denial, and as to some matters by admission. It was averred that defendant, claiming the right so to do under the patent, was mining large quantities of ore from the body of the land, and, denying its right to do so, asked against the defendant a perpetual injunction prohibiting forever such acts. The defendant admitted the mining in what is called the "Big Copper Mine," and claimed the right to do so. In the lower court all questions at issue were decided in favor of the defendant, and from that action and judgment the case comes to this court on appeal, and the questions hereafter discussed were properly saved, and come properly before us in this court.

The record presents to us for determination, necessarily, the following questions: "Was the complainant in the court below, upon the issues and evidence, entitled to the relief prayed, or to any substantial part thereof? Incident to this, and involved in it, are three others, to-wit: *First*. Did the commissioner of the land-office commit the mistake charged in the bill? *Second*. Was he induced and caused to do so by the fraudulent collusion, conspiracy, artifices, and acts charged in the bill? *Third*. Is the defendant an innocent purchaser for value, without notice, so that even if the first two questions are held in the affirmative, no relief can be decreed? Aside from these is an additional question, presented on the supplemental averments, and answer thereto: Suppose it be held that the fraud alleged is not proven, or that the mistake did not occur, or that defendant is protected as an innocent purchaser for value, without notice, what disposition is then to be made of the application for a permanent injunction? If all the questions are decided in favor of the defendant, and the decree dismissing the bill is sustained, what effect

would such a decree have upon the matter alleged in the supplemental bill? It would seem that if the United States, denying that the legal effect of the patent is to give the defendant all the ore within the boundaries of the grant, even if it is valid and binding on the government as to all other things, should bring a bill to enjoin the defendant from its use, that it would be a complete answer to plead the supplemental bill in this case, and the issue thereon, and a decree dismissing the same for want of equity. That question would, under such a decree, be *res adjudicata*. The questions in the record will be disposed of in the order stated, and as they naturally arise.

First, then, as to the fraud alleged. An analysis and consideration of the evidence is necessary to determine that point. In the beginning, it is well to remember that this grant was made to Ramirez in 1844; that he was placed in actual possession of it at once; that in 1860 he filed his application with the surveyor general for confirmation. An examination of the acts, knowledge, and motives of Ramirez for over 20 years with respect to the lines of the grant, before his acquaintance with the alleged co-conspirators, will throw much light upon the contention for determination.

Serafin Ramirez was an officer high in authority. He was presumably an intelligent man. The mine to which he referred must have been a property well known to him. Ramirez went to the place in person; and when he stood upon the mine, and walked over the ground to take juridical possession, he must have given attention to natural physical objects, and have well known whether the mine was east or west of the Canon del Agua spring, and whether the spring constituted the boundary for his east line, as stated in the description. The decree of the departmental assembly giving him this property was an important title-paper. It was his right from the crown. With it he was secure in his property within its boundaries, and without it he had nothing. It was a valuable possession, and it is reasonable to believe he gave attention to the lines named as boundaries. If he saw that the land was really east of the spring, while described as west thereof, is it to be presumed he would remain silent? Can it be believed that he never read so important a title paper? If he did read it, familiar as he was with the location, it is most strange so important a mistake as a change in the boundary lines, completely reversing them, would not impress him; and it would be remarkable if he did not read so important a document. Certainly, after the annexation, and when he began to make preparations to perfect the title to his property, the question of boundaries would impress itself upon him as of first importance. In a country like New Mexico, location is of the utmost concern. Water-rights and mineral deposits are valuable, and changes in lines affect them. No two points would have come to the mind of Serafin Ramirez with more force than the location of the Canon del Agua spring, and the mineral deposits in that region, in their relation to his grant. The spring especially, as a landmark visible and well known as a boundary line, would have been a prominent object. Imagine this high officer, an intelligent man, at the Canon del Agua spring, in the act of taking juridical possession by physical acts, pulling grass and throwing stones. Is it reasonable to believe that he was inattentive to location when it was everything to him, or that he did not know whether this landmark (the spring) was the east or west line? Again, consider, with respect to his act of possession, the northern boundary. The deed of juridical possession says: "On the north, the road of the Palo Amarillo." That act was many years ago; by date February 15, A. D. 1844. Many changes in the traveled ways have probably occurred since then. In this country, where but few roads are laid out by public authority, and where they are generally used for the public convenience by common custom and consent, the lines of travel must constantly change and vary, as particular localities become more or less prominent as agricultural, commercial, or mineral centers. But can there be any reasonable doubt that at the time of the actual delivery of pos-

session, when Ramirez was in person on the ground for the very purpose of confirming his title by the act of possession, there was just such a landmark as his deed of possession describes as the northern boundary, to-wit, "on the north, the road of the Palo Amarilla?" Can there be any doubt but Ramirez knew this road well, and knew, as his deed of possession said, that it marked the northern boundary of his tract of land? The deed from the Mexican authority is a formal document. If Ramirez ever was attentive to description, he would have been so when this document was placed in his hand as his evidence of title. That instrument recites the northern boundary of the tract in dispute in this proceeding as being "on the north, the road of the Palo Amarilla; on the west, the highest summit of the little mountain of El Tuerto." When Ramirez read over this instrument, was he in ignorance respecting this road? It was not in that solemn instrument named as the north-west boundary, but as the northern boundary, while the highest summit of the little mountain of El Tuerto was named as the western boundary. How could it be that Santiago Florez and Don Serafin could look to the north as a monument for a line to run east and west as a boundary, and intend to make that road a north-western boundary, and not a northern one, without so stating in the written description? To hold this description in the deed of May, 1866, to Cooley, Kitchen, *et al.*, to be correct, and the survey right, and the description in the deed of possession from the Mexican government, by "Santiago Flores, first justice of the illustrious corporation of Santa Fe, and judge of original jurisdiction of the — department of New Mexico," of February, 1844, to be wrong, is to presume, not only that the illustrious officer who signed that instrument was ignorant or inattentive, but also to presume that the man of all others interested, himself an important public officer, was also ignorant or neglectful. Ramirez, if the deed of 1844 is wrong in description, would certainly have observed it. When he read therein that the road was the northern boundary, he would have said: "No; here is a mistake. The road is not the northern, but the north-western, boundary;" and when he read, "the highest summit of the little mountain of El Tuerto" as the western boundary, he would have said: "There again is an error. This mountain is not the western, but the eastern, boundary." Ramirez must have known the points of the compass, with respect to the land, as well in 1844 as in 1866, as he is proven to have been on the land, and familiar with its topography. It is not to be presumed he was asking for land as to the qualities of which he was in ignorance, and about the boundaries of which he was uninformed. It must be remembered that Jose Serafin Ramirez was not an illiterate man at the time he received this land, and in the humble walks of life; but he was an officer of rank, an auditor of accounts, and therefore necessarily accustomed to details, and to a scrutiny of statements, and would be impressed with the importance of correct descriptions. In his petition asking for the land in controversy, he describes himself as follows: "Jose Serafin Ramirez y Cusa Noba, first auditing officer of the departmental treasury of New Mexico, and lieutenant of auxiliary cavalry, a citizen and employe of the nation in actual service for some years, and a creditor to the government to a large amount." In determining the probability of mistake, the characteristics of all persons who are parties to the transactions are proper matters for consideration. This man Ramirez was doubtless a competent man. He held a position which, in the experience of mankind, always calls for careful attention to phraseology and description. He was the first auditing officer of the treasury. The Mexican government was his debtor. While such a person might be inattentive or mistaken, it is not probable he would be in so important a transaction, and in so gross a manner as to entirely change the location of his lands. Neither is it reasonable to suppose that such a mistake would have remained for so many years without discovery.

Let us consider, for a moment, the opportunities presented for a discovery

of mistake between 1844, the date of the conveyance by the Mexican government to Ramirez, and 1866, the date of his deed to Cooley, Kitchen, *et al.*,—a period of 22 years. At the close of the war with Mexico, and the conclusion of the treaty of Guadalupe Hidalgo, in 1848, he would, as a prudent man, consider his titles, with a view to confirmation by the government of the United States; as his title papers would necessarily undergo inspection, and the lines of his lands be fixed and established by the action of this government. On the thirtieth day of December, A. D. 1859, Serafin Ramirez filed with William Pelham, then surveyor general of the territory of New Mexico, his claim to the land now in controversy, and based his claim on the grant from Mexico. This was filed as a notice to the world of his right, and of the character, limits, and lines of his claim. It was an important proceeding on his part; not less so than his original grant from Mexico. It was an act to obtain from the government of the United States official recognition of the boundaries of the land. From 1844 to the date of this application, 15 years had intervened, with Ramirez a resident of New Mexico, and in actual, physical possession of this land, and with knowledge of its location. His title papers were carefully preserved, and referred to in terms and by date in this notice and application, which is in these words:

“EXHIBIT E.

“THE CANON DEL AGUA GRANT. CLAIM OF JOSE SERAFIN RAMIREZ.  
*“United States of America. Territory of New Mexico.*

“Notice.

“The surveyor general of New Mexico is hereby notified that the undersigned, Jose Serafin Ramirez, a resident of the county of Bernadillo, territory of New Mexico, and a citizen of the United States of America under the treaty of 1848 between the United States of America and the republic of Mexico, claims originally a tract of land that was donated by the authorities legitimately constituted, and authorized to make such donations, by the laws and government of Mexico, on the twelfth day of February, 1844, by virtue of the authority vested in the governor and departmental assembly. Said claim, as will be seen by reference to the documents, is complete. Said grant of land was made and confirmed by General Mariano Martinez, governor and commander in chief, under the authority of that government, on the thirteenth day of February, 1844, and juridical possession given on the fifteenth day of the same month. Said granting officers granted the same under the authority of the colonization laws of Mexico and the laws of Spain in force at the time the land was granted. The quantity of land claimed is five thousand varas square, making one Castilian league, and bounded on the north by the Placer road that goes down to the yellow timber; on the south, the northern boundary of the San Pedro grant; on the east, the spring of the Canon del Agua; on the west, the summit of the mountain of the mine known as the property of your petitioner,—as appears by the original title deeds accompanying this notice, numbered 1, 2, 3, 4, 5. The land claimed does not conflict with any other lands granted by the said government of Spain and Mexico; to prove which he offers the evidence necessary to prove his claim, the claimant to which is the original grantee.

“Very respectfully,

JOSE SERAFIN RAMIREZ.”

Notwithstanding his familiarity with the topography of the country, his personal knowledge of the objects named as calls, his knowledge of the direction of the El Tuerto from the spring, his physical possession, not a hint is given of any mistake in description in his grant papers. Mark the words of the description: “Bounded on the north by the Placer road that goes down to the yellow timber; on the east, by the spring of the Canon del Agua; on the west, by the summit of the mountain of the mine known as the property of your petitioner.” Ramirez does not here follow the description in terms of his grant, but uses as to the northern boundary different phraseology, show-

ing he was attentive to description. During these 15 years Ramirez reposed in the belief that there was a road which constituted the northern, and not the north-western, boundary. He was satisfied that his land was west of the Canon del Agua spring. The spring and land are not far distant from Santa Fe, being only a day's ride therefrom. During that 15 years considerable mining was done in its neighborhood, and business transacted at the Plaza San Francisco, in its immediate vicinity. That town then contained 2,000 to 4,000 people. Hon. Trinidad Romero—a man of much prominence, a former delegate to congress from New Mexico, one in whose honor general confidence is reposed, and whose statements can be taken as certainly credible—was examined as a witness in this case. He testifies in substance as follows: "I am well acquainted with a place by name of Real de San Francisco. I lived there in my early days for about six or seven years. About 4,000 people were there at that time. I went there to reside with my father in 1844. My father was Miguel Romero. He removed from the Cerillos to the Placers. I can't tell exactly how long I remained there—but from six to seven years,—from about 1844 to 1851. I remember the time we removed from there to Las Vegas. My father had a little grocery store there, and hauled water for the miners. I was at San Francisco the last time three years ago in August, and am familiar with the different localities in that vicinity. I am acquainted with the locality called the 'Palo Amarilla.' It is about south of the Real de San Francisco. My father owned a little farm there, and planted corn and beans. There were several old mines in the vicinity of Palo Amarilla; several shafts in a little mountain. My father used to tell me they belonged to Serafin Ramirez. They were there, working both mines. I know the Canon del Agua spring. It is about three or four miles south-east from San Francisco town." Melquiades Ramirez, a brother of Serafin Ramirez, testifies that the latter came to Santa Fe in 1839; that he resided there until 1846, and then moved to Real de San Francisco, in Santa Fe county; resided there about a year more or less, and went to live at San Pedro, about nine miles distant from San Francisco, and continued to reside there until 1865 or 1866. This witness, on the point of the familiarity of Ramirez with the localities, is conclusively corroborated by others. The evidence establishes that Ramirez was engaged in that region of country for a long time; so that, during the 15 years between his deed of possession and the filing of his notice and claim with the surveyor general, he became thoroughly acquainted with the country, and the location of the road and the Canon del Agua spring. This being true, when he came to look up his old title papers in 1859 to make out his claim for filing before the surveyor general, and to validate his title, is it reasonable to believe that he had not then ascertained whether his land was east or west of the Canon del Agua spring, or that so important a fact would be overlooked? Consider this act in the light of facts. He had lived at San Francisco, at San Pedro; had mined and done business for 15 years in the immediate neighborhood of the Canon del Agua spring; necessarily had traveled the roads, and inspected the country, and was a man of standing and large intelligence. His claim before the surveyor general is not signed by attorney, but by himself, so he presumably read it over. He must by actual observation and travel over the tract in these 15 years have been very familiar with its lines and points. If his land did in fact lie east of the spring, so that it constituted the western, instead of the eastern, boundary line, how utterly amazed he would have been to read in the claim he was about to sign as his boundary line: "Bounded on the east by the spring of the Canon del Agua." Knowing the land as the evidence proves he did, with his intelligence, it is unreasonable in the extreme to believe such a mistake in description as to completely reverse the location of his land would not have attracted his notice at such a time. It is equally unreasonable to suppose that he then knew there was a mistake, and omitted to state it. The petition, if he believed the description in-



correct, would have set up the mistake, and asked confirmation by correct boundaries. After so filing the notice and claim before Surveyor General Pelham, Ramirez proceeded to prosecute the same. The records in evidence from the surveyor general's office show the following:

*"Serafin Ramirez vs. United States.*

"This case was set for trial on the tenth day of January, A. D. 1860, and the witnesses, being present, were duly sworn; their evidence was recorded. The surveyor general makes his finding on the case so far as it relates to the land. The grant to the land situate at the Canon del Agua \* \* \* has been proven to have been in the quiet and undisturbed possession of the applicant from the thirteenth of February, 1844, up to the present time."

This action of the surveyor general was taken January 10, 1860. It thus appears as undisputed that Ramirez made his application to the Mexican government, had granted and was placed in the actual possession of a tract of land of which the Canon del Agua spring was prominently named as the eastern boundary; that for over 15 years he had lived on and about the land, knowing the same well; that he instituted proceedings before the surveyor general by the same description, after his full personal knowledge, to have confirmed to him a tract of land lying west of the spring, and carried these proceedings to a successful termination. In all these 15 years the evidence does not disclose that even a whisper was heard that the lands were east of the spring, instead of west. Upon the proofs brought by Ramirez before Surveyor General Pelham in 1860, on the application for confirmation, that officer finds actual, continuous, physical possession in the terms before stated.

Thus it appears the grantee, in 1860, was himself engaged in placing before the surveyor general evidence to identify his possession of the grant, with its boundaries as then described. The record in this case does not contain the evidence on the point thus introduced before the surveyor general. The nature of the inquiry, however, furnishes satisfactory information as to the character of that evidence. To constitute proof of "quiet and undisturbed possession," it was necessary that the evidence establish occupancy; not of some tract—some place—in New Mexico, nor yet of a tract with different boundaries from those in the petition, nor of a tract lying east of the spring, when the claim was for land lying west of that point, but of the identical tract asked for, lying west of the spring. Proof of possession must identify the tract possessed. It is therefore fair to assume the evidence placed before Surveyor General Pelham in 1860 by the grantee was to the effect that he occupied the land described in his application, to-wit, a tract lying west of the spring. Would witnesses be found on such a hearing to swear that Ramirez exercised dominion west of the spring, if the fact was he did not so occupy; or that his dominion was west of the spring, if in fact it was east of that place? It would be a strange proceeding, in such an application, to name the spring as the eastern boundary, and then extending for a long distance west, and, to support the averment of continuous possession of such a tract, to introduce witnesses to swear to the occupancy of a tract of land to the east of such a monument. Such a line of proof would be absurd. The surveyor general finds the grantee, from the date of the grant, had been in actual occupancy of the identical tract described in his application and notice, lying west of the spring, and he finds this "*was proven.*" Did Ramirez, while he was engaged in proving to Surveyor General Pelham that his land lay west of the spring, suspect that it was east of that point? While looking up witnesses to prove 15 years' continuous possession from the spring west, did it occur to him that his land was not west of that point, but east of it? This very proceeding of Serafin Ramirez in finding witnesses, taking them to Santa Fe to prove actual and continuous possession by himself west of the Canon del Agua, not for a short time, but for 15 years, is wholly inconsistent with the theory that this grant was to the east, and not to the west. It cannot be this proof was taken

in such a loose and unreliable manner before Surveyor General Pelham as that he would find it proven by the evidence that Ramirez had been in continuous possession of a tract of land to the west of the spring, when in point of fact he had not occupied or claimed a foot of such a tract, but only another and entirely different one. Occupancy is a physical fact, open to observation and proof, and manifested within defined lines or points. It is established that the petition of Ramirez for the grant, the decree for juridical possession by the judge, Santiago Flores, was for land west of the spring; that the petition to Pelham, as surveyor general, was for a tract lying west of the spring; that witnesses appeared before such surveyor general and proved 15 years' possession of land lying there; and that Surveyor General Pelham recommended for confirmation a grant located there. The description was written and considered so often by parties with knowledge of the locality, was proven before Pelham as actually occupied, that the inference therefrom is very strong that such is the correct location for the land actually conveyed in the grant. Thus the matter rested at the time of the recommendation for confirmation in 1860; and until new developments were made, and the hand of new manipulators came to the surface, without a suggestion from any source—notwithstanding the grantee had, without doubt, often traveled over every acre of the land—of mistake in description.

In considering where the tract granted actually did lie, whether east or west of the spring, the report of Surveyor General Pelham should have great weight. His recommendation to congress is for the confirmation of a tract lying west of the spring. There is not a line of proof that evidence on which he found possession in fact of that tract was either corrupt or mistaken. So far as the evidence discloses, Ramirez remained content with his description up to about the time, in 1866, when he was visited by Miller, Cooley, Carey, and others on the expedition ordered by Clark. Before this, Cooley and the parties who set that expedition on foot had prospected the country there. They had organized a mining company, and elevated Ramirez to its presidency. They doubtless ascertained the value of the Big copper mine and the minerals near it, and coveted such a prize. They clearly comprehended the difference in value between a tract of land lying west of a line drawn north and south through Canon del Agua spring, and one lying to the east of such a line, and including the Big copper mine.

For a period of over 18 years, up to the time when the hand of these men first began to appear, there had been no thought, so far as appears, of a mistaken description, or of any uncertainty in location. During that period the locality in controversy was not an unknown or obscure place. The evidence is clearly to the contrary; that it was a place, during much of that time, of large importance, and well known. The town of San Francisco contained a varying population, with from two to four thousand people; stores, and commercial transactions of considerable extent; planting grounds near; an organized church and chapel, where people congregated to worship; and with Ramirez one of the active leading spirits. During all that time he made no claim to the town which this survey gives him, but, to the contrary, recognized the title of others to property there in various ways. At this place it is well to observe, the survey complained of now is made to include a part of the town of San Francisco. Not only does the survey extend north of a road described in the petition for the grant, and in the grant, as the northern boundary, but it includes a substantial part of the town of San Francisco. Ramirez did not ask to run his line even to the town, but asked "for a tract of *vacant land*, known as the 'Canon del Agua,' *near the placer* (or town) of San Francisco, \* \* \* and *distant from that town* about one league, more or less. The land I solicit is vacant and without owner." This petition of Ramirez bears date February 12, 1844. Nazario Gonzales went to the town of San Francisco when a young man about 23 years old. He is a witness in

this case, and testifies: "When I went there [to San Francisco] in 1842, there was about one hundred families living there. I know how the right to locate lots for building purposes was then acquired. They applied to a justice of the peace for a lot on which they wished to build, and he would give a certificate which entitled them to a piece of ground." Was it this land on which the town was being built which Ramirez sought to acquire? He says not, in his petition. He says it was vacant land he asked for; not a tract to include in its lines a town with over a hundred families. Did it include the town? The petition he filed says "no," but that "it is distant from the town about one league;" while the survey sought to be upheld in this case says "yes; it does include a part of the town." If the land he wanted came up to the town, why did he not petition for land adjoining the said town of San Francisco? If he intended to embrace over a hundred residences in the grant he asked for, why did his petition not say, "Including the town of Real de San Francisco, with the houses and lands therein occupied by others?" The land he asked for, in the terms above, as vacant, for cultivation and pasturage, a league from the town, and south of the road, is, by the survey complained of, extended north of the road to and including the town, and actually including the chapel erected and used as a place of public worship. We are not only asked to hold that land, described as west of a given point, all lies east of it, but that the same tract, described as having the road for its northern boundary, extends far north of the road; also, that the same tract, described as being vacant, really included a town and its place of worship, and that while, by the description in the grant, it is located a league away from the town,—three miles distant therefrom,—that in fact, notwithstanding the declaration in the grant and petition that the land desired was vacant, outside of, and below the town, yet that it ran up to and included a large part of the town. If the position of the appellee be true, Ramirez for 15 years lived upon, used, and occupied a tract of land, a part of which was in the town, when he believed it was distant a league therefrom; that included houses he was asking the permission of others to occupy, the western boundary of which was located where the eastern boundary was described to be. If the survey be correct, then there was a mistake in the description in the grant as to the northern, eastern, and western boundary; not one mistake in description, but at least three. The presentation of such a claim carries on its face the most serious suspicion. The facts apparent in the evidence respecting the location of the northern boundary are quite as interesting and important as those relating to the eastern boundary. Even if the eastern boundary is correctly located, and the northern is not, it should prove fatal to the survey. On page 654, Record, Mr. Griffin, who made the survey, said, respecting the northern boundary, in answer to a question: "You will find there is nowhere in the testimony, I don't think, or in the survey, anything called the northern boundary except the points. It is south-east and north-west boundary."

The petition of Ramirez to the Mexican government, and the deed of possession, both do fix, not a north-western, but a northern, boundary; and it is at this point the complainant in this case has reason to make serious objection. It is because there is nowhere in the survey a northern boundary fixed, when there is such a boundary named in the grant, and which the survey defines, that substantial reason is bound to question the correctness and validity of the survey. The principal part of the evidence upon which these points and lines were fixed was taken in May, 1866. On page 649, Record, Mr. Griffin says he was not then a deputy United States surveyor. He was in no sense a sworn officer. He was not at that time intrusted by the government with any duties, and his act could no more bind or preclude the government than that of any other private person. On page 643 he says: "I was out there in May, 1866, at the Canon del Agua grant, as a *notary public*, in connection with Mr. Miller, as chief clerk of the surveyor general's office. I

was along as *notary public* simply." Page 649: "I received compensation for my services from the *owners of the grant*,—the parties who purchased from Ramirez." He was the agent of those only through whom the defendants in this case claim. The evidence in the record proves that the then claimants, after the recommendation in 1860 by Pelham, and before this evidence was taken, in 1866, visited the locality, organized companies, operated mines, became familiar with the topography and mineral deposits and resources of the locality, and that they contracted with Ramirez for the purchase of the property.

If the boundary described in the grant as the eastern boundary could be changed, and the land inverted so as to include the Big copper mine and its adjacent mineral, it would increase the value of the purchase by hundreds of thousands. The manner in which this business was clearly transacted is not creditable to any of the parties engaged in it. The period was favorable for fraud and wrong. The country was just recovering from the civil war,—a period of great agitation,—and the best thought was turned to the questions then engrossing the public attention. New Mexico was far distant from business or populous centers, away from all railroad and telegraph lines, and the scrutiny usually applied to populous centers. Under such circumstances, the then surveyor general, John A. Clark, visited Washington, the residence of some of the leading spirits in the enterprise. From there he directed a letter to one designated as "Chief Clerk and Translator." In response to that letter, a part of the evidence was taken which fixed the boundaries named in the survey complained of, and now sought to be maintained. For some reason not explained, that letter failed to find its way to the files, and is not to be found. Miller calls it a "private letter,"—possibly too private for preservation. It is at least suspicious that what was done in obedience to the instructions should be preserved, and the instruction lost or destroyed. What business has a public officer giving private instructions as to the basis of a public survey,—so private that the party to whom addressed regards them as too private to go on the public records? The evidence proves that Cooley, Carey, and others of the purchasers from Ramirez had been on the ground, and became personally acquainted, not only with Ramirez, but also with the country about his grant. It will be seen by referring to Exhibit L 3, p. 371, that a mining company had been organized to operate mines; that Jose Serafin Ramirez was the president of such company. It was called "The Mining Company of the Placer de San Francisco." A contract was entered into by Serafin Ramirez on one part, and as president of the company, and John C. McFaren, of U. S. A., of Washington, D. C., Asa B. Carey, also of the army, at Santa Fe, Charles W. Kitchen, Denmore, Hinkley, and Cooley, of the other part, bearing date October 20, 1865, whereby the grant, with some other property, was sold by Ramirez for \$40,000. A prior contract had been made at a consideration of \$32,000, and an increase of \$8,000 on the price occurred. The parties were to pay to Ramirez the \$40,000 on the first day of May, A. D. 1866. On the seventh day of March, A. D. 1866, Ramirez and his wife (see page 372, Record) extended the time for making this payment "from the first day of May, 1866, to June 1, 1866,"—just one month. Observing these dates, which are important, it is worth while to inquire, where was Clark, the surveyor general, while these important negotiations were proceeding? On page 45 it will be seen that the surveyor general, from Washington, only eight days after this extension of time, directed Miller, his chief clerk and translator, to go out on the ground, and to make an inspection thereof. It is not to be forgotten that Miller swears this letter, though from a superior officer to an inferior one, respecting an act now claimed to be public and official, was private, kept from the files, and cannot now be produced or found by its custodian. In his letter dated May 10th, reporting to Clark, surveyor general, how he obeyed the instructions, their

purport is clearly seen. The transaction is odorous with suspicious circumstances. May 1, 1866, there was due from the purchasers to Ramirez for the grant \$40,000. March 7, 1866,—about 90 days before this sum became due,—Ramirez was induced to extend the time of payment to June 1, 1866. March 15th,—only eight days after this extension was procured,—Clark, the surveyor general, from Washington, directed his clerk, Miller, not to make a survey, nor to locate points, lines, or boundaries in aid of the government, but to go out on the land, and take evidence of witnesses respecting landmarks. There can be no reasonable doubt, after the careful reading of the evidence pertaining to the transaction, that the purpose of the purchasers in procuring the extension was to enable them to ascertain whether, in the meantime, these boundaries could be reversed and the location inverted, and that the direction to Miller was in aid of that enterprise. The real inducement,—the true inwardness,—to this remarkable direction by Surveyor General Clark to his clerk, Miller, and the more remarkable manner in which the thing was done, is established by the last paragraph of Miller's report of how he carried out the instructions. In that report (page 46) he says:

"As there is no fund out of which to defray my expenses in making the examination, and collecting the evidence here reported, and as, in view of a probable early survey of the land in question, it was important to *the parties interested* that the boundaries should be clearly identified, so as to enable the surveyor general to act understandingly in giving instructions to his deputy for the survey, *they furnished Mr. Griffin and myself transportation both ways, bore our necessary expenses while on the trip, and paid the witnesses for their attendance.*

"Respectfully,

DAVID J. MILLER, Clerk and Translator."

Two things are established by this quotation: *First.* A survey of this tract had not then been ordered by any official authority, and so the direction of Surveyor General Clark was extraofficial and premature, and made for some purpose outside of the line of his official duty. It is important to inquire what induced Surveyor General Clark to give such direction to Miller. There is no evidence that he was moved to do so by orders from his superiors in office; besides, up to the time when he gave Miller his instructions, nothing had occurred indicating any incompatibility between the calls and natural objects. There had not been, at the time, in the field, any surveyor to ascertain any reason why the survey could not be made by following the calls of the grant. It is an unaccountable coincidence that the contract for the extension of payment should be concluded on the seventh day of March, and on his own motion that Clark should order Miller to locate landmarks not then disputed or in controversy. *Second.* Not only was the work directed extraofficial, but it was undertaken without any public funds to meet the expense, and dependent on the private generosity of interested parties to pay the bills. It was not the government or its department which in fact instituted the taking of evidence at that time, but it was those parties who had contracted for the grant, and who had procured the extension of time for payment, that this very proceeding might be taken before they were called upon to pay. Clark and Miller had placed themselves in the hands of the men who were inspiring the transaction. It is a suspicious coincidence that March 7th the extension should occur; that March 15th the private instructions should go to Miller; that on May 10th he should go with the purchasers to the ground; May 19th, a deed should be made by Ramirez to Cooley & Co., and identical with the survey later made; and June 12, 1866, the grant confirmed by congress. There was no order for a survey; none was then, in fact, made. There was no money with which to pay expenses. What was the motive which induced Clark and Miller, forgetting their duty, to throw themselves on the charity of Cooley & Co.? Surveyor General Pelham had heard evidence, and recommended for confirmation under the description.

Ramirez for nearly a quarter of a century had occupied and roamed over the tract, without a whisper of mistake in his description. What new light flashed across the mind of Clark during this 30 days of extension to the purchasers of the claim? This was all answered by the following quotation from the report of Miller: "It was important to the parties interested that the boundaries should be clearly identified to enable the surveyor general to act understandingly in giving instructions to his deputy for the survey." There is the key to the whole transaction. It was not for the reason that it was of consequence to the government; but because it was important to the parties interested,—the claim-holders,—that this inquiry was commenced. Time, too, was the essence of the transaction. It must be done before the extension expired. It might have been the voice of Clark which directed the proceeding, but it was the mind of Cooley, Kitchen & Co. that conceived it, and their hand which manipulated and controlled it. Clerk Miller, continuing, says, (speaking of this transaction, and of Cooley, Kitchen & Co.): "They furnished Mr. Griffin and myself transportation both ways, bore our necessary expenses while on the trip, and *paid the witnesses for their attendance.*" "Our party consisted of Colonel Carey, Senor Ramirez, Messrs. Cooley, Kitchen, Hoffman, and Mr. Griffin. Magnanimous grant claimants! Was transportation necessary, they were ready to furnish it to the government without cost or price. Was money to pay the bills needed, it was at once advanced. Did witnesses ask for pay, a generous purse was at hand at their service. What a mockery of justice! What a tribunal to protect the interest of the government, and make a fair and honest inquiry as to a disputed landmark! The men who inspired the expedition, who hired the teams, who paid the bills, who procured the order for the proceeding, had only 30 days' extension for payment, and an interest of many thousand dollars to invert the grant, and place east instead of west of the spring, and thereby make it cover a mineral tract of almost fabulous wealth. Not a man in the lot, unless, possibly, the weak clerk, Miller, was there to protect the government. Griffin, even, was hired and paid by the company as a mere "notary" to administer the oath to witnesses. No wonder an expedition so induced and inspired had its mind on a single point,—to make west east. It is not strange that the northern boundary was to it a matter of light moment, when the immense wealth was in the eastern extension. Who was there to examine or cross-examine, on behalf of the government, the witnesses produced, or to say a word in its behalf? The situation of Miller was not such as to enable him to act independently and fearlessly. On page 619 of the record the evidence of David J. Miller, taken in this cause, is set out, and it fully discloses the character of his mission. He says: "Surveyor General Clark was then on leave of absence." It is well to note this coincidence. March 7th, Cooley, Carey & Co. had procured the extension for payment. Between that date and the 15th, Clark, from Santa Fe, would have just time enough to procure from Washington his leave of absence, and reach that place. He would have eight days in which to accomplish that object. On the 15th he did write from Washington, giving Miller his secret instructions. Did Cooley also procure the extension, and report it to Clark? Did he (Clark) then write for and obtain a leave of absence, and, when it was received, hasten to Washington, have a conference with the parties in interest at that end of the line, and on the 15th write to Miller the secret instruction which took him with the grant purchasers, then in New Mexico, to the land, to pave the way for an inversion of the grant by a change in its lines? The circumstances point with great certainty in that direction. Continuing, Miller says, (page 619;) "I received a letter from the surveyor general—then on leave of absence—from Washington directing me to go upon the ground of the Canon del Agua grant. \* \* \* I find no record of this letter. *I looked for it among the official records.* This letter, I cannot say whether it was official or not. My recollection is, I had letters from the surveyor general, and *they were usu-*

ally private,"—more than one it seems. "I am inclined to think this was also. I have looked in the files and records to see if it was recorded, supposing it might have been deemed official, and made a record of, but I do not find it."

Within 90 days these developments occurred: Time for payment extended, and, it is fair to presume, though the proof on that point is not direct, leave of absence procured, and a trip by Clark to Washington. Also in proof, the letter of instruction to Miller; his trip to the grounds; his reports; the deed from Ramirez to Cooley, Kitchen & Co.; and the grant confirmation. It is fair to assume that these private letters of Clark to Miller relating to the grant contained matter which it was not for the public to know, or they would have been placed on the files of the office. Miller in his evidence, continues: "When the parties claiming were ready to go upon the ground, I accompanied them." It was under these circumstances that Miller went to the grant,—not favorably surrounded for independent action. He was out in obedience to private instructions. His mission was in no legal sense official. He was the guest of men whose interests were in an extension of the eastern line beyond the Canon del Agua spring, so as to include the Big copper mine, and who from actual observation on the ground were familiar with its topography. There were five of them. He stood as one to five. Why did Cooley and his partners go with Miller? Why did they not allow him to select his own notary, and proceed to the land alone, and make his investigation and take his evidence in his own way, on his own responsibility? There is usually motive in all human action. Is it to be presumed by men of experience and observation in life that these grant claimants fitted up that expedition, and went out to the land, as an act of disinterested benevolence towards the government? Not at all. They had large interests at stake. The Big copper mine and its mineral belt was in the balance. That was the stake to be lost or won on the trip. If evidence could be found or fabricated on that expedition which would form an excuse or justification for a direction from the surveyor general to his deputy in the field, a few months later, to disregard directions, and establish the eastern line east of the spring, and include the Big copper mine, the value of the grant would be immensely advanced. To accomplish that end was, as we believe, the reason why the parties in interest would not allow Miller to go alone. They went to be conveniently near him for suggestion, and to present witnesses. The inclusion of the Big copper mine, to gain legal control of it, was the central thought and inspiration of the men who shadowed Miller on that expedition. Instead of going to the town, and making public announcement of the object of the inquiry, so as to elicit information, the evidence in the record proves that they went directly to the Big copper mine, assuming in the beginning that they were at the right point, and then took evidence to support that assumption. Every lawyer and jurist knows the value of cross-examination, and the weakness of *ex parte* affidavits. Witnesses who without cross-examination state evidence with great certainty, often, upon such examination, entirely change their testimony, or break down. Miller went directly to the Big copper mine. He says: "On the following morning, our party, consisting of Col. Carey, Senor Ramirez, Cooley, Kitchen, Hoffman, and Mr. Griffin,—who accompanied with his transit, and as notary public,—most of the witnesses and myself ascended the Tuerto mountain to the spot, 'where the highest summit' thereof was scientifically ascertained by Mr. Griffin, and thence descended to the old Ramirez mine, where the witnesses were sworn and testified."

The inquiries Miller was out there to make were: Where is the Tuerto mountain? and where is the mine described in the grant? Without swearing a witness, by some intuition, Miller, and the whole party in interest against the government, went right to the mountain which their interest required to be the Little Tuerto, and to the mine they desired to establish as the old Ramirez mine. It was worth to Cooley, Carey & Co. probably a hundred thou-

sand dollars to have that mountain the Little Tuerto, and the mine the one they sought. The inspiration of the expedition was to make that the Ramirez mine, and, without evidence, the party went direct to the spot they sought to find. Who was the pilot that guided to that point? The call they sought to find lay west of the spring. It was a curious infatuation which led them in the first instance to go east to find a call described as being west. Miller must have at least known that Pelham found Ramirez was in possession of the west; and it is strange, therefore, that Miller did not make at least some slight effort to find the landmark where the grant said it was. The evidence does not disclose the slightest search at the place where the grant designated the landmark. It is not difficult to divine the subject of conversation on the road to the mountain. What reasonable person can conclude, all the surroundings considered, that Miller's investigation is entitled to much weight, or that it should have been a controlling point in directing the future survey? On the contrary, the extension, the trip to Washington, the secret instructions from there to Miller, the expedition filled up by the grant-owners, the manner in which it was all begun and ended, furnishes the strongest evidence of fraudulent collusion. Upon a careful examination of the record, it is shown that only two witnesses on that trip were examined respecting the location on the surface of the earth of either the mine or the mountain. Miller, in his record, really assumes the point in question. He dates his point "at the old Ramirez mine, in the Tuerto mountain," and then takes as to the mountain the evidence of two witnesses. Jose Serafin Ramirez, the grantee, and so a party in interest, and Juan Jose Anya, are the only witnesses whom Miller examined at that time respecting the mine or mountain. Miller was there to investigate, and a town full of witnesses. Why did he not call them? Contenting himself with the evidence, on this point, of two witnesses, he hastened to Santa Fe, and made his report. A public officer who would recommend a disregard of boundaries named in a solemn instrument on such evidence, so as to invert the grant, and change its value to the extent of hundreds of thousands of dollars, is either incompetent or dishonest; and the latter is the reasonable conclusion. It is most manifest the government was practically without representation, and the whole proceeding a private enterprise, under the color of official sanction, on the part of Cooley, Carey & Co., during the period of their extension, before confirmation of the grant, to take *ex parte* evidence to serve as an excuse for a subsequent claim for an extension to the east of the spring, so as to take in the Big copper mine and other valuable mineral tracts. It was an expedition with millions, almost, at the bottom of it; in which the government had no equal chance,—corrupt in its inception, and on its face; fraudulent in its execution. In conception and execution, we are strongly impressed, the evidence proves it was the work of Cooley, Kitchen & Co. An inquiry full of significance forces itself forward at this point: If Miller and Clark believed there was a mistake in description, at the close of Miller's investigation, why was not that fact communicated to the proper authorities at Washington? The committee of congress before whom this claim must have been pending, or congress, if the claim was there reported, must have reposed in the belief that the land they were about to confirm to Ramirez, but really to Cooley, Carey & Co., was west of the spring, and did not include the Big copper mine. Miller, and Clark, Cooley, Carey, and the rest, knew the value of the Big copper mine. They also knew that confirmation was being pushed, and that an effort would be made to claim that mine under the act of congress. It was either a deliberate attempt on their part to deceive the constituted authorities, or they did not believe the grant included the mine. What would have been the effect of a report to congress, coming from the surveyor general, that the grant about to be confirmed did not lie where it seemed to from the grant description, but it included one of the most valuable mines in New Mexico, and to make the sur-



vey would require a complete inversion of the grant from its location as described before congress? In the survey made a few months later, the northern boundary clearly ascertained by this *ex parte* proceeding was ignored. In the notes of the notary, Mr. Griffin, the following is fixed at a point where the evidence was taken: "At a point, say, two and one-half miles from the Placer del Tuerto, where the road from said place touches the Palo Amarilla Arroya, on the south side, at a bend from which the arroya turns suddenly to the west." At this place a number of witnesses gave their affidavits. Three of these, Jose Martin, Juan Jose Anaya, and Guadalupe Chaves, are appended, as follows:

Jose Martin: "I know the place called 'Palo Amarillo.' I consider that we are now at the *place most properly so called*, and it is so named from the *palo amarillo* that is found here. This tree is found more or less extensively in all the country, but abounds more at this spot than anywhere else in this section. The road which crosses the arroya for the Palo Amarillo planting ground sometimes crosses a few paces above, and sometimes a few paces below, this spot. The main road running from the Placer del Tuerto to the Palo Amarillo, I consider, comes only to this place; and from this place to the Palo Amarillo planting ground there is only a path.

his  
"JOSE X MARTIN."  
mark

Juan Jose Anaya: "The arroya we are now on, and the place we are now at, are called and known the 'Palo Amarillo.' I consider we are at the lower end of the Placer and Palo Amarillo road. There are *palo amarillo* through the country, but they are more plentiful here than elsewhere. To go to the planting ground of the Palo Amarillo, *the main road is left at this spot by crossing the arroya to the west and descending* to the planting ground.

his  
"JUAN JOSE X ANAYA."  
mark

Guadalupe Chavez: "The spot and the arroya we are now at and upon are called the 'Palo Amarillo.' The Placer and Palo Amarillo road, I consider, ceases as such at this spot. Below this place it takes the name of the 'Placer and San Pedro Road.' The trees and bushes called '*palo amarillo*' are found, more or less, over this section of country, but at this place they are more abundant than elsewhere; whence the name of the place.

his  
"GUADALUPE X CHAVEZ."  
mark

At the point thus fixed the road turns to the west. If the north line of the Canon del Agua grant were fixed at that place, it would much more nearly answer to the description in the deed of possession than where it was finally placed by the survey sought to be set aside. At this point the road proper leading down to the Palo Amarilla, in one sense, terminates. It turns to the west, and, if a line were drawn directly east and west through this point, then with propriety might the boundary named in the deed of possession be said to be answered, to-wit: "On the north, the road of the Palo Amarilla." A line drawn east and west to this point would exactly make that call: "On the north, the road of the Palo Amarilla." That road would be on the north of such a boundary. It would fill to a certainty the description—the same in legal effect, but different in phraseology—set out by Ramirez in his petition asking for the grant, as follows: "The boundaries solicited are, on the north, the road leading from the Placer to the *Palo Amarilla*." This phraseology, conceived by Ramirez himself to fix his boundary, clearly indicates the northern point at which the line should be drawn from east to west for the northern boundary of the grant. It assumes there is a place known as the "Palo Amarilla." It assumes there is a road from the Placer to that point, and

makes the place where the road reaches the Palo Amarilla a boundary point. Fifteen years later, when Ramirez files his petition before Surveyor General Pelham for confirmation, he does not copy this phraseology, but expresses it in different words; showing, additionally, that he was then cautious about the description. In that petition he expresses it: "Bounded on the north by the Placer road that goes down to the yellow timber." Miller in his expedition, by the affidavits he took, definitely proved that there was a point down the Palo Amarilla road where there was a direct turn to the west, and that it constituted the northern line of the grant, which could be definitely fixed by a line drawn through that point. Griffin knew that, but discarded it in the survey, carrying the line further north, to include the town. This point, when the road branches to go west, and from which point the road going down from the Placers lies north, is from one to two miles below the town of San Francisco. Mr. Griffin fixed it at about two and one-half miles. It must be certain that Ramirez and Flores meant to fix some line as a northern boundary. The boundary line would not be a mile in width, so it could not be the whole distance in width from east to west from the Placers to the Palo Amarilla. Ramirez says the land he asks is distant about a league from town, which is a little over two miles. That would correspond to the point fixed by the evidence above set out, and be about the Placer, where the evidence on this point was taken. There could be no mistaking the northern boundary, from the evidence taken by Miller in the presence of Griffin, and no excuse for extending it nearly two miles to the north of where it should be, so as to include a part of the town of San Francisco. To do so would be to include within the line, in that direction, from one to two miles not contemplated in the petition of Ramirez for the grant, or fixed by the deed of possession, or established by the evidence. The circumstances attending the taking of this evidence are discreditable to those directing it; and the disregard of the northern point in the boundary line established by the evidence taken must have been a willful disregard by Surveyor General Clark of his official duty. Here it is pertinent to inquire, of what use was that evidence? Miller says it was to be used as a basis of instructions by the surveyor general to his deputy in making the survey. It is strange that such precaution should be taken, in the absence of any complaint as to boundaries, and more significant that the land department at Washington, and congress, about to act on the question of confirmation, should be kept in ignorance on a matter of such vital importance; especially so, in view of the fact that, while confirmed to Ramirez, it was owned in fact by Cooley & Co., and contemporaneous with which change in ownership came the claim for a disregard of the grant description. Three days after this evidence was taken, Serafin Ramirez conveyed the grant in formal terms to Cooley, Kitchen & Co., and, in 20 days after the grant was confirmed, the evidence in the record proves that this conveyance was formulated, while the parties were on the trip.

For the first time in the history of the grant for 20 years a new description was used to designate its boundaries. The transformation worked during the 30 days' extension for payment by the new company to Ramirez, and by the trip under the management and auspices of Cooley, Kitchen & Co. of May 10, 1866, can be best seen by placing the two descriptions in contrast with each other. The description asked for by Ramirez in his petition for the grant, contained, also, in the grant, in Ramirez's petition before Pelham for confirmation, referred to in the proceeding to identify the actual possession of Ramirez with the lines of boundary, contained in his written agreement of sale to Cooley, Kitchen & Co., reads, with only slight variations in phraseology: "On the north, the road of the Palo Amarilla; on the south, the northern boundary of the Rancho San Pedro; on the east, the spring of the Canon del Agua; on the west, the highest summit of the little mountain of El Tuerto, adjoining the boundary of the mine known as inherited property." As a further de-

scription of the tract, Ramirez says, in his petition in 1844, asking for the grant: "I ask for a tract of vacant land near [not to] the Placer of San Francisco, and *distant from that town* about one league, more or less. The land I ask is *vacant*, and without owner, and I solicit because I have no possession or property by which to support myself or family." The land is further identified by Ramirez in his petition before Pelham for confirmation, in 1860, in these words: "The quantity is five thousand varas square." Consider all these points of identity and description, promulgated by Ramirez himself, with the utmost familiarity as to location, mountains, and points. It was "vacant land;" not land on part of which was a town of several thousand people. It was "*near to*," not directly adjoining, nor yet embracing within its limits, the town of San Francisco. It was a tract with a defined northern, southern, eastern, and western line, with the points of the compass, and not with north-eastern and north-western boundaries. It was about 5,000 varas square, nearly square in form, and not a tract triangular in shape. It made the "road leading down from the Placer to the yellow timber" a point north of the northern boundary line, and did not extend north along that road two miles, and include the road within its extension lines, as the survey does. Contrast all these descriptive points, formulated for the very purpose of identification by Ramirez, with the description carried into the deed of Cooley, Kitchen & Co., concocted on the ground, when they were out there, as Miller says, "paying for transportation, the witnesses, the notary, and the bills;" which description was for the first time exhibited in the deed to Cooley, Kitchen & Co. from Ramirez. It was adopted by the deputy-surveyor, imposed on the commissioner of the land department by *ex parte* affidavits, inspired by the grant-owners. It is this new description, so conceived and procured, operating, as it does, to take from the government valuable property which, by mistake of facts, was carried into the patent, which this case seeks to vacate, remitting the grant-owners to the lands described in the act of confirmation. It reverses every line and call as written down in the act of confirmation. Contrast this survey with the calls of the grant, to see how completely it ignores the grant as made out and confirmed. Mark the words of the new description, thus brought into existence: "On the north and north-west, by the road commencing at the Placer of San Francisco, and leading to the Palo Amarilla; on the south, by the spring of the Canon del Agua; on the east, by the summit of the Tuerito mountain; on the west, by the Palo Amarilla." What a transformation was thus brought by the extraofficial expedition under Cooley, Kitchen & Co. during the period of suspension in payment. The northern boundary was no longer to the south of the road, "leading down from the Placer to the yellow timber," so that the road lay north of the grant; but the northern boundary was obliterated, and in place thereof a north-western boundary was substituted, including a strip of land from one to two miles wide, and running east and west, north of the spot which the witnesses examined by Miller fixed as the Palo Amarilla, and including, also, the whole of that strip of land to the east of the Palo Amarilla road,—over a mile in width; in itself a large and valuable possession instead of a northern boundary line, running east and west down through the defined point, with the road to its north, and the town of San Francisco "*distant*" therefrom; there was in its place a single point furthest to the north, with lines diverging therefrom, not directly east and west, but nearly south-east and south-west, as boundaries. The point as defined by the new description was not "*near to*," or "*distant about one league from*, the Placer of San Francisco;" but it was right there, including the town. The south line was not "the northern boundary of the Rancho San Pedro," but the Canon del Agua spring. That spring ceased to mark the eastern line of the grant, and, instead, the grant had no eastern line at all, but only a point some two miles distant from the spring as a mark of the extreme eastern limit. The grant ceased to be in form about "five thousand varas square," as Ramirez had de-

scribed it to Pelham after 15 years' occupancy, but in the form, nearly, of a triangle. In a word, there was a complete obliteration of boundary lines, an entire disregard of prominent landmarks, points, and directions which for 20 years had been carried into the written description of the grant boundaries, and which had in actual possession so marked the ground out on the earth's surface by visible and prominent points and objects as to make it capable of identification within such monuments by proof before Surveyor General Pelham. This court is asked to believe that such a disregard of landmarks actually marked on the ground, such a change in directions, as literally to turn over the tract from the west of a named line to the east of it, and convert a parallelogram in form to a triangular tract, was demanded for the vindication of truth, honesty, and justice, or, at least, that such a transformation was but an error of judgment. We find it impossible, under the evidence in the record, to reach such a conclusion. Many facts have been stated and reasons given which influence our minds to the contrary opinion, and others will be given. The mere statement that the survey makes a change in points, lines, and location as that before shown carries with it the probability that such a survey is grossly wrong. It is no wonder that Mr. Burdett, the commissioner of the general land-office in 1874, was compelled, by what appeared on the face of the survey, to disapprove it as being *prima facie* wrong. The commissioner of the general land-office suspended the survey, and returned it to the surveyor general of New Mexico for further investigation. His communication was as follows:

"EXHIBIT K.

"*Department of the Interior. General Land-Office.*

"WASHINGTON, D. C., September 23, 1874.

"*James K. Proudft, Esq., United States Surveyor General, Santa Fe, New Mexico*—SIR: I return herewith a plat approved October 16, 1866, of the survey, containing 3,501 21-100 acres of the private land claim, in the territory of New Mexico, called 'Canon del Agua,' confirmed to Jose S. Ramirez as No. 70, by the act of June 12, 1866, (14 Stats. p. 588.) The boundaries of this grant, as described in the original title papers, (ex doc. No. 28, 36 Cong. 2d Sess. House of Rep. page 32,) are as follows: The 'land known as the "Canon del Agua," in the Placer of San Francisco, bounded on the north by the road leading from the Palo Amarilla; on the south, by the northern boundary of the grant of San Pedro; on the east, by the spring of the Canon del Agua; and on the west, by the highest summit of the little mountain of Tuerto, adjoining the boundary of the mine known as inherited property.' The only evidence on file in this office as to the location of those boundaries on the earth's surface is found on the plats of survey of the Canon del Agua and San Pedro grants, and, as thus indicated, the present survey of the Rancho Canon del Agua in no manner conforms to the calls for such boundaries contained in the original title papers, except as to the northern boundary, or 'road leading from the Palo Amarilla;' and with respect to that boundary it is not clear that the Canon del Agua extended further north than the southern boundary of the tract claimed to be within the limits of the Ortiz Mine grant. The Canon del Agua, as surveyed, extends between two and three miles south of the northern boundary of the San Pedro grant as surveyed; whereas the said northern boundary of the San Pedro grant is the southern boundary of the Canon del Agua, according to the original title papers in the case last named. The spring of the Canon del Agua, in the survey of the ranch of that name, is also south of the northern boundary of San Pedro as surveyed, and a western boundary of the Rancho Canon del Agua; whereas, according to the title papers of the last-named *rancho*, that spring is the eastern boundary of the Canon del Agua. The highest point of the little mountain of Tuerto, as shown on the plat of Canon del Agua, is east of the spring of the Canon del Agua, and the eastern boundary of the claim; when,

according to the original title papers, it should be west of the said spring, and the western boundary of said *rancho*. In view of these manifest differences between the calls for boundaries contained in the original title papers in this case, and their location by United States Deputy-Surveyor Griffin, I do not deem it advisable to take further action upon the survey until the parties in interest shall have had an opportunity to show by testimony the exact location of said boundaries, and such other facts relative to the extent of the place known as 'Canon del Agua' as will enable this office either to approve the survey of that *rancho* as now made, or to locate it in such a manner as to do justice to the claimants and the United States. You will therefore notify the claimants that in its present condition, and with the evidence now before this office, this office cannot approve the before-mentioned survey of Canon del Agua *rancho*. If, however, the claimants, or any other interested party, will deposit with you sufficient money to pay the expenses of an investigation as to such boundaries, you are hereby authorized to publish for four weeks, in some newspaper of general circulation near the vicinity of the land, a notice calling upon all parties in interest to produce, within sixty days from the expiration of said publication, such exhibits, or testimony relative to said boundaries, as they may desire to submit. In the event of such deposit of money, you will transmit to this office all exhibits and testimony received in response to such notice, and also your report thereon.

"Respectfully,

S. S. BURDETT, Commissioner."

Here, in 1874, was the result,—a suspended survey.

Before considering further the proceeding after this order of suspension by Commissioner Burdett, it may be well to retrace, and consider what was done after Miller returned from his expedition. The next step was an order from Surveyor General Clark to Griffin to make the survey. It is pertinent to inquire why Mr. Griffin of all others was selected for that work? Surveyor General Clark must have known that Griffin was one of the Cooley-Kitchen expedition. Griffin had gone out with them, had been selected and paid by them, and was necessarily on intimate terms with them. He had sworn the parties to the affidavits taken by Miller. He was with the latter at the point selected by him as the Tuerto mountain and the Ramirez mine. He necessarily heard all the talk on that trip respecting these points, and, in the nature of things, was impressed by it. Why did Clark send out a man whose mind was thus impressed,—who was a member of the expedition which had gone to the land for the very purpose of identifying the landmarks? Clark knew the state of Griffin's mind, when he sent him, respecting these monuments. It is presuming too much in favor of Clark's ignorance to believe that he knew Griffin was a member of that expedition, and yet to suppose Griffin's mind was not settled as to the location of the Ramirez mine. Under such circumstances, it must be apparent that Clark, when he started Griffin from Santa Fe to make the survey, knew that Griffin and Miller and Cooley, Carey & Co. all were of one mind as to the location of Tuerto mountain and the Ramirez mine. Consider the situation at that moment of time. The government was interested in placing that east line where the Ramirez grant described it to be,—at the spring,—and not two miles east of it, so as to save to the public a large and valuable tract of mineral land, if it could honestly and fairly be done. The grant claimants were, on the other hand, interested in carrying the line east of the spring to include the mineral. The stake at issue in the survey was not less than a hundred thousand dollars. What would an honest surveyor general do under such circumstances? Would he throw his deputy-surveyor into the company, and, under the influence of the adverse party, send him out with them to look on while the very point in dispute (assuming, for the argument, that it was an honest difference) was being discussed, investigated, determined, and reported upon adversely to the government; and then, after all that was accomplished, select him, as a disinterested

surveyor, whose mind was open to a consideration of the point, to stand fairly and evenly between the government and the claimants? Or would he say "No. Mr. Griffin must already have a fixed opinion on this question, and a surveyor shall run the lines who has not prejudged the controversy?" Who, under the evidence in contemplation, can follow Mr. Griffin from Santa Fe to the grant with Cooley, Carey & Co., taking the point he then did, and say that he was in a frame of mind, however honest, to stand impartially as to the question then at issue? Not satisfied with placing Griffin in advance, where he would naturally become impressed against the government on the point he was to determine, the surveyor general tied his hands with instructions. Why did not the surveyor general send out a deputy-surveyor whose mind was not fixed against the government, and give him the grant description, and tell him to make the survey, and find the calls, and report the result? Instead of giving an unbiased surveyor an opportunity to go to the locality, and exercise an independent judgment, he selected Griffin, who must have prejudged the point, and, by his instructions, tied his hands, and fixed the initial point of the survey. Clark says: "It is represented to me that the landmarks named in the Canon del Agua grant do not correspond in direction or position with the corners or distances." Griffin knew that, because he was out there with Miller, gathering material upon which to base such representation. Griffin is specifically instructed to take two places in the Palo Amarilla road as points in the survey; thus making the northern point in the line to include San Francisco. We believe this instruction to be utterly indefensible. It presumes against the government, and in favor of the grantees. Clark's action in sending Miller out to the grant, and in selecting Griffin, with his presumably formed opinion, was also in favor of the grantees. So, also, his confirmation of the survey. The acts of Clark respecting this grant are uniformly adverse to the government; so much so as to create a belief of his insincerity.

Griffin took, as deputy-surveyor, some evidence as to the locality of the mine. On that point his first witness is Francisco Aranda. He does not testify that the El Tuerto mountains do not extend south-west of the San Francisco. He was asked: "What is the name of the little hills or mountains on the western end of the Sierretta del Tuerto?" *Answer.* It is a part of the Sierretta del Tuerto." He does not say, however, where this lies, but does say they lie to the east of the town; but he is not directed to another range west of the town. Jose Martin was the next witness before Griffin. He swears, in a general way, that the Sierretta del Tuerto is south and east of San Francisco. His attention was not pressed on the point whether the mountain did not also extend south-west of the town, and he was not asked whether the mine was east or west of the town or spring. Jose Guerro is the next witness. His evidence is not very full. He swears the Ramirez mine is in the Sierretta del Tuerto, but does not say where that is,—whether east of spring or town. Juan Ortega is the next witness. He does say the mountains are east of the town. He is not asked if they do not also lie south-west thereof, or if there are not other mountains lying south-west of the town by that name. Tecundo Chaves locates the Sierretta del Tuerto as commencing west and south-west of the San Francisco, and extending east. He says the mine is in these mountains, but does not say whether east or west of either the spring or town. Guillermo Roival swears that the Tuerto begins south-west of the town, and extends to the east; that the mine is in the mountain,—but does not otherwise locate it. Aban Nieto swears to the same effect. Ramirez is also sworn, and says: "The Sierretta del Tuerto commences at the Plaza del Tuerto *on the west*, and runs to the east one and a half leagues, more or less." That is all the evidence on this point taken by Griffin. If it would not unduly extend this opinion, it would be of interest to get out every fine of evidence taken by Griffin. A close scrutiny of it will demonstrate that it is wholly insufficient to overthrow the calls of the grant. And it is astonish

ing that it ever should have been regarded as sufficient to set aside a clear description. Jose Martin, whose evidence was taken by Miller, has some point to it, and, coupled with Miller's report, tends to fix the mine east of the spring; but there was no cross-examination of the witness, and his attention was not in the slightest called to any fact which might modify his evidence so far as the same is adverse to the complainant. It is remarkable that not a single one of these witnesses was asked whether or not there was an ancient mine west of the spring, and near the Palo Amarilla road. It was the duty of Griffin to survey to the call, if he fairly could. It was his duty to ascertain if there was not a small mountain to the west of the spring, generally known, or known to many, as the "Little Tuerto;" and if there was not at that point an old mine which would answer the call; and yet not a question is asked on those points. Special Surveyor Treadwell, sent out to make an examination by the commissioner of the land-office, McFarland, did make such examination, and in his evidence says: "After personal examination, and carefully considering all the testimony taken, I have concluded that the little mountains south-west of the town of San Francisco are the Little Tuerto range, and the highest peak is the little mountain of El Tuerto." If diligent inquiry had been made by Griffin or Miller, they might have obtained the same, and even more, information on that point.

Analyze the evidence taken by Mr. Griffin. The witnesses are named as follows: Francisco Aranda, Jose Martin, Jose Guerrero, Juan Ortega, Tecundo Chaves, Guillermo Roibal, Aban Nieto, Jose Serafin Ramirez,—eight in number. Of these eight witnesses, Aranda, Martin, possibly Guerrero and Ortega,—four in all,—in a general way fix the Tuerto as east of the Placers. Their evidence discloses nothing like a critical or careful examination. They were not asked by Griffin as to the mountains or mines south-west of the town. The other witnesses sworn by Griffin really corroborated the grant calls. Chaves swore: "The Sierretta del Tuerto commences on the west, south of and near the Placer del Tuerto." The word "near" is not very definite, and might have been used to mean a greater or less distance. The mountain, at all events, according to his evidence, began west and south of the town. How far west and how far south he does not state. Roibal states: "The Sierretta del Tuerto commences at the west, south of and near this town, and extends east to the plain." Aban Nieto says: "The Sierra del Tuerto commences west, and south of and near this place, and extends east." Ramirez swears: "The Sierretta del Tuerto commences at the Plaza del Tuerto on the west, and runs to the east." His statement is not very clear. Whether he meant the Tuerto began west of the town, or east, is not certain. Three witnesses out of the eight clearly testified the Tuerto mountain was west and south of the town, and in a direction to verify the western call of the grant. Four testify to the contrary, and one, with large interest, was indefinite. Not a single man was called and examined as to mountains or mines south-west of the town, in the direction of the Palo Amarilla, in support of the grant call. The evidence that did come out on that point was not brought out by a direct reference to it. In addition, it is evidence that Cooley & Co. produced the witnesses who were examined. Aban Nieto, a witness called by the defendant, (folio 2563,) says: "Captain Carey summoned witnesses." This fact may account for the absence of witnesses to sustain the interest of the government. Tecundo Chaves also says, referring to his evidence before Griffin: "They took me from Real de Dolorez, together with Aban Nieto and Guillermo Roibal, in Mr. Cooley's carriage." "Cooley came in a carriage to where I, Nieto, and Guillermo worked." As further characterizing the transaction, the wife of Ramirez says: "The grant was sold to the government company from the states. Col. Carey was one of them. We signed a contract in writing out there, May 8, 1866. Kitchen was present, and money at that time was delivered to us. A note was given to us for \$1,200 the same day,—May

8th. The condition of that note is that it was to be paid when the grant was surveyed, and the title made perfect." All this is corroborated by the son. What would be the course of a fair examination? Witnesses in large numbers would have been called, and questions asked directing their minds to the point in controversy. They would have been asked as to the mountains to the south-west of the town; to the west of the spring; as to their height compared with others, so as to ascertain if they were mere hills or properly mountains; as to the names they were known by in 1844 and 1846 and 1860,—all important dates; as to the mines north-west of the spring, their extent, who had opened, and who had worked, them. It was of the utmost importance to the public to sustain the calls of the grant. Just enough evidence was taken to make a very weak excuse to disregard the call to the west of the spring. It is to be presumed that the deputy-surveyor reported all the evidence taken. The evidence reported is far short of proof upon which the calls of the grant should be rejected, and the value of the grant increased, and the complainant to that extent wronged. The direction of Clark to Miller, under the circumstances, and at the time made, to go to the land to take proofs; the manner in which he executed that direction; the influences by which he surrounded Griffin, to impress him as to the incompatibility of the landmarks with the calls; the fact that, after he had so impressed him, he selected him as the deputy to make the survey in the field; the very slight proof taken by Griffin as to the western call, its prompt approval by Clark; and the failure, in all that time, of these officials, to do any act tending to support the grant calls,—as it was clearly the right of the government to expect of them,—are badges of fraud, and full of significance, which is greatly strengthened by the fact that the identity of the grant as described by Ramirez in his title papers is totally destroyed by the survey.

Mr. Burdett, the commissioner of the general land-office, suspended this survey, and returned it back for proof, September 23, 1874. He gave his objections to the surveyor general, and made an order that would impress every honest man as just and fair; which is elsewhere in this opinion set out. It was for the publication of notice that evidence on the point might be taken. Why it was not given it is not difficult to understand. It provided for public notice in the newspapers near the land. The effect of such a publication would have been to open the door for public examination of witnesses, in the presence of all who chose to hear. Persons having interests would have appeared. Examination and cross-examination would have resulted. If the grant claimants had accepted this order, it would have been the highest evidence of good faith. It would have shown they did not shrink from a public inquiry as to the location of their claim. How was this most righteous requirement by the commissioner of the land-office met? Was it in a fair spirit, by publication to the world that there was a dispute as to the location of the Canon del Agua grant? Was the public informed that Cooley, Kitchen & Co. denied the correctness of the grant description, and were proceeding to take in the Big copper mine, and the valuable mineral grounds adjoining it; thereby depriving the government of the lands, and depriving miners of the opportunity of acquiring interests in such minerals? No; to the contrary, the evidence was taken by Miller, and Griffin was imposed upon the commissioner of the general land-office to induce him to approve the survey. The opposition of the Ortiz mine claimants, who insisted the survey included some of their grant, was also procured to be withdrawn. It appears that Mr. Elkins had an interest in the Ortiz mine, and that his wife was a stockholder in the San Pedro Company, so it would not be difficult to arrange for a withdrawal of opposition by the Ortiz mine owners; and so by the withdrawal of opposition, by concealments, and *ex parte* affidavits, the action of the commissioner was procured. The instruction of Burdett contemplated notice, and a public examination of witnesses as to the location of the Little



Tuerto and the mine. The evidence foisted upon the commissioner as a substitute for evidence of that character was *ex parte*, taken in private, without notice of cross-examination. If the commissioner of the general land-office had known how Miller was surrounded on his trip to San Francisco, and of the fact that Griffin had been led to prejudge the point of inquiry in the case before he started on the survey, and that he was not permitted to make a survey upon his own judgment, fixing his own initial point, but was limited in his power, and not permitted to act for himself, and that the evidence thus placed before him was all private and *ex parte*, he would have rejected it as outside the record, and have enforced his order for a public notice, and evidence taken under it. The additional testimony on this occasion sent forward is of a class with all the rest. It related, however, to the San Pedro grant; but it shows that the same hand which directed Miller was yet visible. Evidence not on file was needed as to San Pedro. Instead of depositing money, and making open publication as to that grant, what was done? Let the surveyor general himself speak. He says: "Having no means of determining from the records the positions of the natural objects called for as a boundary on the south side of the addition to San Pedro, I mentioned the matter to the gentleman acting here as agent of the owners of the claim; and he thereupon brought before me, and I examined under oath, witnesses to establish the localities." It is a singular fact that the name of the "gentleman acting as agent" for the grant claimants is not given. Who was he? It is very rare indeed, in a law suit, that one party goes to his adversary to produce witnesses against himself. The "gentleman acting as agent for the grant"—very smooth words—was not the disinterested person that a faithful officer would usually select to privately look up the witnesses, and present them for examination, to make out a case as to a boundary against the grant. The "gentleman acting as agent for the grant" would very naturally produce witnesses favorable to its claim; and would not very probably produce those, and pay them out of his own pocket, who would give evidence to cause the rejection of the grant claim, or to fix a monument different from the one desired by the grant agent.

Here was a survey suspended by the commissioner of the general land-office. He was not satisfied it was correct. There was a reversal of the calls. He asked for public notice, and open proofs as to monuments. These proofs would cause a rejection or affirmation of the survey. The surveyor general of New Mexico knew that this proof was asked for. Who would he go to naturally, impulsively, if honest, for proof to sustain the contention of the land-office? Would he go to those interested in defeating that contention? Would he seek out those interested against the claim of the department? Did any litigant or claimant in any department ever before do so absurd a thing? And yet that is just what was done in this case. It was not disinterested men—witnesses beyond influences—that were brought before the surveyor general, but the gentleman who was "agent for the claimants" was generously requested to bring in evidence to support his claim. That evidence was taken, and sent on to the department. The evidence thus produced was every line that found its way to Washington. From the beginning, when Cooley, Carey, *et al.* began to manipulate Serafin Ramirez, to the last act in confirmation of the survey, it was the mind of the claimants which conceived, and their hand which executed. The evidence proves conclusively that Clark and Miller were subservient to the wish of the claimants. There is not a single act shown by Clark or Miller in support of the boundaries of the grant, as contained in its written description. There is not a word by them spoken to maintain, or try to do so, the grant calls. From the day Pelham, (acting, as we believe, in good faith, upon proof, and in the right,) recommended the approval of the grant by the description in the grant deed, to the date of Burdett's suspension of the survey, in all that pertained to the interest of the

government in that grant it was practically without a representative. We believe if Burdett, when he affirmed the survey, had been in possession of the facts shown in the record in this case, he would certainly, and without hesitation, have rejected it, and the claimants would have been limited to the lands west of the Canon del Agua spring. It was evidence such as this, taken under the influence and in the manner stated, which Clark sent to the commissioner of the general land-office to induce him to approve the survey, when that officer called for evidence taken after the publication of notice. The commissioner expected that the inhabitants of San Francisco—the miners claiming properties to be affected; all persons who might have adverse rights—would have notice, and might be heard. Such an examination would be fair and honest, and commend confidence; not so, the *ex parte* affidavits substituted in its place. A recital of the manner in which this evidence was taken carries its own condemnation. Are the averments of the bill of complaint not fully proven, even at this point in the evidence? Here are the averments in part: "The commissioner of the general land-office taking said false and fraudulent affidavits, so as aforesaid forwarded, as a basis for his action and decision, was led into and induced, under a mistake founded upon the false survey of the said Griffin, and upon the false and fabricated affidavits returned as before stated, to approve, and did approve, of said false survey as so made by said Griffin." The theory of this part of the bill of complaint is to the effect that the real facts were not placed before the commissioner, but, to the contrary, that these *ex parte* affidavits taken by Miller and Griffin were imposed upon him as the truth, and as being honestly taken by the agents of the government, whereas they were taken by the claimants themselves, and not by the agents of the United States; and the commissioner thereby acted under a mistake, and, by reason thereof, approved a survey wrong in fact, created and induced by the fraudulent act of the grant claimants. We have no doubt the commissioner would instantly have rejected the survey if there had been before him the facts disclosed in this record. It is apparent the commissioner was in great doubt when he approved of the survey. That is evident from the terms of approval, which are as follows, (page 77, folio 370:)

"The boundaries of this grant are represented on the survey under consideration, but, as thus represented, the highest summit of the Little Tuerto mountain is the east boundary, instead of the west, and the spring of the Canon del Agua is a west, instead of an east, boundary, as described in the record of juridical possession. The spring of the Canon del Agua is also a considerable distance at the north boundary of San Pedro rancho, and Placer del Tuerto on the north is included within the claimed limits of the Ortiz mine, (confirmed, as No. 43, by act of March 1, 1841.) As, however, all the natural objects described in the record of juridical possession have been found, the present survey is within these boundaries; and as claimants of the Ortiz mine aforesaid have, by conveyance acknowledged March 16, 1875, released to the claimants of Canon del Agua all interest in said mine, as claimed, which appear to conflict with the survey of the Canon del Agua now under consideration, I have decided to approve said survey. You will give notice of the decision to all parties in interest, including the owners of the Ortiz mine aforesaid, and allow sixty days from the service of notice for appeal to the Hon. secretary of the interior. If, at the expiration of the said sixty days, no appeal be taken, you will so notify this office, and if appeal be taken you will also notify this office, and transmit with your notification all documents or arguments which may be filed with the parties named. Please acknowledge the receipt of this communication. S. S. BURDETT, Commissioner.

"Date, Washington, D. C., March 25, 1875."

It is a most significant fact that two orders of the interior department,—one to publish notice in Santa Fe, and take public proofs as to the calls and monuments of the grant, and the one above,—both of which would have disclosed

to the public in New Mexico, and especially to those there interested adverse to the grant claimants, what they were trying in the dark to do, and which would have opened the door to an honest investigation, were utterly disregarded. The Ortiz claimants, as shown, were silenced by a purchase from them of a release, and thus their opposition before the department was quieted. Otero and the other parties in interest on the grant, were utterly ignorant of the proceeding. To publish either of the notices ordered by the department would arouse them, and so they were not notified, but kept in ignorance while the secret work of overturning the grant boundaries went forward. No fair-minded man could read this approval without at once being impressed that there was doubt in the mind of the commissioner, requiring the purchaser to look further into the title. It is not pretended that any notice was ever given of this decision. If notice had been given to the residents of San Francisco, or to the miners upon the grounds east of the spring, the light of day would have been let in on the scheme of these grant claimants to reverse the boundaries of the grant. Suppose Mariano S. Otero—who himself claimed the Big copper mine, and who had told two of the stockholders in this case before purchase that he intended to sue for it—had been notified, or that notice had been given at Bernalillo, San Francisco, or Santa Fe, who can doubt that the evidence which is in this record would have found its way before the interior department, causing a reversal of its action.

So far, we have only considered what occurred up to the time of the confirmation of the survey. Let us now consider whether the courses are incompatible with the landmarks named in the deed by which Ramirez received his land, and whether the land does not really lie west of the spring, and could not have been placed there by the survey, and at the same time every landmark, monument, direction, and call have been fully met. There is no contention as to the existence or location of the Canon del Agua spring, and that is an important landmark. The road "leading down from the Placer to the yellow timber" is also well established. Jose Martin, Juan Jose Anaya, Guadalupe Chaves, (see Record, pp. 52 and 53,) witnesses sworn by Griffin, locate this road exactly, and fix the point at *the Palo Amarilla*, where it branches to the west. That spot leaves the road north of it, is "about one league distant from the town," as Ramirez expressed it in his petition, and a line drawn east and west there would answer the call. If the spring is taken as the east point, and a line be drawn through north and south, an eastern boundary is fixed according to the description in the grant. If a line is drawn east and west through the Palo Amarillo road at a point fixed by Jose Martin and others, where that road bears to the west, until it intersects the line east, drawn north and south through the spring, the course and landmarks of the grant description are both sustained, and the east and north boundary fixed. The north boundary of the San Pedro grant constitutes the south boundary of the Canon del Agua. A line drawn along the north boundary of the San Pedro from east to west until it intersects the line drawn from north to south through the spring makes the south boundary, and follows the description in the grant. If these be taken as correct lines, then there only remains to find the west line. The deed of possession given by Santiago Flores to Ramirez describes the west line in this way: "On the west, the highest summit of the little mountain of El Tuerto, adjoining the boundary of the mine known as inherited property." Ramirez also describes the land he asks as "distant about one league, more or less, from the Placer del Tuerto." In his petition to Pelham for confirmation, Ramirez describes the tract as "five thousand varas square." In seeking a landmark, we should look west of the spring, rather than east, because the title paper says it is west. We should seek to bound a tract of land that would be about a league distant from San Francisco, rather than a tract surrounding and including that town; a tract with a north, south,

east, and west boundary, containing 5,000 varas, and square, or nearly so, in form,—for the plain reason that these are all named as prominent calls in the title paper, and they should be answered, if they fairly can be. It should also be adjoining the “little mountain of El Tuerto,” as distinguished from some larger mountain not likely to be so known or called, having the east, north, and south boundaries fixed. Why not begin at the south-east corner, and measure along the south line west for a quantity, and find a point from which a line drawn north to its intersection with the northern boundary line will include and embrace sufficient to make “five thousand varas square.” Doing this, the land will be the proper distance from San Francisco; it will be “five thousand varas square;” it will answer the call for the Canon del Agua spring as the east boundary line; it will meet the call for the “north line of the San Pedro as the south line of the Canon del Agua.” It will fill exactly the call for the Palo Amarilla, and leave that road in the very words of the grant description: “to the north, the road of the Palo Amarilla.” Quantity, form, distance from San Francisco, the spring, the north line of the San Pedro, the Palo Amarilla road,—all landmarks,—are exactly met as set out in the grant description, and, at the same time, courses and distances are preserved. Contrast such a survey with the one actually made, and can there be any reasonable doubt about which embraces the land actually intended by the Mexican government, and in fact embraced in the Canon del Agua grant. If there can be added to the landmarks met by such a survey, also, the little mountain of El Tuerto, the case will be made beyond reasonable doubt; and, if that be supplemented by the mine, it will stand almost as clear as demonstration. Keeping in mind the description of the mountain named as a landmark west of the spring, in the grant from the Mexican government, a consideration of the evidence on that point will add strength to the case for the complainant. The words of this western call, so far as they relate to the mountain, are: “On the west, the highest summit of the little mountain of El Tuerto, adjoining the boundary of the mine known as inherited property.” It will be observed the term “the little mountain” is used. The term “little” is of itself descriptive, and this word was doubtless used to distinguish the mountain from some other larger one, or from a range of mountains by that name greater in extent. It is fair to assume, from the use of this word, that there were at that time other mountains of the same general name, larger than the particular one intended in this call; and so the words “little mountain” were used as of more certain description. John B. Treadwell was appointed by the land department as a special agent to proceed upon the ground, and examine into the landmarks. He obeyed his instructions, and in February, A. D. 1884, took evidence in the locality of the town of San Francisco. Among the witnesses whom he examined are the following, with their evidence on this point:

Edward J. Edgar: “I have resided in New Mexico since 1857, and lived near the town of San Francisco ever since, excepting two years. I am familiar with the names of the surrounding mountains. I know the mountain called the ‘Little Tuerto.’ It is situated south and a little west of Real de San Francisco, and distant about one and one-half miles from that town. I know the road running from the Real de San Francisco to Palo Amarilla. The Little Tuerto mountain is on the west side of the road. The road is about five hundred yards from the base of the mountain. I know a mountain called the ‘Big Tuerto.’ It is the second high peak south-west from Real de San Francisco; distance, a quarter of a mile or more. I have no interest antagonistic to the Canon del Agua patent.”

Eulogia Aranda: “I was born in the town of Real de San Francisco, territory of New Mexico. I know the mountain called the ‘Little Tuerto.’ It is the first mountain west and south of the town of San Francisco, and the arroya passing through the town runs along the east base of the same. I have known

the Little Tuerto by that name ever since I can remember, and I am now thirty-three years of age. I have never known the Little Tuerto mountain to be called by any other name."

Tecundo Chaves: "I am sixty-nine years old. I first went to Real de San Francisco in April, 1842. That was when the mines were first discovered there. I lived there until the year 1858, and since that have lived at Real de Dolores. The mountains west of the Real de San Francisco is the Little Tuerto range. I never knew these mountains being called by any other names. I have no interest antagonistic to the Canon del Agua grant." This is one of the witnesses whose evidence Griffin also took.

Francisco Martinez: "I am sixty-nine years of age. Went first to Real de San Francisco in the year 1843, and lived there until 1854, and have visited there frequently since. I know the mountain known and called the 'Little Tuerto.' It is east of the town, and the other mountains also west of the town are called the 'Little Tuerto Mountains.' I have no interest antagonistic to the Canon del Agua grant patent."

Antonio Nieto: "I was born in Real de San Francisco, and have lived there most of my life. I do not know the mountain known and called the 'Little Tuerto.' The mountain just south-west of Real de San Francisco is called 'Sierra de la Placer.' I have no interest antagonistic to the Canon del Agua patent." While this witness does not identify the name of the Little Tuerto, he does prove there were mountains south-west of San Francisco, and about the place designated in the call.

Jose Romero: "I am over forty-three years of age. I came to Real de San Francisco when a child, and have lived there and in the vicinity ever since. I know a mountain called and known as the 'Little Tuerto Mountain.' That is the Little Tuerto mountain. [The witness here points to the mountain just south-west of this town, and adjoining the same.] It has been called the 'Little Tuerto' ever since I can remember. I have never known it to be called by any other name. I have no interest antagonistic to the Canon del Agua claim. I know where the Sierretta Padernal is from here. It is the same range as the Little Tuerto, and just south of the Little Tuerto, this side of Palo Amarilla, and just to the left of the road leading from Real de San Francisco to Palo Amarilla. Said road passes between the Little Tuerto and the Padernal mountain. I have no interest antagonistic to the Canon del Agua patent."

Bartolo Pena: "I came to the Old Placers, nine miles from here, when I was nine years old, and have lived in this vicinity ever since. The only mountain I knew as the Little Tuerto is situated north-west of here, on the other side of the second arroyo. It is about three hundred yards from Real de San Francisco. The other end (to the south-west of here) of it is called 'Palo Amarilla.' This end is called the 'San Francisco.' I have no interest antagonistic to the Canon del Agua."

Manuel Sanches: "*Question.* When did you first come to Real de San Francisco? *Answer.* I was one of the discoverers of the *placers* here. I lived here until twenty years ago. Have lived within thirty miles ever since, and have frequently visited this place." This witness here makes a somewhat confused statement, but locates the Little Tuerto south-west of Real de San Francisco, and has no interest adverse to the Canon del Agua.

Jose Manuel Guerrero: "I came to the Real de San Francisco in 1841; lived there until 1845; moved away, and returned again in 1855; and have lived there every since. I know the mountain called the 'Little Tuerto.' [Witness here points in a south-westerly direction from San Francisco.] That is the mountain, just west of the arroyo passing through the town of San Francisco. I have known it to be called the 'Sierretta del Tuerto' ever since 1841. I have no interest antagonistic to the Canon del Agua."

Juan N. Guerrero: "I was born in Santa Fe in 1824. I lived here in Real

de San Francisco from 1841 to 1847. Then I moved away, but returned here from one to three times a year. I know the mountain called the 'Little Tuerto,' [pointing to it.] That is the mountain, south-west of here, Real de San Francisco, and the first mountain west of the arroyo passing through this town. I have known this mountain to be called the 'Sierretta del Tuerto' since 1841. I have no interest antagonistic to the Canon del Agua grant patent."

Juan Guerrero: "I was born in the Real de San Francisco in the year 1847. I know the mountain known and called the 'Little Tuerto,' [pointing to the mountain.] That is the mountain, to the south-west of the town of Real de San Francisco, and the arroyo running through this town is at the eastern base of said mountain. I have known these mountains to be called the 'Little Tuerto' ever since I can remember. I have never heard them called by any other name. I have no interest antagonistic to the Canon del Agua grant."

Jose Eusebia Sanchez: "I was born in New Mexico in 1835. I know the mountain known and called the 'Little Tuerto.' I do not know one mountain as the 'Little Tuerto,' but the first range west of here, Real de San Francisco, running north and south, is called the 'Little Tuerto Range.' This range has been so called since I came here, in 1843. The mountain four miles north of here was called the 'Tuerto Mountain,' and is now called the 'Ortiz.' The Padernal, or Flint, mountain is located in the Little Tuerto range, just south of the road passing from Real de San Francisco to the Palo Amarilla. I have no interest antagonistic to the Canon del Agua grant."

S. H. King: "I am a native citizen of the United States. I came to Real de San Francisco in June, 1849, and lived here until the fall of 1850. I am forty-seven years of age. I returned here in the fall of 1879. I know the little mountains known and called the 'Little Tuerto.' They lie west of here. I have known them for the past three and a half years to be called the 'Little Tuerto.' I have known this by conversing with the old Mexican settlers. As near as I could ascertain, the summit of the Little Tuerto is about one and a half miles south-west from Real de San Francisco. I have no interest adverse to the Canon del Agua patent."

This witness makes thirteen in number who were examined under oath by Special Agent Treadwell. Every one of them in effect denies the Little Tuerto to be south-east of San Francisco, where the survey in dispute places it, but fix it south-west of that town, and generally from one to two miles,—about where the western call of the grant is. Twelve of this thirteen have not the least interest in the result of this proceeding, and may therefore be presumed fair and disinterested persons. Those examined by Treadwell were upon interrogatory, but for convenience their evidence is here condensed, and the questions are omitted. J. B. Treadwell on the 14th day of December, A. D. 1883, was appointed by N. C. McFarland, then commissioner of the general land-office, to visit the ground, and make examinations respecting the calls of the grant, as the department was not satisfied with the survey made by Griffin. Commissioner McFarland says, in his letter: "It is desirable the examination be made under the immediate direction of the department, and, being in the vicinity, you have been selected for the work." Treadwell swears he did not consult or talk with any attorneys or parties in interest, but proceeded to the ground, conversed with the people, and took the evidence. His proceeding is in every way creditable, and, contrasted with Miller's examination, is like the brightness of day to the darkness of midnight. He is sworn as a witness in this case, and, as such, states: "I proceeded to the town of Real de San Francisco, now Golden, about the 21st day of January, A. D. 1884. I proceeded to take the testimony of every person I could find who was familiar with the country, and competent to testify. I also made examinations and surveys of the surrounding country in question, when not taking testimony. After carefully considering all the testimony I had taken

and from my personal examinations, I have concluded that the range of mountains south-west of Real de San Francisco are the Little Tuerto range, and that the highest peak in this range is the little mountain of El Tuerto. It is designated on the map filed herewith, marked 'Exhibit B.' Mr. Treadwell, from surveys and personal observation on the ground, was able to find mountains to the south-west of the town, which would be west of the spring, and answer the western call. His name makes 14 witnesses whose evidence sustains the grant, and identifies the western call, and which disputes the survey of Griffin, and proves it to be radically wrong. Here is also further evidence to the same point:

Felipe Delgado: "Live at Santa Fe. I am fifty-three years old. Lived in Santa Fe since 1853. Real de San Francisco is about thirty-five miles south of Santa Fe. I at one time lived there. Began to live there when I was about eight years of age. I went to school at that place. I remained there until 1849. There were many people there at that time. I know the mountain there called the 'Sierra del Tuerto.' I know it. It is to the west of the *plaza* of Real de San Francisco. The Tuerto mountains are to the west of the San Francisco *plaza*. They were called the 'Little Tuerto Mountains.' Not by any other name."

Juan Delgado: "I am twenty-nine years old. I am acquainted with the Real de San Francisco. It is about thirty-five or thirty-six miles south of Santa Fe. I went there to that town in 1877 and resided there a short time. In 1878, I had a store out there in charge of another man before I went there to live. I am acquainted with the different localities in that region, and know the names by which they were generally called when I was out there, and when I lived there. There is a chain of mountains to the south-west of Real de San Francisco,—to the south-west of the town. They were called the 'Sierretta del Tuerto.'"

Felipe B. Delgado: "Am a merchant, and live in Santa Fe. I am forty years old. I was born at the *placer* of Real de San Francisco, which is about thirty-six miles south of Santa Fe, and continued to reside there about seven years, and up to the time when the United States forces occupied this territory. I recollect something of the mountains then. There are some ridges or mountains there to the south-west of Real de San Francisco. They are mountains. The last time I went there I saw them more distinctly. On the west side there are high mountains."

Vicente Garcia: "I am fifty-five years of age. Live at Santa Fe. I first knew the place called the 'Real de San Francisco' in 1840 or 1841. My parents resided there at that time at the Real de San Francisco. I was occupied at the parochial church at Santa Fe, but was often at San Francisco. I was there frequently, visiting my father, to 1846, and then went to live with my father. I then knew, and yet do know, the location about the Real de San Francisco. There are mountains west and south-west of the town. They had different names. They were generally called the 'Mountains of San Francisco of the Tuerto.' The Real de San Francisco is situated on a hill. There is a *canon* or creek right west, which runs down from the San Francisco Mountains to the Una de Gato. At a great distance from that *canon* west is the Sandia mountains. You can stand on a hill on the west side of San Francisco, and, far to the west, see the Sandia mountains. The Sandias are to the west of the town fifteen or twenty miles, possibly thirty. It is a long distance. From that point where you look to the west, and see the Sandias, there are some mountains between the town and the Sandias, but they are much lower than the Sandias. There are some mountains near the town, where the mountain commences. The Sandia is a long range of mountains." The cross-examination of this witness was very searching, to induce him to state something whereby it could be argued no mountains were west of San Francisco until the Sandias are reached, fifteen miles distant; but the witness lo-

cates mountains, notwithstanding a very close cross-examination, west of the town, and near there, over which the Sandias could be seen.

Jose Henriques Guerrero. This witness was called as to other points on his original examination, but was taken in hand by the defense, and critically cross-examined about locality, and corroborated the calls of the grant. As to the mountains southwest of the town on cross-examination, he said: "*Question.* Were there any mountains west of the town of San Francisco, or southwest of it? *Answer.* The San Francisco mountain is to the west of San Francisco. The mountain I know as San Francisco is very near to the town, and west of it." He was also pressed further to locate the Sandia mountains far to the west, and to say no mountains were between the Sandias and the town. He did so locate the Sandias, but did also place mountains to the south and west of the town, between the town and the Sandias, and near the town. He said, further: "The country to the west of the *canon* that runs by San Francisco is broken. There are some small mountains there. They are not hills, but small mountains." This witness was an old man, seventy years of age, and savagely pressed on cross-examination. At times he became somewhat confused, but he held quite persistently to the point that there were small mountains south-west of the town. All this was evidence brought out by the defense on cross-examination.

Jose Maria Samora. This witness is examined at great length, but the substance of his evidence as to the mountains south-west of San Francisco is that the Sandia range of mountains is many miles distant to the west of the town, and runs a long distance from north to south; that it is a high, well-known range; that near, and to the west and south, of San Francisco, is also a range of small mountains, which witness designates by name as the "Palo Amarilla." He says: "The mountain that is near San Francisco disturbs the view of the Sandias, and that continues up to the Palo Amarilla. This is a tolerably high, small mountain. There is only one well-known peak in these worth a name. It is called the 'Palo Amarilla.' This mountain, just west of San Francisco, was very well known. It is a long range,—about five miles,—and was called the 'Palo Amarilla Ridge.' There was no mountain in there called the 'El Tuerto.'" This witness clearly identifies a long range of small mountains extending from near San Francisco to the south-west about five miles. It is true, he does not identify the name "El Tuerto," but he places the mountains there, and it may be he never heard any part of it called by that name; but a cloud of other witnesses not only swear also to those same mountains, but have heard them called by the name of "El Tuerto."

Samuel H. King: "My age is forty-six. I live at Oak Grove ranch. I am acquainted with Real de San Francisco. It was my former residence until within the last four months. I first became acquainted with that place June, 1849. I lived with my father, who was engaged the principal part of the time in mining. I am familiar with the principal places in that locality. In 1849, I was over those mountains nearly every day. I knew pretty much all the mines that were being worked. *Question.* You speak of a small range of mountains lying in the south-west of this town. Do you know the name of that range? *Answer.* All the name I ever knew or heard to it was the 'Sierretas de la Plazas,' and I never heard that until I came back here. *Q.* Never heard it called the 'Palo Amarillo'? *A.* No, sir. *Q.* You do not know, then, whether that range of mountains extending south-west is ever called the 'Palo Amarilla Mountains' or not? *A.* No, sir. *Q.* Do they run along by the side of where this planting ground is? *A.* They terminate at this planting ground. The planting ground is at their foot." It will be observed this witness clearly defines mountains from the town running down south-west to the Palo Amarilla, but does not fix their name, either as "Palo Amarillo Mountains," as one or two other witnesses did, nor as "El Tuerto," as very many state. On the substantial point that there was something more than mere foot-hills—in



fact, mountains—south-west of San Francisco, he is clear, from years of personal observation.

Stephan White: "*Question.* Is there a little range of mountains running south-west from the Placer de San Francisco? *Answer.* Yes, sir; it extends down to the Palo Amarilla planting ground. They run from San Francisco down to the Palo Amarilla, on the west side of the road that goes down there. From the town the road runs about south-west. In going from the Real de San Francisco to the Palo Amarilla planting grounds, these mountains lie to your right hand as you go down. *Q.* What is the character of the country between this town (Real de San Francisco) and the Sandia mountains? *A.* Where I went over, it seems to be a rolling country,—a kind of grazing country. *Q.* Are there any distinctive mountains there? *A.* Not between them. *Q.* There are no distinctive mountains, as I understand you, between this town and the Sandias? *A.* Not west, there is not. *There is south-west.* There is a little range of mountains runs right along west of Real de San Francisco. I never knew the name of them. They are three or four hundred feet high. They are not as high as the mountains to the south-east. I should say the mountains to the south-east are not 2,500 feet high, but about eight or nine hundred feet. The mountains to the south-east are the highest."

John U. Talbot: "I am fifty-three years old. I met Mr. Ballou. My understanding is he was president of the San Pedro & Canon del Agua Co. I met him early in 1880, and, along with Colonel Grafton and others, went out there to the town, and looked around some three or four days. I had been there before,—first, in September, 1879; and was there frequently, two or three times a year, after that, until I moved to that place. I had some interests there. I am tolerably familiar with the different localities in the vicinity of Real de San Francisco. I surveyed a line out there. There is quite a hill, you might call it, or a small mountain; comes right up to the town. It is an elevation of probably three or four hundred feet high. It is on the west and south-west side of the town. These mountains extend from the town south-west,—The first one about a mile, probably, to where the Palo Amarilla road goes through between that and another one. Then there is another one joins in a sort of little chain of hills there, that is lower than the other mountains a good deal."

Richard W. Webb: "I am forty years old. Live at Golden. Have lived at Real de San Francisco for two years. I had visited there before. I have taken occasion to look up the landmarks,—to go over the ground." This witness, under a long examination, fixes mountains south-west of the town, and also south-east, and says both have been called the "El Tuerto;" and designates a little mountain south-west of Real de San Francisco which would answer the grant call. He says: "There is a main road going near due south from Golden, that is known as the 'Albuquerque Road' until you reach a point about three-quarters of a mile from Golden, where, as I understand it, the Albuquerque road branches to the west. I understand it to be the Palo Amarillo road, as told me by residents there,—people that have cultivated the land. I have been over the road. When I saw it, it was an old road, very little used. It took more the appearance of a trail, though you could see it had been used as a road. I have been to one mine or shaft in that vicinity. This lies south of the road leading to the Palo Amarillo, and at the base of a little mountain. At the time I was there, I should think it was twelve or fifteen feet deep. Had the appearance of containing mineral all the way down from the surface. There is a small mountain lies right to the west of it. This mine has an arroya at the eastern base. It is south-west of San Francisco."

Henry Yates: "Am thirty-six. I am acquainted with Real de San Francisco. So became acquainted six years ago. I engaged in mining there, and became familiar with the locality. I know where the Big copper mine is situated. The mountains at that place are called the 'El Tuerto.' There are

also, besides them, other mountains in that vicinity called the 'El Tuerto.' There is a little mountain—it runs north and south—right west of the town, always called the 'Little Tuerto Mountain;' also two little mountains which stand off to the north-west of the plaza, called the same name."

Nasario Gonzales: "My age is sixty-four. I first became acquainted with Real de San Francisco in 1842. I have lived there at different times, but when I first went there I lived at the place for seventeen months. I lived there afterwards about six months in 1846. I am more or less familiar with the localities there, and became so at that time. There are some small mountains to the west and south-west of that town. I do not know the particular names given to these small mountains, but I know they were there. These are small mountains some three miles south-west of the town. Where the mountains leave off, the hills begin."

Trinidad Romero: "I am forty-seven years old. Formerly a delegate in congress from this territory. I first went to Real de San Francisco to reside in 1844. Remained there six years to 1851. I am acquainted with and familiar with the localities in the vicinity of that town. My father had a little farm at the Palo Amarillo, and cultivated there corn and beans." He also places mountains to the south-west of the town. He says: "There was a spring north-west of the Real de San Francisco, and a mountain there of that same name, and a whole range of small mountains extended from that point south. Between the town and the spring the whole range was called the 'Tuerto Mountains' in the early days, from the spring."

The defendant called the following witnesses to the point under consideration, to-wit, mountains south-west of Real de San Francisco:

Francisco Aranda: "There are small mountains to the west and south-west of San Francisco. They are called the 'Small Mountains of the Ojo Valverde.' Never heard mountains in that vicinity called 'Palo Amarillo' or 'El Tuerto.'"

Abad Nieto also fixes small mountains there, but never heard them called the "Tuerto."

Francisco Martinez calls them "ridges" to the west and south-west.

Jose Martinez swears he is well acquainted near San Francisco. "I do not know of any little mountain on the west side of Real de San Francisco by the name of 'Sierrita del Tuerto.' I do not know of any other mountain, except where the mine is called the 'Sierrita del Tuerto.'" On his cross-examination, he admits there are elevations south-west of Real de San Francisco, but designates them as "foot-hills," not mountains. This witness says he is some distracted and out of his mind.

Fecundo Chaves does not know any mountains west of San Francisco by the name of "El Tuerto."

Juan Nieto: "Well acquainted in the vicinity of Real de San Francisco from having lived there. Know of no mountains called 'El Tuerto' except those east and south-east of the town. Am well acquainted with the planting grounds of the Palo Amarillo. *Question.* Do you know whether there are any little mountains right in the immediate vicinity of the Palo Amarillo? *Answer.* No, sir; there is not one. There is only the *sachila* [ridge] that commences at the Ojo Valverde, and runs up to the Palo Amarillo." This witness does not dignify the elevation which other witnesses have called mountains by that title. He calls them "ridges." His evidence, however, proves an elevation there; the same that others call mountains.

Ventura Chavez. This witness shows knowledge of the locality. "*Question.* Is there a mountain where the mine is [referring to one south-east of the town] generally known as the 'Sierra del Tuerto,' or 'La Sierrita del Tuerto?' *Answer.* It is so called. *Q.* Do you know a point there called the 'Palo Amarillo Planting Ground?' *A.* Yes, sir; I do. *Q.* Do you know any other mountain in the vicinity of Real de San Francisco called 'La Sierrita del

Tuerto,' except the one in which this mine is situated? A. Yes, sir; *there is a little mountain just this side by the same name.* Q. Where is that little mountain? A. *That is called the 'Mountain of the Palo Amarillo.'* Q. Then it is not called 'Sierrita del Tuerto,' but the Mountain of the Palo Amarillo? A. It is divided. One is called the 'Sierrita' or 'Palo Amarillo,' and the other is called the 'Sierrita del Tuerto.' Q. Then it is not called the 'Sierrita del Tuerto,' but the 'Palo Amarillo'? A. It is divided. One is called the 'Sierrita' or 'Palo Amarillo,' and the other is called 'Sierrita del Tuerto.' It is divided. Q. Now, which way from the town of San Francisco is the one called the 'Sierra' or 'Sierrita del Tuerto'? A. In this direction, [pointing south-east.] It is clear that this witness had in his mind that there were mountains south-west of the town from the Palo Amarillo planting grounds, running north and east to the vicinity of San Francisco, and on the west of that town. He agrees with the witness who preceded him, except the former modified the extent of the elevation to ridges, while this witness named them mountains. Even a rigorous cross-examination by defendant of his own witness produced but little modification in his statement as to the name these mountains bore.

Mariana Antonio Sandoval was the wife of Serafin Ramirez, and shows an intimate knowledge of the locality. She places the El Tuerto mountain south-east of the town, and says she never knew any other mountain of that name in the locality. This witness also shows that she has an interest of about \$2,000 in the result of the proceeding,—a payment of that amount if defendants get title. Although foreign to the point just now being considered, she also knows that, when Griffin was out with Miller, the contract of sale was made definitely, and money was paid.

Jose Augustin Ramirez, son of the grantee. On his original examination he says: "The El Tuerto mountains are south-east of the town of San Francisco." On his cross-examination, this evidence appears, (page 580, Record:) "Question. Are there not little mountains west of the Albuquerque road, and near the Palo Amarillo planting ground? Answer. Yes, sir; there are. Q. What are they called? A. They are called the 'Small Mountains of the Palo Amarillo.'" This witness also states \$4,000 is due from defendants if their title is sustained, and to that extent both himself and mother are interested witnesses.

Nasario Lopez: "There are no mountains or peaks west of Real de San Francisco. From my infancy I have known of none west." On further examination, however, this witness joins the rest in placing mountains west of the Canon del Agua springs, which would fairly answer the grant call as to that point. He states: "Question. Do you know any mountains in the neighborhood of the San Pedro ranch known as the 'San Pedro Mountains'?" Answer. Yes, sir, I do; some on the eastern side,—that is the old San Pedro. Q. Do these mountains lie east or west of the Canon del Agua spring? A. They remain to the west and the Canon del Agua spring to the east. Q. Are there any little mountains right near to the Palo Amarillo planting grounds? A. There are some very small mountains. They are not high mountains. They are hills near the valley."

W. W. Griffin: "Question. Are there not near the Palo Amarillo planting grounds, and lying between the forks of the road and that ground, two or three little mountains? Answer. There are two or three little hills or elevations,—gravelly elevations. They are not high. They would be called 'hills,' calling the others 'mountains.'" This is the last witness called; and he, the very last one, describes elevations south-west of the town, and north-west of the spring, but he does not designate them mountains.

It is worthy of note that not over three or four witnesses in all have denied absolutely the existence of such elevations. The large majority have called them mountains, a very few have named them hills, but they have not de-

finer just how high elevations must be to cease to be hills and begin to be mountains. It is possible a witness who did not want to discover mountains, might quiet his conscience by requiring the elevation to be quite great before it passed from a hill to the mountain stage of existence. On this point, the evidence of the witnesses has been quoted to demonstrate the correctness of the analysis thereof. It proves, by witnesses called by the defendant, that Francisco Aranda, Ventura Chavez, Jose Augustin Ramirez, Abad Nieto, Nasario Lopez—five in all—place little mountains to the north-west of the Canon del Agua spring. Jose Martinez, Juan Nieto, W. W. Griffin, Francisco Martinez,—four in number,—admit that at the point named there is a ridge or elevation, but they do not think it is made sufficiently large to be technically termed a small mountain. Fecundo Chavez, Mariano Sandoval, do not speak as to the existence of mountains south-west of the town. Their examination was as to mountains there bearing the name of "Tuerto," or "El Tuerto," but not as to the existence or otherwise of mountains; their attention being directed rather to the name of the mountains there, than to the point whether there were or were not mountains there. It is thus seen that a majority of the defendant's witnesses place well-defined small mountains south-west of the town, leading down to the Palo Amarillo, and so north-west of the spring, and that all of them who speak on the subject recognize high elevations there; so, upon this evidence alone, the court could safely believe mountains there which fairly might answer the calls of the grant, except as to the mere matter of name. The defendant's witnesses who say the name "Tuerto" or "Little Tuerto" was never to their knowledge applied to those south-west of the town give evidence negative in character, as those mountains might have borne such a name, and yet the witnesses might not have known it. There was no great significance at that time attaching to the name of these small mountains. The name would be only a matter of custom. A very great many people may have called them "Little Mountains of the Tuerto," and these witnesses who are called by the defendant not have heard such a name. They are generally persons of humble stations in life. If, however, they did not hear such name applied, it does not prove that others may not have done so. A large number of witnesses testified, on behalf of the complainant, that they did know such mountains were there, and did know they were called the "Little Tuerto." This is an affirmative fact, and such witnesses either have seen the mountains there, and have heard such names applied, or they are willfully false. Others who testify negatively may be equally honest, but yet never have heard such name applied. It would not follow that witnesses who did hear such name were either false or mistaken, because other witnesses, less observant, had not heard what complainant's witnesses testify they did hear. The negative evidence would not overthrow the affirmative. What is the weight of such testimony, and what does it prove? It has been copied into this opinion that it might be classified, and thereby the more easily be weighed and comprehended. There will be found hereinbefore, on this point, set out the evidence of the following witnesses: Edward J. Edgar, Antonio Nieto, Bartolo Pena, Jose Manuel Guerrero, Juan Guerrero, S. H. King, Vicente Garcia, Jose Maria Samoja, John M. Talbot, Nasario Gonzales, Juan Delgado, Eulogio Aranda, Fecundo Chavez, Jose Romero, Manuel Sanchez, Juan N. Guerrero, Jose Eusebia Sanchez, Felipe B. Delgado, Jose Henriques Guerrero, Stephan C. White, Henry Yates, Trinidad Romero, Felipe Delgado, R. W. Webb. This is a list of 24 witnesses, each and every one of whom testify clearly and distinctly to the existence of well-defined little mountains to the north-west of the Canon del Agua spring. Of this 24 all but 5 testify they have no interest whatever antagonistic to the defendant in this action. The fact, then, that there are mountains, just where the grant boundaries locate them, in size and name to correspond exactly with the call of the grant, is fully proven beyond a reasonable doubt. The evidence which

these witnesses give on this point is not assumed, but it is quoted from the record. A reference to their evidence, set out, will prove that Edward J. Edgar, Eulogio Aranda, Fecundo Chavez, Francisco Martinez, Antonio Nieto, Jose Romero, Bartolo Pena, Manuel Sanchez, Jose Manuel Guerrero, Jose Eusebia Sanchez, S. H. King, Felipe Delgado, Juan Delgado, Vicente Garcia, R. W. Webb, Henry Yates, Trinidad Romero, each and all in their evidence state that the name of the "Little Mountain of the Tuerto," or "Little Tuerto Mountain," was applied to those south-west of Real de San Francisco. These witnesses are 19 in number; 14 of whom have not, so far as appears, a dollar of interest in the action. Are small mountains to be found south-west of Real de San Francisco? Twenty-five witnesses answer yes, and only four answer no. With such proof, can there be much uncertainty of the fact? Was this range known as the "El Tuerto," and one of them known as the "Little Tuerto Mountain?" Refer to the record for the answer. Nineteen witnesses answer yes, while but nine at furthest say no. As to the fact of there being mountains there, the evidence of twenty-five, yes; and four, no. As to the name being "El Tuerto," and a mountain there known as the "Little Tuerto Mountain," the proof stands nineteen in favor, to nine against. With such proof, there is added to the other calls heretofore referred to as established, by following the description of the grant, the addition of the Little Tuerto mountain, north-west of the Canon del Agua spring. Thus the evidence clearly proves that the grant description can be followed, and landmarks and description as written in the grant deed be found easily, unless it be the mine therein described. With every other boundary, line, direction, and landmark clearly proven in accordance with the Ramirez deed, if some uncertainty does exist as to one single point,—the mine,—that should not operate to set aside every other landmark, and reverse the location of the grant. That survey should be made which will meet most of the calls. Is there any reason why the mine should be given prominence over all other landmarks? Is not the Canon del Agua spring just as prominent a point, and, in the nature of things, better known? Is not the Palo Amarillo road, traveled then daily, as certain as the mine? Distances, directions, lines, spring, roads, farms, should not all be disregarded to give prominence to a single point.

An examination of the evidence, however, will show that the mine also can with reasonable certainty be located where the grant boundary fixes it,—to the west of the spring,—and every point definitely settled. A consideration of the evidence relating to the mine shows that it is at least as likely to be west of the Canon del Agua spring, where the grant description places it, as east, where the survey locates it. The one known now as the "Big Copper Mine," sometimes also called the "Ramirez Mine," is a prominent point in the defendant's contention. In fact, defendant so magnifies this one point as almost to obscure others of equal or greater importance. Whether this mine is the one referred to by Santiago Flores in February, 1844, in the description to the grant, or not, will now be considered. The burden of proof on that point is upon the defendant. The presumption must be in favor of the grant description. It will not be presumed that the judge, FLOREZ, in his official act evidenced by the deed, and placing in possession, made a mistake; and so the question must be whether the evidence proves a mistake.

Antonio Jaques, a witness called by the defendant, is the central figure in the case on this point. When his evidence was taken he was 68 years old, and a resident of Chihuahua, Mexico. He says: "My profession is that of a lawyer. I have been engaged for the last thirty years in the discharge of public offices, and have been for over twenty years a magistrate of the supreme court of Chihuahua, and several times have been president of the court, by appointment of the other judges." This witness, just before his evidence was taken, went to the Big copper mine, and again looked over the ground. He

did this that he might refresh his memory and testify understandingly. He says that he came to the territory on business for Antonio Otero and his brother and copartners in claiming, acquiring, and working a mine called "Our Lady of Dolores;" first in company with Don Antonio Jose Otero, Mariana Barela, and Don Luis Aguilar. That with his associates they denounced the mine according to the law of the country, and posted notices thereof both at Santa Fe and San Francisco, and within 90 days sunk a shaft to the depth of 10 varas, and were put in possession thereof by Albino Chacon, judge of the first instance, who gave them a certificate; and that it was placed on file by the judge. That, the day before he testified, he went to the office of the surveyor general, and there saw, read, and examined that identical paper, and identified it as the one given him by Chacon. That the paper was also signed by attesting witnesses. He swears he worked in that mine himself, sinking the shaft; that it was worked for gold, but showed signs of copper; that they first established an *arrastrar* at Canon del Agua, and, the water not being sufficient, that they established one at San Antonio; that, when he and his associates began first to work the mine, there was nothing but a very small prospect hole there,—not over half a vara in depth at most; that, while he was working this mine, many persons were engaged working out gold at the placers; that he then knew Jose Serafin Ramirez; and that he at that time saw him at Santa Fe, the Placers, Perelta, and Albuquerque; that he saw Serafin at the Tuerto Placers there; that Mariano Barela was at the time superintendent of the working of the mine and reduction of the ores; that they (Jaques and his associates) had eight blasters, men engaged in handling ore in wagons to the furnaces, all kinds of workmen employed—hoisters, wagoners, and other necessary employes; that Mariano Otero is the son of Juan Otero, and Jose Antonio Otero is the uncle of Mariano. He swears, further, that during all that time Serafin Ramirez made no claim whatever to the mine. He identifies clearly this mine as being the Big copper mine, and as the one of which defendant is in possession, and as to which the supplemental bill seeks injunction. He says himself and his associates were working this mine when the American forces came in; that Jose Antonio Otero and Juan Otero remained, and were partners in all their business, and, as such, acquired the interest in the mine which Aguilar held. He goes into the details quite minutely relating to the discovery, and shows much familiarity with the situation at that time, and impresses us as a truthful witness. The title papers to this mine, connected with the evidence of Jaques, constitute a chain of record evidence of great strength, and, that its force may be seen, they are here copied in full:

"EXHIBIT B.

"*The Deeds of Varela et al., Year 1846.*

"Legalized testimony of the registration and grant of the mine Nuestra Señora de los Dolores, situated in the Real del Tuerto mineral district, to the owners of the same, Licentiate Antonio Jaques, Mariano Varela, Antonio Jose Otero, and Luis Aguilar. [Seal.] Third seal. (Four reals.) Eighteen hundred and forty-six and eighteen hundred and forty-seven.

"On this day, at about ten o'clock of the seventh day of April, 1846, Mr. Luis Aguilar has appeared at this office under my charge, showing that he has discovered a mine [*cata*,] of gold, which he states is found in the Bonancita mountains, which registry he has made verbally in the presence of Messrs. Nicolas Pino, Jose Abreu, and Jose Salazar; he having to do so in accordance with the law on this subject within the term of ten days, in the manner by it prescribed, leaving deposited in the office a specimen [*pie dra*] which he declares is from the said mine, the weight of which is twelve ounces; and for the proper evidence this entry is made, which I sign, with the witnesses of my attendance. I certify.

JOSE ALBINO CHACON.

"Attending. TELESFOR SALAZAR.

"Attending. FELIPE SANDOVAL."

*"To the Justice of the First Instance:* We, citizens, Mariano Varela and Luis Aguilar, both natives of the department of Chihuahua, by occupation miners, and now residents of this department, and living in the mineral district of Dolores, appear before you in due legal form, and state that we do in the name of the supreme powers of the nation, and of the local ones of the department, make formal registry of the mine which is situated in the Placer del Tuerto mountains, belonging to this precinct, which mine has a small excavation, and it is unknown who may have been its owners, it having been open from time immemorial, its courses being from north to south, and which we bind ourselves to work for gold, silver, copper, or what God shall be pleased to give us therein, giving it as a name 'Nuestra Senora de los Dolores;' for which purpose we ask that you be pleased to return to us, acted upon, this registry for our security, allowing us the time fixed by the ordinances on the subject for sinking the shaft of possession, and in due time to return and apply for possession.

*"District of Dolores, April 12, 1846.*

"MARIANO VARELA.

"LUIS AGUILAR."

"SANTA FE, April 13, 1846.

"All that is due under the law for the purpose being presented and admitted according to the requirements [circumstances] of the ordinance on this subject, *entry is made in the book of registrations of this office* of first instance of the mine mentioned in the foregoing petition, discovered by citizens Mariano Varela and Luis Aguilar, to whom is conceded the term of ninety days, counted from this date, for them therein to notify this office of the said registered mines, then having a shaft a vara and a half in width or diameter at the mouth, and ten varas in depth, for the purposes contemplated; the citizen Jose Albino Chacon, first constitutional alcalde of the illustrious corporation of this capital, financial justice of the department, and *ex officio* judge of the first instance of the Central district thus provided, acting with attending witnesses. I certify.

JOSE ALBINO CHACON.

"Attending. FELIPE SENA.

"Attending. NARCISO CARDINAS."

*"To the Justice of the First Instance:* We, Antonio Jacquez, Antonio Otero, Mariano Varela, and Luis Aguilar, all shareholders in the mine Nuestra de los Dolores, the former of twelve shares by donation which the latter have made to them gratuitously, as will be accredited, if necessary, with the proper document, which they do not present now, so as not to expose it to loss in the transit from this point to the capital, appear before you in due legal form, stating that having *denounced* the said mine you granted in your decree of the thirteenth of April ninety days to sink the possession shaft on the terms prescribed by the ordinance on the subject, and the same being finished, we apply to you that you be pleased to come to give us possession thereof, or to direct that the justice of this mining district do so, being pleased to concede to us for that purpose the measurements and appurtenances corresponding to us as a company mine under article two, title 11, of said ordinance; wherefore we request that you be pleased to provide accordingly, this being justice, and we declare as is necessary, etc.

*"District of San Francisco del Tuerto, July 12, 1846.*

"ANTONIO JACQUEZ.

"ANTONIO JOSE OTERO.

"MARIANO VARELA.

"LUIS AGUILAR."

"SANTA FE, July 14, 1846.

"As I understand that I am not authorized to delegate this authority that is conferred upon me by law to the justice of the peace of that district, to order him to place in possession of the mine of Nuestra Senora de los Dolores

the solicitors in this petition, I will proceed myself formally to do so at the earliest opportunity.

JOSE ALBINO CHACON."

"DISTRICT OF EL TUERTO, July 21, 1846.

"As it is required by the mining ordinance that, in order to execute the possession asked for by Messrs. Jacquez, Otero, Varela, and Aguilar, an expert should be appointed to examine the declivity or incline of the vein, the direction in which it runs, the hardness, softness, or quality of the ores, etc., and there not being in this department any professor, and it appearing to me that citizen Julian Tenorio is the most proper person, I appoint him to discharge the duty of expert in the possession that I should give to-day to the aforesaid gentlemen of the mine Nuestra Senora de los Dolores, for which purpose they shall be summoned, and this decree made known to them, as well as the citizen appointed expert, so that he may accept and be sworn; as so ordered, decreed, and signed, with my attending witnesses, for the lack of a secretary.

JOSE ALBINO CHACON.

"Attending. ANTONIO CHAVES.

"Attending. FRANCISCO SARRACINO."

"Messrs. Jacquez, Otero, Varela, and Aguilar were immediately notified of the foregoing decree, and said that they heard the same, and signed it with me, and those of my attendance.

JOSE ALBINO CHACON.

"Attending. ANTONIO CHAVES.

"Attending. RAFAEL CHACON."

"Immediately, the citizen Julian Tenorio was notified of the foregoing decree, and said that he heard the same, accepted the appointment, and swore to faithfully perform his duty as expert in the possession that will be given of the mine Nuestra Senora de los Dolores, according to his best knowledge and understanding, and that he will act without injuring any of the parties, without being influenced by gift, bribe, or other passion, and signed the same with me, and those of my attendance.

"Attending. ANTONIO CHAVES.

JOSE ALBINO CHACON.

"Attending. RAFAEL CHACON.

JULIAN TENORIO."

"I proceeded immediately, accompanied by my attending witnesses, the appointed expert, and the interested parties, to the mine called 'Nuestra Senora de los Dolores,' and, finding ourselves there, I ordered the expert to examine the same, and he, having done so, said that the shaft of possession had the ten varas in depth, and the vara and a half in diameter, as required by the mining ordinances; that the vein is of gold; that it runs from north to south. Its inclination is horizontal. Its declivity lies in the lower part of the hill. Its walls show the greatest solidity. And, the expert not having anything else to say, his statement will be recorded upon the corresponding record book. And according to him there were given to the parties interested, and measured from the mouth of the mine to the east, one hundred and ninety varas, and to the west ten varas. After this they proceeded to measure six locations upon the line or direction of the vein pertaining to them as discoverers and partners, and consequently they were measured from the mouth of the mine to the north eight hundred varas, and four hundred varas to the south, at which limits were placed the corresponding stakes; and I ordered them to build their mounds at said limits. This being concluded, I ordered the interested parties to walk over the surface of the mine, and to throw stones in all directions, in sign of possession, that by this writing I grant to them, in the name of the supreme powers of the Mexican nation to the citizens Don Antonio Jacquez, Don Antonio Otero, Don Mariano Varela, and Don Luis Aguilar; giving to them for their security and protection for all time certified and authorized copies, signing myself, with the appointed expert and my attending witnesses, for the lack of a secretary, there being none in this department.

JOSE ALBINO CHACON.

"JULIAN TENORIO.



"Attending. ANTONIO CHAVEZ.

"Attending. FRANCISCO SARRACINO.

"Fees, eighty dollars. I swear it. [Rubric.]

"In the first page and in the first line is interlined 'Juzgado:' Valid.

"This is a copy of the original, faithfully and legally made, compared, legalized, and authorized by me and my attending witnesses, with whom I act as special justice for the lack of a secretary. I certify.

"JOSE ALBINO CHACON.

"Attending. TELESFOR SALAZAR.

"Attending. FELIPE SANDOVAL."

This record evidence is very impressive, when the seven witnesses who attest as being present at the various acts are considered; for it proves actual possession by Jaquez and his partners, by seven witnesses to the various legal steps, and is record evidence of the fact.

Melquiades Ramirez was called as a witness by the complainant. He is a brother of Jose Serafin Ramirez, the grantee, and was 52 years of age at the time he testified. He came to New Mexico first, to reside, in March, 1845,—about one year before Jaquez and his associates discovered the mine. He swears Jose Serafin Ramirez came to New Mexico in 1839, and was residing in Santa Fe in 1845, when he (Melquiades) came, and they went together to the place in 1846. He says Serafin went to San Pedro, and he went there, and lived with him; that he (Melquiades) lived there until 1863, when he left, and went to the county of San Miguel. He says: "Serafin lived in that vicinity till 1865 or 1866, and then he moved away." He continues, in answer to interrogatories: "In 1846, I knew Mariano Varela, Luis Aguilar, and also Antonio Jaquez, from Chihuahua. They were engaged in 1846 in mining near Real de San Francisco. They worked their ore at that time in San Antonio. I have seen the mine they got their ore out of at that time. That mine lies about a mile and a half south-east of San Francisco. I can't state distance exactly. It is in a mountain. That mountain was called the 'Mountain of the Placer,' and some times 'Del Tuerto.' The first mining work my brother and I engaged in was in working in the Una de Gato, assaying ores, about the year 1852. We got the ores at that time from the Huertas mine, then so called, and also ores from the Cerillos. In 1846 my brother and I had nothing whatever to do with this mine, which Barela and Luis Aguilar were working there in 1846. After that time we did have something to do with that mine. In the year 1854, more or less, we were taking out ore, crushing and working ore, from that mine. *We then claimed it by denouncement as an abandoned mine.* I do not know of any other claim except by denouncement made to it. I, at least, made no other claim. I never heard my brother make any other. My brother and I continued to work that mine from 1854 up to 1863, when I moved to the county of San Miguel to reside. I do know that between the time that Jaques and Aguilar worked it, and the time when my brother took possession of it, that other persons did work that mine. In that time Tomas Valencia worked it. I do not know how long he worked it, but he commenced working it in the year 1846 and a part of 1847. I have seen that mine since then. I saw it the last time in December, 1881, and have heard it called by the name of 'Copper Mine.' *That Big copper mine is the same one that was worked in 1846 by Mariano Barela and Luis Aguilar,* and the same one my brother took possession of in 1853 and 1854 *under a denouncement.* It is all the same mine. It was never claimed by me or my brother as having belonged to our grandfather or grandmother or great-grandfather or great-grandmother or any of the family. I have lately seen a paper on the files purporting to be a claim by my brother Jose Serafin Ramirez, and also an oath indorsed on another paper." The oath to which the witness evidently refers is in the record. It seems to be on file in the surveyor general's office, and indorsed, as would ap-

pear from this witness' evidence, on some of the grant papers. In what way it relates to the grant, who procured it, or who filed it, does not appear, that we can find from the evidence. This oath was not filed prior to its date, but it seems than to have been indorsed on the papers previously on file. It reads as follows:

*"Territory of New Mexico, County of Bernalillo:* Before me personally appeared the undersigned, requesting that the oath might be administered to them, they declaring, under the responsibility of that oath, that Francisco de Moradillos is their great-grandfather and that this is the truth.

"JOSE SERAFIN RAMIREZ.

"Parties sworn. "MELQUIADES RAMIREZ.

"SERTO RAMIREZ."

The witness continues, as to this paper: "I have examined that paper. I never made any such oath or statement. I never appeared before a justice of the peace and made such an oath. I never signed that paper. I understand Sisto Ramirez never signed it. He does not know how to write. I never made any claim myself, nor did I ever know of any of my brothers to make any claim, to the mine Barela worked, by virtue of any inheritance from my father or great-grandfather. The mountain in which this mine is situated was called by different names. It was called the 'La Sierrita del Tuerto,' the 'La Sierra de Bonanza,' and 'La Sierra del Placer.' I saw that mine before Barela worked it. It had been an abandoned mine before that. It was a shaft about two or three varas deep. I had a grandmother whose name was Dolores Diaz. I know Tomas Valencia, and that he was working there, but do not know my brother was working or interested with him. I arrived in this territory in 1845. Stayed in Santa Fe from 1845 until 1846. I came in March. I went to the Placer, and stayed a year. I stayed then at San Pedro three or four years. In November, 1846, I went to the Placers, and stayed about a year, and then went to San Pedro, and stayed until 1857, and then made a visit to Old Mexico, and returned. Stayed there a month, and then came back. My brother was engaged in assaying ores in Una de Gata about 1852 or 1853. I know Juan Jose Jarmillo. He was a justice of the peace at San Antonito in 1853, and *that was about the time my brother Serafin commenced to work this Big copper mine.* I was, under his control at that time, and of course had to work for him. *We denounced this mine, I think, in the year 1854, as an abandoned mine.*"

Bartolo Pena, 61 years old when examined: "I am a miner and laborer. Resided at Real de San Francisco since 1845 or 1846. I know the mine now in the possession of the San Pedro & Canon del Agua Co. called the 'Big Copper Mine.' I heretofore worked in that mine, and again lately. I know who first discovered the Big copper mine. It was discovered by two men, Mariano Barela and Antonio Jacques, and they were partners in working mines. I saw Mariano Barela twice in the mines. I know about the time when he discovered the mine, but can't state it. I know a man living at the town called King. He worked that mine also. I know Jose Serafin Ramirez personally. King worked the Big copper mine; so did Serafin. Lately I have worked for the San Pedro & Canon del Agua Co. I do not know how long Mariano Barela and Antonio Jaques worked that mine. They did not work it much. I was there twice at the time when Mariano Barela was working it. When I first saw them they were at work there. Barela and Jaques first worked the mine, afterwards King worked it, and *after that Serafin also worked it.* I worked also in the Campbell mine. The Campbell mine and the Big copper mine are both in the same mountain. One is on this side, and one is on the other. When I first knew the mine now called the 'Big Copper Mine' they were working it very little. Serafin Ramirez was not a partner with Antonio Jaques and Mariana Barela. Mariano Barela worked that mine for gold. He worked it in San Antonito."

Vicente Garcia: "I first knew the Real de San Francisco about the years 1840 and 1841. My parents lived there at that time. I was there visiting my father frequently until 1846, and that year went there to live with my father. I was acquainted with Mariano Barela, Luis Auguilar, and Antonio Jacques. All three of them worked mines there. I also knew Jose Serafin Ramirez. He moved out there in 1846. Before that, he resided at Santa Fe. Jose Serafin Ramirez was my teacher. There was a great deal of work done in mining in the vicinity of that town from 1841 to 1846."

Nasario Gonzales: "Age 64. Lived at Real de San Francisco. First knew it in 1842. Lived there in 1846, about six months. Was more or less familiar with the different localities. While I lived there, I knew Mariano Barela and Antonio Jacques. They were working mines. I also knew Jose Antonio Otero. I was informed they were working a mine in the little mountain south-east of the town. Before the settlement of the town, that mountain was called the 'El Tuerto'; afterwards it was called the 'Little San Francisco Mountain.'"

Eusebio Sanchez: "I live in Real de San Francisco. First came there to live in 1843. I know a mine now called the 'Big Copper Mine' in that locality, and now in the possession of the San Pedro & Canon del Agua Company. I know it by sight, but have never been in the mine. I do not positively know who discovered it, but I have heard ever since I was very young that it was a man by the name of Mariano Barela. I never knew of Ramirez claiming it until he made the sale to Col. Carey, and I knew of others working it before that."

Trinidad Romero: "I first went to the town in 1844. I know the Big copper mine. I was there about three years ago. I knew that mine from the time we were living there. I was there at that mine at the time Mr. King, an American, who was an immigrant from the state of California, stopped there, and took hold of the mine, and worked it some. I don't remember King's first name. He had a son, S. H. King. I remember their working that mine before King did, but do not remember the names of the parties. I knew Antonio Jaques, and that he was working a mine, but don't remember whether or not he worked that mine. I think King worked the Big copper mine along from 1847 to 1848. I believe about that time Serafin stopped with my father every time he came to town. During the time we lived there I never knew or heard of his working the Big copper mine, or claiming it. I did not hear of his working that mine until after we left there; then, in 1854, I heard of his working it. I think we left in 1851, and Serafin moved into our house."

Francisco Perea: "Fifty-two years old. A member of congress in 1864 and 1865. Returned to New Mexico from college at St. Louis in August, 1845, and up to 1847 went once a month to Real de San Francisco on a business trip to a store my father had there. Antonio Jose Otero was my uncle by his wife, and afterwards my father-in-law. When I was at the Placers in 1846, I knew my uncle was engaged in mining operations there. In going there one time, my father sent a peon with me. When passing by San Pedro we saw some wagons coming, and the peon said to me: 'There goes the wagons of Oteros, bringing ore from the mines.' I know where the mine was situated which he was working at that time. I was near enough to the mine to see where it was located. I saw the wagons coming down the mountains on the south-western part of it. There was a train of wagons coming down, right from the mine, at the time; and I knew where the mine was, more or less, then, and I know where it is now. I did not until late years know any one was associated with Otero in working that mine. The Mexican people called it the 'Otero Mine.' This mine was east of the Canon del Agua spring. I have been at that place in later years. In the year 1865 no one was in possession of that mine."

The foregoing recital contains, as to the Big copper mine, the evidence of Antonio Jaques, Melquiades Ramirez, Bartolo Pena, Vicente Garcia, Nasario Gonzal:s, Eusebio Sanchez, Trinidad Romero, Francisco Perea,—eight witnesses in all,—corroborated by the official papers filed by Jaques, Barela, and Aguilar, and being the title papers identified by Jaques, and copied herein.

The evidence in the case proves, to our entire satisfaction, that Barela, Aguilar, and Jaques, in 1846, discovered what is now known as the "Big Copper Mine." The papers filed by Barela, and the action of the authorities thereon, are conclusive on this point. The papers speak louder than any living witness can. They fix the date, and the evidence which identifies that as the Big copper mine is satisfactory. That Jaques, Barela, and Aguilar did work that mine is proven by at least seven witnesses; and Jacques, who worked there, identifies it as the Big copper mine. Francisco Aranda, a witness for the defendant, testifies that it was said that Jose Otero and Juan Otero were furnishing wagons to Barela with which to haul his ore down to the springs at Antonito. He is corroborated by Perea, who swears he was there in 1846, and saw these same wagons coming down the mountain from the mine, loaded with ore. They were pointed out to him as the "wagons of the Oteros." This work was so publicly known that, as he says, the mine was generally spoken of as the "Otero Mine." The evidence is so strong that it cannot be doubted that Barela claimed to have discovered a mine, which is none other than what is known now as the "Big Copper Mine." This was not an original discovery, but the rediscovery of an old abandoned mine. The papers filed before Judge JOSE ALBINO CHACON prove that Luis Aguilar appeared before Chacon on the seventh day of April, 1846, and claimed the discovery of a mine, and made verbal registry of the mine April 12, 1846. Himself and Mariano Varela, sometimes called Barela, filed formal written application for its possession. On the same date a formal paper was filed, showing that Varela, Aguilar, Jose Otero, and Antonio Jaques joined in the enterprise. An expert was appointed, and formal proofs made. The justice of the first instance, Jose Albino Chacon, recites in the title papers held by Barela, Jaques, and Otero: "I proceeded immediately, accompanied by my attending witnesses, the appointed expert, and the interested parties *to the mines*, \* \* \* and, finding ourselves there, I ordered the expert to examine the same. \* \* \* After this, they proceeded to measure six locations upon the line or direction of the view pertaining to them as discoverers and partners, and consequently they were measured from the mouth of the mine. \* \* \* This being done, I ordered the interested parties to walk over the surface of the mine, and throw stones in all directions, in sign of possession." There was present, as shown by the papers, Antonio Jaques, Antonio Jose Otero, Mariano Varela, Luis Aguilar, as discoverers and partners, Jose Albino Chacon, justice of the first instance, Julian Tenario, interpreter, Anton Chaves, Francisco Sarracino, as witnesses. Eight witnesses attend this formal act of delivering the possession of the very mine in controversy. Antonio Jaques in 1883, standing at the mouth of the mine, identifies it as the one named in these papers. Antonio Jaques, as a witness, proves actual possession and work on the mine in 1846. He says Juan Antonio Otero was an uncle of Maranio Otero, the son of Juan Otero. He says Juan Otero and Antonio Jose Otero were partners in the mine; that they got the interest Aguilar held originally, and when the American forces came in they (the Oteros) remained there, and the mine was then over ten varas deep; and that San Francisco contained 2,000 people. He says: "I worked in sinking a shaft as required by law, and from the time possession was given to me I worked it until the United States forces came into the territory. I had eight or ten blasters at work taking out ore, and men employed hauling ore in wagons to the furnaces. We had all kinds of workmen, wagoners, blasters, hoisters of the metal, and other employes. *Serafin Ramirez made no claim to the mine.* Notices were posted up, both

at Real de San Francisco and at Santa Fe, that we had denounced the mine, in order that, if any other persons had any claim, they could appear and manifest it." This witness comes with the very highest evidence of character. In his country, he has been continuously for 20 years trusted as a member of the highest court in the state, and occasionally its presiding officer. The facts he narrates are corroborated by the witnesses heretofore named, nine in number,—some of whom knew Barela to work there; and others, of the Otero wagons hauling the ore away. The Oteros remained, and continued the work. After Aguilar went back to Mexico, as Perea and Aranda fully prove, Jaques and his associates, in the most public manner, took possession and worked the mine. Where was Serafin Ramirez during this time? Whether at Santa Fe or Real de San Francisco, he would get notice, as it was posted in both places. Where was he during the public act of taking possession; during the previous work to sink the shaft, as the law required; while the blasters and hoisters were taking out ore; while the Otero wagons were hauling it to Antonito? So far as the evidence shows, he was utterly silent. Had he, *two years before*, procured his grant, to claim thereunder this mine? If so, would he have stood by without protest, and see Jaques (known as a profound lawyer) with his associates denounce the mine, work it, receive juridical possession, and build up against him legal titles thereto? The acts done by Jaques and the Oteros were on so large a scale, they must have been notorious; and, in addition, notices were prominently posted in both towns, so, if he had lived at either, he would have known of this occupation hostile to his claim, if he had any. He was a prominent and influential man. The posted notices at the two towns would have come to some of his friends, and they would have informed him, (Don Serafin.) If Jaques tells the truth; if, as Perea says, in 1846 and 1847, the wagons of the Oteros were hauling ore from this mine; if Barela had the ore from the mine taken down in wagons and carts belonging to the Oteros to the spring at San Antonito, before Serafin began work,—it is wholly unreasonable to believe that Ramirez would have stood by without a word. If, in 1843, 1844, or 1845, Ramirez had sent out his peons to clean out the mine, it would not have been an old abandoned mine, as Barela and Aguilar put it on record, as Jaques and others also swear, but one showing work newly done. There is one reasonable theory upon which the evidence in this case can be only reconciled and one which is probably the truth. If, however, Serafin Ramirez had no claim at that time to the mine, but began his claim later, in 1852 or 1853, as his brother swears, by a denouncement, and not under a claim through his great-grandfather, his silence while Jacques worked the mines would be accounted for, and his omission to object to such occupation by Jaques and Barela and Otero be consistent with his claim in 1852, but not with the one he now sets up.

Appellee, in his brief, says: "We suggest, however, that all statements by witnesses as to matters accruing nearly forty years since are to be received with a great deal of caution; at least, so far as exact dates are concerned." That statement is very creditable to the learned counsel, Mr. Thornton, who evidently prepared the able brief in which it occurs, and who has deeply impressed this court, not only with his ability, but as well with his fairness in argument. It is exactly at the point suggested by this quotation where the case of the appellee is weak. The complainant presents the petition of Ramirez to the Mexican government; the solemn written deed of possession made by the judge, and the record therein; the no less formal petition to Surveyor General Pelham, with proof of actual possession under the grant description then made; two petitions; two records, each one undergoing the scrutiny of different officials at different periods; also the title to the mine, with the certificate of the attending witnesses. All this the appellee seeks to overthrow and set aside as incorrect, and substitute for this written record, made at the time of its date, the failing memory of a few old men as to events, names

that mountains bore, dates, transactions, 40 years ago; and this evidence subject to those feelings and interests which are necessarily a part of human nature. The character of such evidence proves its inherent weakness. Where so large a stake is involved, there is also the temptation to corrupt witnesses,—to shadow them, as Davis and Hart did Aranda. There is, in addition, the liability on the part of the witnesses, in speaking of so remote a time, to be inaccurate where certainty is important, and forgetful or visionary respecting dates or events. All this; and much more which might be added, shows that evidence depending on memory is not in any degree so reliable as what has been so often solemnly reduced to writing and made a matter of record. Here it is well to observe, there is another record as to the location of this grant, which in a high degree corroborates the deed of Ramirez. This is set out in Exhibit H of the record. It is the petition for the same land by another claimant:

*"To the Judge of the First Instance: I, Jose Terran del Vallo, native of the department of the east, and established here in this territory for eight years, present myself before your honor, stating that having examined a tract of unoccupied land, which is known by the name of the 'Canon del Agua,' which in the name of the sovereignty I register and solicit, as much for the purpose of encouraging the pursuit of agriculture, although with immense labor which it needs, as for the purpose of keeping some animals on its summer pasturage. \* \* \* Said tract has from north to south 4,300 varas on the east; 5,000 from east to west on the north; from north to south on the west, 4,300; from east to west on the south, 5,000 varas. \* \* \**

*"Real de San Francisco, February 15, 1846.*

*"JOSE TERRAN DEL BALLE."*

The record in writing recites that the judge, TRINIDAD BARCELO, actually went with Del Balle onto the ground, found it vacant, and gave formal possession. Here is a date fixed by writing and record, and a written recital of the fact, which shows that at the date February, 1846, the tract known as "Canon del Agua" was vacant. If the Big copper mine had been a part of that tract, and then occupied, no such certificate could have been made. If it was not a part of the tract, but was far to the east of it, and occupied, it would not have been in the way of such a recital. The description used is strong evidence to corroborate the description of the grant to Ramirez. It defines the boundaries as being from north to south, and from east to west, with the points of the compass. So, also, does the description in the grant to Ramirez, in effect, as recited in the original grant. Del Balle's petition and grant give the length of each of the boundary lines, which corresponds exactly with the description used by Ramirez in his petition in 1859 before Pelham, to-wit: "The quantity of land claimed is five thousand varas square." Ramirez himself regarded the Canon del Agua, as described in Del Balle's petition, as the same owned by him, and granted; because on the seventh day of December, A. D. 1887, he procured for him a conveyance of the grant. In that instrument Del Balle recites that he conveys to Ramirez because the latter has a *prior title*, and has given him 500 varas of the land. Later, August 7, 1866, after Cooley, Kitchen & Co. had received their conveyance from Ramirez, Del Balle is again called upon for further conveyance to this same grant. At that date he makes a second conveyance, for which \$100 is paid. This conveyance is witnessed by Ramirez. Here, then, is an additional record, dated only two years later than Serafin's grant, in which the idea is clearly conveyed that the lines are direct north, south, east, and west, and the form about square. From the fact that exact distances are named, it is probable that measurements were made. This shows that there was a well-defined tract of land known there as the "Canon del Agua." This record is also sought to be overthrown by the same class of evidence. Contrast this description with a diagram showing the lines made by the survey sought to be

upheld, and it reveals such a departure from the description as at first sight to condemn the survey. It is also written in the record by the justice of the first instance, CHACON, in writing, proven by eight witnesses, that on the twenty-first day of July, 1846, Jaques, the Oteros, Varela, and Luis Aguilar were in actual possession of the Big copper mine. Which shall prevail,—this record, thus attested and preserved, or the infirm memory of a few witnesses?

Holding fast to these papers written, and records made and attested, by so many different men, safe anchorage is found upon which to establish the truth; turning away from this safe and reliable proof to "evidence which should be received with caution," nothing can be certain or reliable. No public official, with a merely executive duty to perform, should permit himself to be drawn from positive, reliable, certain written evidence, to rest upon that which is uncertain and visionary. There is no one fact about which men are more liable to be honestly mistaken than as to dates; and, respecting Ramirez's claim, dates are of the utmost importance. If it be true that he made no claim that the Big copper mine was the one referred to in his papers until years after the grant, then there is no reason why that mine should be taken as a land mark more than the one west of Canon del Agua spring. It is not so important what Ramirez claimed *after* 1848, in ascertaining the boundary point,—although such a claim would have its weight,—as what he claimed prior to 1844, the date of his grant. We believe the evidence does prove with certainty that, early in 1846, Jaques and his associates had actual possession of the mine, and that the Oteros continued to work it. It also proves that at occasional intervals, at a later period, Ramirez also occasionally worked the mine. There is an entire failure of the proof as to a continuous claim by Ramirez, or continuous work. The written evidence which Ramirez placed on file as to the mine west of the spring described it as "ancient." The evidence proves that he worked that mine quite as early as the other, and the evidence as clearly indicates that as a call in the grant as the one to the east. Here it may be well to consider the evidence relating to that point. The following evidence tends to show a mine south-west of the Real de San Francisco, and north-west of the Canon del Agua spring, at a point where a large majority of witnesses place the Little Tuerito mountain, and a point corresponding with the call of the grant.

Bartolo Pena, in his examination taken before Treadwell, says: "The mine on the left side of the arroya, just at the foot of the Padernal mountain, was discovered by Ignacio de Geboro. Do not remember the year, but it was the first mine discovered and worked in this section. It was an iron mine. It was afterwards located and claimed by Jose Serafin Ramirez. He called it his own mine. There is also another mine in that section of the country, the Big copper mine. It was discovered by Mariano Varela and Antonio Jaques. After it was discovered, Serafin Ramirez worked it."

Trinidad Romero: "*Question.* Do you know, during the time you were first residing at San Francisco, there were any old mines in the vicinity of the Palo Amarillo? *Answer.* Yes, sir; there were several shafts there in a little mountain, but I do not now remember what they called the little mountain. My father used to tell me they belonged to Serafin Ramirez. They were then working those mines. I first went to Real de San Francisco, to reside, in 1844, and lived there six or seven years. My father had a planting ground at the Palo Amarillo, and I herded the cows and goats near there. Near the roads over there, close to the Palo Amarillo, I have seen two shafts there,—maybe more; two I remember well. I know Serafin Ramirez very well. My father was personally well acquainted with him. He was his 'compadre,' and used to stop with my father every time he came to town." Again, speaking of the old shafts to the south-west of the town, the following is in his evidence: "*Question.* From my recollection of your testimony,

you mentioned that the people went sometimes on one side of the mountain, and sometimes on the other, when the road was bad. It was in that little mountain, was it? *Answer.* Yes, sir; it was on the Albuquerque road. They had some particular name for that little mountain at that time, but I have forgotten it. It was close to the place called 'Palo Amarillo.'

Mariana Antonio Sandoval, (folio 2819:) "Was the wife of Don Serafin. *Question.* In 1864, and the early part of 1865, did not your husband make locations of new mines, many of them near the town of San Francisco,—some in the mountains, and some of them near the Palo Amarillo? *Answer.* What mines are to be found in the Palo Amorilla? You are asking so many questions I have become confused; there are so many mines over there."

Jose Augustin Ramirez: "Son of Don Serafin. Was born in 1845. I know the place known as the 'Palo Amarilla Planting Grounds.' My father worked a mine close to the Palo Amarilla. I do not recollect the exact time. He generally took me along with him. My uncle Melquiades Ramirez lived with my father at that time, but did not work in that mine. He did not discover the mine. This mine is a little south-west of the town of Real de San Francisco. It is between the two roads that go to San Pedro; that is, the old and the new road,—about half way between them. It is an *old lead*, probably five or six feet deep. It was discovered and prospected by my father. I can remember when he discovered and prospected it. At the time I was justice of the peace, in April, 1865, my father, Jose Serafin Ramirez, Melquiades Ramirez, Manuel y Lopez, and Juan Ortiz made a petition to me as justice of the peace to register a mine of lead and silver at the Palo Amarillo. It is the mine I have just spoken of, and the shaft is five or six feet deep." Consider this evidence of the son in connection with the paper to which he refers, and it proves conclusively that this mine is not a new discovery, but an "ancient mine." The following, in evidence, is the paper to which the witness refers:

"TERRITORY OF NEW MEXICO, COUNTY OF SANTA FE.

"*Claim of a Mine at the Palo Amarilla.*

"PLACER, March 28, 1865.

"*To the Honorable Augustin Ramirez—SIR:* Your petitioners, proprietors and owners of a lead and silver mine at the placer of the Palo Amarillo, *and within* the location of the tract of the Canon del Agua, within the district of the Placer de San Francisco, state that as members of the New Mexico Gold and Copper Mining Company, at the placer of San Francisco, and in its name, we register and claim a mine of one thousand five hundred feet on the direction of the vein. *The said mine is ancient*, and known as 'Antonio Salazar's,' of whom it was bought by your first petitioner in the year 1848, and the assessment work done according to the old laws, and now it is registered as a part of the company, by halves with your first petitioner. \* \* \*

"JUAN ORTIZ.

"JOSE SERAFIN RAMIREZ.

"MANUEL C. Y LOPEZ."

A certificate is attached to the foregoing, dated March 28, 1865, signed by AUGUSTIN RAMIREZ, justice of the peace, certifying that Jose Serafin Ramirez, Melquiades Ramirez, and Manuel C. y Lopez came before him, and declared "that everything contained in the preceding instrument is the truth." Augustin Ramirez identifies the mine named in this instrument as the one near the Palo Amarilla. Augustin was born in 1845; so in 1848, when this paper recites this mine was bought by Ortiz, Augustin was only three years old, and could not have known about it. It was a mine as early as 1848, so he is mistaken about its being discovered by his father, unless it had fallen into disuse, which is likely, and was again owned by Don Serafin. This mine was of sufficient importance to buy and sell in 1848. Its history prior to that date is not very clearly disclosed. It is about the place where Bartolo Pena locates



a mine, which he says was the first one discovered in the country, and which he says Ignacio Gebere discovered, and which he says was afterwards located and claimed by Serafin Ramirez, and which Pena calls an "iron mine." Unless these two mines are the same, then there are two very old mines there. Serafin Ramirez and his associates no doubt regarded the mine described by Augustin as a very old one, for they described it as an "ancient mine."

Felipe Delgado, (folio 713:) "*Question.* In your testimony yesterday you stated that Ramirez was working a copper mine situated in the Canon del Agua. What direction was this mine from San Francisco? *Answer.* I heard the mine was to the west of the Canon del Agua. *Q.* The question is, what direction was it from the town of San Francisco? *A.* To the south. *Q.* Was it south or east? *A.* To the south directly. There was one other copper mine that I heard of in that district. I heard it was near the Canon del Agua to the west." "The Canon del Agua runs from the south to the north. I heard it was on the west side, but whether above or below the spring I do not know. This copper mine was not in the same mountain in which the mines known as 'Bonanza' and 'Bonanzito' were situated. That mountain is separate from the Canon del Agua. The Canon del Agua mountain is south-west of the mountain where the Bonanza mine was. San Francisco mountain is the name where the Bonanza was. When I went out there it was not known there was any mineral this side of the mountain." This gives a strong indication that, at the time, there was a mine to the south-west, that it was a copper mine, and worked by Ramirez.

Juan Delgado: "I have seen some old mines near the road that goes down to the Rio Grande, a little to the south-west of San Francisco."

Stephan C. White: "*Question.* Do you know whether there are any old shafts—mining shafts—around anywhere in the vicinity of this Palo Amarilla planting ground? *Answer.* Yes, sir; there is one old shaft,—an old mine out on this road we are speaking of, [the road going down from San Francisco to Palo Amarilla,] to the right of the road before you turn off to go down to the Palo Amarillo,—to the west of the road. There is an old shaft there. More iron, it appears to me, in the shaft than anything else, with some copper to the west of it. The shaft is probably five or six feet deep. They call it a mine. It would be called a mine if it showed a big body of mineral. There is a good body of mineral in it."

John M. Talbot: "There is a road leads from San Francisco directly down to the Palo Amarilla. There is one mine south of this Palo Amarilla road, about a mile and a half from Golden, in a south-westerly direction, on the east side of a small mountain,—an old mine that had been worked there; a good deal of rock thrown out; about eight feet deep. Showed a good deal of mineral, iron, and galena ore."

Euliojio Aranda: "I heard White testify. I heard all the people say Ignacio Vara sunk that shaft, but I do not know him, or see him do the work. I do not know when it was sunk. When I saw it, it was old, and about six feet deep."

This proves that as early as 1848 this was then an old mine. Who Ignacio Vara is, the evidence does not disclose. Another witness does speak of him as having discovered the first mine in that country. It will be observed that the word "discovered" is used both to apply to a mine never before worked, and also to one commenced and abandoned; so it would not result from the use of that word that this mine might not have been very old. B. W. Webb testifies also to a mine in the same locality.

Although we have compiled a statement of the evidence given by the defendant's witnesses as to the Big copper mine, its location, and Ramirez's relation to it, yet this opinion has extended to such length that it is deemed advisable to omit such detailed statement. It is, however, our belief that such evidence in no way overturns that of Antonio Jaques, or the record

above referred to, and the witnesses who support it, and that it is not sufficient upon which to hold it proven that the mine mentioned in the grant description lies east of the Canon del Agua spring, rather than west of it; especially in view of the other evidence in the record. With the overwhelming weight of evidence proving the Little Tuerto to be just as the petition of Ramirez fixes it,—north-west of the spring,—with mines there fairly meeting the description in the grant in that particular, it does seem that the lands granted should not be inverted so as to make such a radical change in location, even if it were uncertain as to the exact locality of the mine. If all other calls in the grant description—the landmarks—can be found, and there is uncertainty as to one only, that should not operate to disregard all others.

#### THE NORTH BOUNDARY LINE.

Let us now examine the evidence as to the foregoing line, and it will be plain that such line is wrong beyond all doubt, as fixed by the survey. The evidence which shows an absolute disregard of the northern boundary, as recited in the grant description, is to our minds perfectly conclusive. It will not be necessary to add to the length of this opinion by quoting all the evidence, but a careful reading of it demonstrates that San Francisco at the date of the grant was a town of about 2,000 people. The survey includes a substantial part of that town. It is not to be believed that Ramirez asked, or that the judge of the first instance granted and turned over to him, possession of such a town. It was a flourishing mining region, and the vacant lands adjoining it would be reserved for commons to actual residents, as by the Mexican custom at that time; besides, the evidence conclusively fixes a line east and west, near a mile and a half south of the town, as the correct northern boundary.

Juan Delgado: "Going down the Palo Amarillo about two and a half miles, the Palo Amarillo road forks to the right,—to the west."

Jose Maria Samoza: "The road from San Francisco to the Palo Amarillo goes about two miles almost directly to the south, and then changes to the west."

Samuel H. King: "I know the Palo Amarillo. A road went down there from Real de San Francisco. It was a plain road. The whole produce raised on the Palo Amarilla was hauled over that road to the Real de San Francisco. The Palo Amarilla at that time was cultivated by different people from the new places. You went from San Francisco down on that road some mile and a half or two miles, and then the road breaks off to the right, to the Palo Amarilla."

Stephan White is to the same effect. He says: "The Albuquerque road runs about south-west from the town, and then the *Palo Amarilla road branches off to the west*. The first three-quarters of a mile (from the town) is south,—a very little west of south; then *you turn west*."

R. W. Webb: "There is a main road going nearly due south, known as the 'Albuquerque Road' until you reach a point about three-quarters of a mile from Golden, where, as I understand, the Palo Amarillo road branches to the west. I have been over that Palo Amarillo road. In a short line it would be almost an easterly and westerly course."

Henry Yates says: "The direction of the Palo Amarillo road, from where it branches off from the Albuquerque road, is nearly east and west."

Trinidad Romero: "In going from Real de San Francisco to the Palo Amarillo planting ground, you went down south on the Albuquerque road. I used to walk it two or three times a day, and then turn off the Albuquerque road to the west from the main road, and this road which turned off went to the Palo Amarillo planting ground."

Francisco Aranda: "To go to Palo Amarillo, you went down from San Francisco on the Albuquerque road about one league. There we turned off to the west from the main road, in going to the Palo Amarillo. That is the

way I left with my wagons of corn to go down to the wells from the Palo Amarillo. It passes in the direction of the west, and between two little mountains there."

Juan Nieto: "The road going from San Francisco to the Palo Amarillo goes south a distance, and then turns west. The arroyo of the Palo Amarillo runs to the west."

Jose Aguilar, who swears he was present when possession was given to Ramirez, says: "The northern boundary of the grant was fixed from three-quarters of a mile to a mile from the town."

Nazario Lopez: "I know the boundaries pointed out to Ramirez when he took possession. They were, on the west, the old road leading to the Palo Amarillo and San Pedro; on the north, I do not recollect exactly, but I believe it was the foot of the same mountain." If that is so, why is the north line carried a mile and a half north of this point, so as to include the town?

Mr. Griffin, in his evidence, says (folio 3245) that it was right where these roads forked, going down on the Albuquerque road from San Francisco, and turning west to the Palo Amarillo, that a point was fixed. He gives no satisfactory reason, nor does any occur in the evidence, why a line east and west was not there established for the northern boundary.

Jose Augustin Ramirez. This witness, who was a son of Serafin, was present at the survey with Mr. Griffin, Serafin, and others. His evidence, with what has already been given, fixes the point for the northern boundary so clearly there should be no doubt about it. See folio 2874. "Question. Is there not about a mile and a half south from the town of San Francisco, on the road leading to the San Pedro ranch, another road turning off to the right, towards the Palo Amarillo? Answer. Yes, sir. Q. Do you know, or were you present, when Mr. Griffin, with some other parties, took testimony at the forks of that road on the seventh of May, 1866? A. Yes, sir. On the old road leading to the San Pedro there is a monument placed near the Palo Amarillo. Q. I ask you, on the seventh day of May, 1866, whether, when Mr. Griffin and your father was there at the forks of that road with your father and other parties, was there anything said about that point being one of the boundaries of the Canon del Agua grant? A. Yes, sir. Q. What was said? A. That was the boundary of the grant; that Serafin Ramirez had sold it. There are little mountains west of the Albuquerque road."

If it be said the presumption of law is in favor of the survey, it may well be asked if this evidence does not completely overthrow that presumption. Here was Serafin himself and Griffin. Before them was the road coming down south,—the Albuquerque road,—with Real de San Francisco a mile and a half to the north, and at this point the road branched to the west, and went out to the Palo Amarillo, and right there a monument was placed. According to the evidence of Griffin and Augustin Ramirez, Serafin Ramirez right then and there said: "*That was the boundary of the grant.*" This point answered exactly the call in the description. There is no satisfactory reason found why, exactly at this point, Griffin did not obey Serafin, and establish a line east and west through that point as the northern boundary. This evidence alone brings to our minds full and complete conviction that this survey is radically wrong. The doctrine of the supreme court in the *Maxwell Case* is accepted by this court, and also regarded with great satisfaction on this point. *U. S. v. Land-Grant Co.*, 7 Sup. Ct. Rep. 1015, 1271. Surveys should not be overturned for light causes, or on uncertain evidence, or by reason of merely suspicious circumstances; but in a case where it is most conclusively and satisfactorily proven that a boundary line is pointed out by the grantee to the surveyor and the purchaser, and such line is entirely consistent with the courses, distances, and calls of the grant, and such boundary is utterly disregarded, and extended a mile and a half to the north of the honest line, and so as to include a large part of a populous town, the case stands on different grounds, and it becomes

the highest duty of a court of conscience to set it aside, unless the rights of innocent purchasers for value, and without notice, intervene. Such proof should completely overthrow every presumption in favor of the survey. The importance of the land thus unlawfully included is seen by the statement that, to the north of such a boundary,—estimated, but not calculated,—there seems to be about one-third of the land included within the survey, so that, regardless of any question respecting the Big copper mine and the extension to the east, that to the north is wholly wrong. The manner in which this survey was ordered is shown by the following from Mr. Griffin's evidence, (folio 3263:)

*Question.* In the survey of private land grants, when a point is given—a single point—as a boundary,—either northern or southern boundary, or an eastern or western boundary,—what is the rule observed by surveyors fixing that boundary? Is it by drawing a line, either north or south or east or west, through that point till it intersects the other boundaries, or what is the rule? *Answer.* Well, that is what I hold to be the correct rule; but in this case the instructions of the surveyor general forbade that method of survey, and directed otherwise. But the other I hold to be the correct rule; and if I had been sent out there to survey that or any other grant, without specific instructions, *I should have so surveyed it.*" Here is the deputy surveyor himself condemning that survey,—his own. If it be said the presumption is that his survey was correct, the answer is that the survey is not correct in that particular. He says: "The other, the one I did not follow, I hold to be the correct rule." Then the one he did follow was incorrect. If Griffin had been sent out, not tied down by instructions, he would not have located the lines where this survey places them. That he says, plain enough. After stating the rule which was not followed, mark his words: "If I had been sent out there to survey that or any other grant, without specific instructions, I should have so surveyed it." And, if he had done so, the north boundary line would never have gone north of the point fixed by Ramirez, and designated to Griffin, as the northern line. Griffin should have communicated to the surveyor general the information given to him by Serafin Ramirez. He should have reported that Ramirez fixed the point for the northern line a mile and a half south of where it was placed by the survey. Turning to the instructions given to Griffin by Clark, they are utterly indefensible. Miller had reported to him affidavits which fixed the point where the Amarillo road turns to the west from the Old Albuquerque road. This exact boundary was before him when in effect he instructed Griffin to disregard it. After designating how to survey the San Pedro grant, he says to Griffin: "You are directed to establish the initial point of the survey in the established boundary of the San Pedro grant at the most westerly intersection of the two lines." He says the entire road from the placer seems to have been intended as a boundary. The *termini* of the road will therefore be taken as two points in the survey. It is difficult to conceive how Clark honestly believed that whole road to be a boundary line. The initial point he fixed was where the road and the northern boundary of San Pedro intersected. If he wanted an honest survey, why did he not direct Griffin to draw a line along that boundary east from this initial point for the southern line of the Canon del Agua? Griffin says that the correct rule, if this were done, would cut off one-third of the grant as surveyed.

While the evidence in this case does compromise Surveyor General Clark, we do not think, as to Mr. Griffin, it proves anything wrong in intent. A reference to Clark's instructions to Griffin shows that, as to the San Pedro grant, he ordered the latter to apply the principle which, if let alone, he says he would have acted on in making the survey of the Canon del Agua. As to San Pedro, Clark instructs Griffin: "The north and south boundaries will be east and west lines run through the points named." Now, why did he not permit Griffin to ascertain on the earth's surface the point which Ramirez pointed out as the northern boundary, and there draw a line east and west for

the northern boundary line? Griffin swears that is what should have been done, and what he would have done but for his instructions. Such a line, as a northern boundary, would have obviated any contest as to that point. Not a single item of evidence in this case, not a fact in it, will carry that line a foot north of that point; and yet it is said the rule of surveying must be violated, and the evidence disregarded, to uphold the survey made in disregard of correct rules. To us it is a perfectly plain case, as least as to this northern line. If it be objected that, by fixing the northern boundary line at the place where Ramirez pointed it out to be, it will have the effect to reduce the quantity of land which otherwise might be included in the grant, it is to us a satisfactory answer that there is no obligation on the part of the government to carry the boundary line north of the place fixed by the Mexican government, so as to increase the quantity of land, when it cannot be had within described boundaries. The people of Real de San Francisco have a right to say that land used by them as commons, and not claimed by Ramirez, shall not wrongfully be included in the survey, only to make up quantity, or, if such strip is public domain, the United States has the right to object to its being thrown in as a gratuity to Ramirez, so as to increase the number of his acres. The same survey fixed the lines of both the San Pedro and Canon del Agua Grant; and if within the exterior lines of these two grants, as described in their grant deeds, enough land could not be found to make the quantity of both, that would afford no reason for carrying the Canon del Agua survey where it should not be, so as to make up from the government the quantity lost, if any, because the grants either overlapped each other, or because there was less in quantity than the grantee supposed within the outside lines described in the grants.

There are other things in the record which point with great force and directness to the conclusion that at the time of this Canon del Agua grant there was a mountain, or series of them, known as the "Little Tuerto," constituting a western call for the grant. These cannot very well be classified so as to be presented in an orderly arrangement, but will nevertheless be given. Mr. Griffin, on page 650, testifies: "*Question.* Please state what was designated to you by the surveyor general as being the eastern boundary of the San Pedro grant. *Answer.* The eastern boundary of the San Pedro grant was a little mountain at the west end of the Tuerto mountains." Mr. Griffin's memory failed to serve him so as to enable him to state in exact terms. Instead of naming "a little mountain at the west end of the Tuertos," which might imply it was not a part of the Tuertos, the surveyor general, as will be seen on page 70, (instructions,) describes the boundaries of the San Pedro, "on the east, the little mountain of the Tuerto;" showing clearly it was a part of the Tuerto mountains. Mr. Miller in his report of May 10, 1886, to Clark, (page 46, Record,) after he and Griffin and Cooley & Co. had been on that expedition, says: "In the case of the San Pedro grant, the little mountain of the Tuerto, cited as the eastern boundary, is fully identified, as the depositions will show. It is a part of the Tuerto mountain, though the official translation describes it as a little mountain on a line with the said Tuerto."

Jose Aguilar, a man of 60 years, whose evidence is in this opinion also elsewhere referred to, and who swears he was on the grant with Serafin Ramirez and Santiago Florez when juridical possession was given to the former, swears that the boundaries were pointed out to Ramirez, and further says, speaking of the Canon del Agua grant: "*Question.* What was the western boundary of that grant given at the time of the possession? *Answer.* The San Pedro grant."

Nazario Lopez testifies also that he was present when juridical possession was in fact given to Ramirez, and when the boundaries were pointed out to him. Both this witness and Aguilar are called by the defendant. See page 609. "*Question.* Were you present at the time Santiago Florez placed him

[Ramirez] in possession of this [Canon del Agua] grant? *Answer.* I was, sir. I was there, and knew the boundaries pointed out to him, and the landmarks. Q. Give them. A. On the west, the old road leading to the Palo Amarilla and the old San Pedro grant."

With what weight this evidence comes: There stood Ramirez, the judge, Flores, in the prime of life, vigorous, and with minds alert to the importance of the act being done. There was Aguilar, Lopez, and others. It is not an overdrawn imagination which, coming to that moment and place, sees Santiago Flores take Ramirez by the hand: "Turn your face to the west. There stretching out before you, and to the west, is the San Pedro grant. Its eastern boundary is your western line;" and then, taking up the title papers for the San Pedro grant: "See, here it is written down in this deed, the little mountain of the Tuerto is the east boundary of the *San Pedro* grant." It is true, no voice from the past has in words made such expressions; but if the description written down in the San Pedro grant is true, and the evidence of Aguilar and Lopez called by the defendants is also true, just such an event must have occurred right there on the land when possession was given. It must be remembered that the delivery of possession was a very solemn and formal act, under the Spanish system. The party receiving possession was taken by the hand in a formal way, and walked over the land, and he then pulled the grass and threw stones, crying, "God save the king," and it is this formal act which those two witnesses are describing. If this did occur, then Florez and Ramirez both believed the San Pedro grant was to the east of the Canon del Agua. It is written in the San Pedro papers that the little mountain of the Tuerto is its eastern boundary. It is written in the grant of the Canon del Agua that the same mountain is the western boundary of the Canon del Agua, and further written that such mountain is west of the spring. It is pointed out to Ramirez, on the ground, that the point thus described is his western boundary. Can any man doubt there was in the mind of Florez the little mountain of the Tuerto marking the eastern boundary line of the San Pedro, and the western of the Canon del Agua, and that he actually pointed out this same San Pedro as west to Ramirez, as these men swear that he did? How could Ramirez, standing thus with his face to the west, looking in the direction of San Pedro, be mistaken?

Take Griffin's instructions, and the evidence of those two old men, and it is almost conclusive against the survey. Here are his instructions from Clark, (see page 70:) "The boundaries of the San Pedro grant are as follows: On the north, the outlet arroyo of Chimal; on the east, the little mountain of the Tuertos; on the south, the outlet of the arroyo of San Antonio; and on the west, the Sandia mountains, to which is added one square league on the south. The calls of the grant as above are said to be well-defined land-marks, and easily identified. The eastern base of the Sandia mountains forms a complete boundary on the west. The north and south boundaries will be east and west lines run through the points named, and the east boundary will be a north and south line run along the western base of the little mountain of the Tuerto." Bearing in mind that Florez pointed out to Ramirez the San Pedro as lying *west* of the Canon del Agua, and taking these instructions, how plain the problem. The little mountain of the Tuerto, the Canon del Agua spring, the relative positions of the two grants, are all important descriptive points. The survey should have been so made as to fill all these calls, if it could fairly be done. Over 25 witnesses have been quoted proving conclusively that the Tuerto mountain lies west of the Canon del Agua spring, and south-west of Real de San Francisco. If the survey had made that little Tuerto mountain the eastern line of the San Pedro, then the San Pedro would have been west of the grant in controversy. That would have located it just where Aguilar and Lopez swear Florez pointed it out to Ramirez as lying. Griffin did not do that. He ran a line, as shown by the plat in evidence, from north to south

through the Canon del Agua spring, and marked that line as the east line of the San Pedro. Estimated by the plat of Griffin's survey, the northern line of San Pedro marks the southern line of the Canon del Agua grant for 80 chains only, where it should mark the whole south line. A line drawn north and south through the east line of the San Pedro, according to Griffin's survey, would cut the Canon del Agua into two parts; one of which would be east of such east line of San Pedro, and the other west, instead of the whole of it west, as Florez pointed out to Ramirez in the presence of Aguilar. A line taking, as surveyed by Griffin, the north boundary of San Pedro as a point, and drawn east and west, would sever the Canon del Agua into two parts; one of which would be north, and the other south, of the San Pedro, instead of all being north, as described in the grant boundary. If the evidence of the cloud of witnesses which has been already quoted fixing the Little Tuerto mountain south-west of San Francisco, and also west of the Canon del Agua spring, is true, and Griffin's plat correctly exhibits his survey, then he has made the eastern boundary of San Pedro 80 chains east of where it should be, and thereby to that extent overlapped onto the Canon del Agua grant. He has also made the eastern point 290 chains east of where it should be. What strange infatuation operated to draw the lines of both these grants east of the real positions, and thereby to embrace the valuable bed of mineral around the big copper mine? The survey sought to be set aside is utterly inconsistent with the act of Florez in pointing out the San Pedro grant as marking the western boundary of the Canon del Agua; and that he did so point it out is proven by the defendant's own witnesses already quoted. Fix the Little Tuerto mountain where the evidence in this case places it,—south-west of San Francisco, and north-west of Canon del Agua spring,—and draw a line from north to south through that mountain, and at once the whole evidence falls into perfect harmony; the calls of both grants are perfectly answered and preserved. With such a point fixed, and such a line drawn, the Little Tuerto mountain becomes the east boundary line of the San Pedro, as called for in the grant, and also west of the spring. It also becomes the western boundary call, as described in the grant in controversy. San Pedro grant marks the west boundary of Canon del Agua, as Aguilar and Lopez swear Florez pointed it out to be, and all the other calls are met. But depart from this established truth,—this landmark, proven to exist on the surface of the earth just where these men in the early days knew it was,—and at once there is a medley of confusion, entirely irreconcilable with established facts. Place the Little Tuerto mountains where God put them, and the old inhabitants named them, and the evidence proves them in fact to be, and every line and its direction can be located, the description in both grants sustained, form preserved, quantity secured, and the relative directions of the grants with respect to each other will be correct. Place the Little Tuerto, to serve a personal interest, where it is not, and nothing but uncertainty results.

In this connection, it may be well to consider the evidence of Miller, the clerk of Clark, and who was called by the defendant. He is directly at variance with Griffin as to the location of the old mine spoken of in connection with the Little Tuerto mountains, (see page 622:) "*Question.* Now, were you at the mine that Ramirez claimed was the old Ramirez mine inherited from his grandfather? *Answer.* We were at the mine that was said to be that. I do not know, of course. *Q.* Well, now, was that mine at that time to the east or west of the Canon del Agua spring? *A.* I think it was north-westerly; in a north-westerly direction from the spring." Later in the examination, after the witness had opportunity to think over the matter and refresh himself, his mind was brought back to the same point, as follows, (see page 629:) "*Question.* You are satisfied, then, that this morning you made no mistake in saying that the mine that was established as the old Ramirez mine was north-west from the Canon del Agua spring? *Answer.* I said it was north-

westerly, I thought; more of that course than any other course approximately. I meant approximately and it seems so to me." Although abundant opportunity was offered the witness, he made no withdrawal or retraction of this evidence. If he is correct in his statement, then a mine was found at that time corresponding with the calls, and west of the Canon del Agua spring. If it be said that other parts of this witness' testimony are inconsistent with the statement quoted, or in that respect that he is contradicted by other witnesses, then it may well be replied that such a contention by defendant only tends to prove the contradictory character of his own evidence, and the caution which the court should exercise in weighing it. This same observation will apply with equal force to the witness Francisco Aranda, who, under oath, denied his own statement.

It is manifest, in the evidence of Jose Augustin Ramirez, son of Don Serafin, that a mental struggle was continuously present in his mind during his evidence. He had an interest with his mother of \$3,250 in an unpaid note and contract to sustain the survey, and press the boundary to the east and north, and yet to do so was so far inconsistent with real facts that his evidence is inconsistent in many particulars with that theory. On page 579, folio 2878, this occurs in his evidence: "*Question.* Do you know at that time, May, 1866, [referring to the time when Griffin, Miller, Carey & Co. were out on the ground,] what point your father claimed was the northern boundary of the grant of the Canon del Agua? *Answer.* The Tuerto mountain. *Q.* On the north? *A.* On the north, yes. It is to the north of the San Pedro. *Q.* But I ask you what it was that he claimed was the northern boundary of the Canon del Agua when they were out there in May. *A.* Up to the Tuerto mountain, in front of the Real de San Francisco, and it is to the north of the old San Pedro, which is about ten miles from the Real de San Francisco. *Q.* Is there not, about a mile and a half south from the town of San Francisco, on the road leading to the San Pedro ranch, another road turning off to the right, towards the Palo Amarilla planting ground? *A.* Yes. *Q.* Is it not true your father insisted, at the time, that point was the northern boundary of the grant, and that they had no right to go further north than that? *A.* I do not recollect that. I was present when Mr. Griffin, with some other parties, took testimony at the forks of that road, May 7, 1866. *Q.* Was there anything said then, at that time, about the forks of that road being the northern boundary of the grant? *A.* On the road leading to the San Pedro there is a monument placed, and near the Palo Amarilla. *Q.* But I ask you whether upon the 7th day of May, 1866,—the time Mr. Griffin was there at the forks of that road with your father and other parties,—was there anything said about that point being one of the boundaries of the Canon del Agua grant? *A.* Yes, sir. *Q.* Well, what was said? *A.* That was the boundaries of the grant. Serafin Ramirez had sold it. *Q.* Are there not little mountains west of the Albuquerque road, and near to the Palo Amarilla planting grounds? *A.* Yes, sir; there are. *Q.* What are they called? *A.* They are called the 'Small Mountains of the Palo Amarilla.'" It required, evidently, tenacious cross-examination to bring the witness to this point. Two things are made apparent, if this witness on this point speaks the truth: *First.* That Serafin Ramirez pointed out to Griffin the very point of the northern boundary. The witness says there a monument was placed. In this he is fully corroborated by the other evidence. The point thus pointed out is also about one and a half miles down on the road leading to Palo Amarilla, meeting the very words of Santiago Florez and Serafin Ramirez, as distant from Real de San Francisco. With this place definitely fixed for Griffin by Ramirez himself as the northern boundary, and a monument placed, why was the line carried north a mile and a half beyond the place Serafin said it should stop, and so include the town? Is such an act, done with such light, to meet the approval of a court of conscience? *Secondly.* This evidence of the son proves that the father recog-



nized the little mountain at that point as the Tuerto mountain. He fixes that as the boundary point for the north line, and says a monument was placed there for the north line, and that his father claimed the Tuerto as the north boundary. A line east and west there would mark the Tuerto as a northern point on the boundary, and one north and south would mark it as a point in the western boundary; making the Little Tuerto to the south-west of the town, north-west of Canon del Agua spring, and the north-west corner landmark of the grant, where the grant description says it is.

A further very strong reason for disbelieving the claim that there is a mistake in the deed to Ramirez is found in the fact that, if such mistake be admitted, then there is no western boundary at all named in the deed. The only western boundary attempted to be named in Ramirez's deed from the Mexican government is: "On the west, the highest summit of the little mountain of El Tuerto. \* \* \*" For the purpose of the argument only, concede the word "west" was used here where the word "east" was intended, and substitute the intended word for the one really used, and the absurdity of the claim is seen at once. If the mistake contended for occurred, the description as corrected would read: "With boundaries as follows: On the north, the road of the Palo Amarilla; on the south, the boundary of the Rancho San Pedro; on the east, the spring of the Canon del Agua; on the east, the highest summit of the little mountain of the El Tuerto. \* \* \*" Where is the boundary line on the west? Which of the two points east is to be taken as the point through which the eastern boundary line shall extend north and south? This unreasonable position cannot be bettered by assuming the spring to be intended as the western boundary, because in the survey it is not made that line. If the description preserve the words of the grant, only substituting the words claimed to be intended for those used, on the theory that the spring is to be on the south line, then there is no west boundary, and no way to find one.

Another circumstance tending to show that the Big copper mine is not the one referred to in the grant description is found in the evidence of Bartolo Pena before Treadwell, elsewhere set out. In that evidence he speaks of a mine at the foot of what he calls the "Padernal Mountain," but which others call the "Little Tuerto," south-west of San Francisco, at a place where the grant call describes, being the western boundary, and west of Canon del Agua. He says this mine was discovered by Iganacio Gebare, and was the first one discovered in that country. That fact would make it the oldest mine in that region. He further says: "This mine was afterwards located and claimed by Serafin Ramirez. He called it his own mine." This corresponds well with the words used by Ramirez in his petition for the grant, when he says of the mine, "known as the property of your petitioner." It was evidently a mine in existence before the grant, and, if located and claimed before that date by Ramirez, would be as likely to be the one referred to in his petition as any other. This view of the question is strengthened by the fact that it is located to the west of the Canon del Agua spring, and at the right point to meet the direction named in the grant.

There has been considered so far the matter of fraud and mistake alleged in the bill of complaint. The evidence compiled and analyzed, relating to that subject, is so clear and convincing that there can be no reasonable uncertainty but the allegations are substantially proven. The evidence makes it very clear that the Canon del Agua spring should mark the line for the grant boundary on the east, and that the point where the Amarillo road turns to the west should mark the northern boundary line. An overwhelming weight of the evidence places the little mountain of El Tuerto to the west of the spring, and as the point and place for the western line. This being true, and the fraud and mistake alleged being fully and clearly proven, it remains to be considered whether the defendant occupies the position of an innocent purchaser, so that

there can be no relief against him on the ground of fraud and mistake. This branch of the question must be considered and settled in the negative, before the complainant can have any relief on such allegations. Even though fraud and mistake be proven, yet, if the defendant is an innocent purchaser for value, equity will not interfere with his title.

Is the defendant an innocent purchaser? The fraud charged being fully proven, the inquiry remains whether the defendant is an innocent purchaser for value, so as to estop inquiry as against it, and to enable it to hold notwithstanding the fraud and mistake. The complainant contends that the defendant had, through its president, Ballou, and its stockholders Grafton and Welch, of whom Grafton was its attorney, actual notice of the fraud charged in the bill of complaint, or at least sufficient to put it upon inquiry, and to bind it to whatever such inquiry would have disclosed. The evidence proves the defendant corporation paid \$500,000 for the property, and put into it in improvements \$500,000 more in cash; the investment including the two grants of San Pedro and Canon del Agua. So it is clearly a purchaser for value. The evidence also proves (folio 1859) that the stockholders were as follows, with the shares of stock named: George W. Ballou, Boston, Mass., 100,000 shares; Solon L. Wiley, Greenfield, Mass., 100,000 shares; Benjamin T. Grafton, Washington, D. C., 50,000 shares; James P. Welch, Santa Fe, N. M., 100,000 shares; Frank Morrison, Boston, Mass., 49,600 shares; David H. Darling, Boston, Mass., 100 shares; George E. Beatty, Boston, Mass., 100 shares; Taster Shores, Boston, Mass., 100 shares; Thomas Ewing, Lancaster, Ohio, 100 shares. The certificate of association bears date March 22, A. D. 1880. The name George William Ballou appears to this certificate as president, and therefore we conclude that he was elected at the date of organization. The evidence in this case proves that Grafton is a lawyer, residing in Washington, D. C.; that Welch, another stockholder, who resided in Santa Fe, was much of his time in Washington; that Mariano Otero was a delegate in congress from the territory in 1879 and 1880; and that both Grafton and Welch knew him there. Ballou testifies: "The San Pedro and Canon del Agua Company acquired title to most of the property *through* B. F. Grafton." This statement is indefinite. If he meant that Grafton was the attorney for the company, and was engaged as such in securing the title for the company, and in that way the defendant procured its title through him, the defendant would be charged with whatever facts respecting infirmity in the title came to his knowledge while he was engaged as the attorney for the company in prosecuting its business. Otero swears that one evening Mr. Welch called Otero to his room, and said to him that he wanted to introduce Otero to Mr. Grafton, and did so introduce him. That Grafton then and there asked Otero about the grant in question,—what the witness knew about it; and that he told Grafton that he had heard it said by people on the grant that it was a fraud, or a great deal of it was a fraud. That he told Grafton that he (Otero) had a claim for a mine that was said to be on the grant, and that he had at one time shown the papers by which he claimed the mine to Mr. Welch. That Welch had taken the papers to a lawyer, and had him examine them. He told Grafton, further, that he intended to see if his papers were not sufficient to hold the mine. That Welch and Grafton were together, and heard this talk. That he had heard before this that Grafton was making negotiations respecting the grant. That he learned, the night of this conversation, that Grafton had, or was about to take, an interest in the grant. He says, further, that he told Grafton in Welch's presence that people on the grant said it was a fraud, and that the witness himself believed it was a fraud all the way through; that Welch and Grafton had called upon him at his room at the National Hotel, but he was having so many callers that they all then left, and went to Welch's room, so as to have a better opportunity to talk. He says he told them he had a claim to what the witness identifies to be the Big cop-

per mine. After this conversation, he saw Grafton at Lamy, New Mexico, which is not far distant from the mine. He testifies, further, that Mr. Welch was in Bernalillo county, New Mexico, and that Welch went out there, looked at the grant, and talked about buying it; and that witness told him he had a claim on that property. That, if he thought of buying, he had better first look at the papers which witness held, in which he based his claim to the mine. He (Welch) asked of witness to see the papers, and that he let Welch have them, and Welch took them off, and had a lawyer examine them for him. That he (Welch) had these papers three or four days. That when he returned them the witness told him (Welch) that the property belonged to the Oteros, and sooner or later they would sue for it. Neither Grafton nor Welch were called by the defendant, so we are bound to accept the facts stated by Otero as true. George William Ballou was a witness, and from his evidence it appears that on the twentieth day of February, A. D. 1880, himself, Mrs. Ballou, E. L. Motte, Dr. Little, M. G. Gillette, (a mining expert, who afterwards became superintendent for defendant in conducting its mineral operations,) B. F. Grafton and Dr. Welch, (the persons who had talked with Otero in Washington,) and Mr. Chittenden, all visited New Mexico, and went out to the property for a day or two, and looked it all over; that they saw the mines, talked to the miners, and had the fullest opportunity to see the various mining claimants, and did see many of them. They were at San Francisco, and had an opportunity to talk to the people. It appears by the evidence of the witness Yates that he showed Ballou a number of lines which had been claimed as grant lines; and that he told him of one line in particular, and said to him that was the line which Welch claimed now as the boundary line. Ballou could see by this that it took in a substantial part of the town. Yates testifies further as follows: "He [Ballou] told me he had come there to invest in this grant, and I went around with him for two days, and showed him the country as much as I could. I told him we were working the Delgado mine; that it was in dispute; that I had worked there a long time, thinking it was not in dispute. He said, if he bought the mine, he would do a good part by me, and by Hart and Brown (both miners) also. He said he wanted to see us have our rights. Brown and I were interested in a number of mines; in the Keystone, Ora Cash, and the Romero. Johnny Hart was also interested in mines. Ballou saw all that belt of country around there. I went all through the placers with them. There was conversation between Ballou and the miners. *I told him we claimed those mines, and had them located, and were working them under the United States laws.*" White testifies, in substance, that at this time Ballou and his party were stopping at the hotel in Real de San Francisco, and that himself and four or five other miners went to the hotel to see him, and to tell him about their claims, and did so tell him; and that he replied, if he bought the property, he would do what was right by the persons claiming the mines, and would buy the mines, and not bother the miners. It appears, further, that three or four mines were being worked there east of the spring at that time.

This evidence establishes most conclusively that the party made a trip from Massachusetts to examine the property; that Ballou, Grafton, and Welch, who represent 250,000 shares of the stock in the defendant company, spent two days on the ground for the very purpose of looking it over. In the very nature of the transaction, they must have traced lines, observed the spring, and the direction of the mines therefrom, and have seen that the lines included a part of the town. The information traced directly to them, the purpose of the inspection, all forbid the conclusion that they did not fully understand the situation. They thus saw and knew a part of the land pretended to be covered by the grant was actually in the physical possession of other persons, claiming to have the legal right thereto, and claiming that the lands were mineral lands, subject to the laws of the United States. The president recog-

nized all this, and said they would buy their claims. If these three persons were defendants in their capacity as individuals, no court would have the slightest hesitation to charge them with notice. Mr. Ballou also testifies that he did in fact examine the patent, and rely upon it. It is fair to believe that he heard these statements, saw the occupancy by others, and examined the patent and record; and with notice the company determined, no doubt on consultation, to take the chances. He says: "The purchase of the said grant was made some time in January, 1880, previous to my first visit to New Mexico, although some of the payments were made, and transfer of the title to the property was not completed until after my return. The San Pedro and Canon del Agua Company was organized on the twenty-eighth of January, A. D. 1880. I am one of the incorporators of the company, and now its president."

The evidence quoted, with that in the record, proves that on the twenty-eighth day of January, 1880, the San Pedro & Canon del Agua Company, the defendant, was organized, and made a contract for the purchase of the Ramirez grant, and paid some money down,—but how much the evidence does not disclose; and that Ballou, as president of the company, was sent out to New Mexico by the company, with Grafton and Welch, altogether representing 250,000 shares,—a large majority of the stock,—as agents to make examination of the property, and ascertain all about it; that they came, and did go upon the property and look over it; that they learned that miners were occupying parts of the property, claiming it to be a part of the public domain, and claiming the right to locate mines, under the laws of the United States, and claiming thereby to own the mines within the claimed lines of the grant. The persons so inspecting saw the town of San Francisco within the lines, in part, and people living there, and thus had notice of an adverse claim by such people. They saw from the location of the spring, and of the eastern point of the line, and by reading the Ramirez description, that the grant was inverted. They saw, instead of the grant being either grazing or agricultural lands, that it was one of the largest known and most valuable mining camps in the territory, and knew the land was well-known mineral land. With this notice, they were bound to look further into the record, and bound to take notice of all the proceedings in the progress of confirmation, including the action by the surveyor general on Moradillos mining claim. The evidence discloses that it was not until after this visit that the title was conveyed to defendants as a corporation. Who can doubt that upon the return of Ballou, the president, Grafton, the lawyer, with Welch active in the purchase and creation of the organization, that they reported to the board of directors, and, the report being satisfactory, the title was conveyed to defendants?

The certificate of association bears date March 22, A. D. 1880; but Ballou, the president of the defendant company, swears (folio 3490) that "the San Pedro and Canon del Agua Company was organized on the twenty-eighth day of January, A. D. 1880." As he speaks with certainty, and fixes unhesitatingly the exact date, his statement is taken as accurate, although the certificate of organization bears date March 22d afterwards, and shows the corporation then already existing. These three dates are significant,—actual organization, and contract for the purchase of the property, January 28th; the visit of the president, Ballou, also Grafton and Welch, to the grant, February 20th; the return and certificate of organization, March 22d following. According to the evidence of President Ballou, the title during this *interim*, from January 28th to February 20th, was not yet conveyed to the defendant company, nor had the purchase money yet been fully paid. Payment and conveyance of the legal title stood suspended between those periods of time. The transaction about to be undertaken was a large one, involving the expenditure of a million dollars. The contracting parties were in Boston, and the grants were in New Mexico. The enterprise about to be entered upon was the working and development of the mines on these two grants; the Big copper mine

being the basis of operation. Every consideration of business prudence would have led the company, before finally concluding its purchase, making full payment, and receiving conveyance of title, to dispatch an agent to the ground with an expert to make an actual examination of the extent, character, and value of the ores; to ascertain whether the mineral wealth actually existing would justify such an immense expenditure. The evidence proves there was, on and after the visit of February 20th, unpaid purchase money in the hands of the defendant enough to give it full protection. Through its president, agent, and attorney, full notice was received while on that trip to have enabled the defendant, by withholding the purchase money, to protect itself; so that, in buying and receiving title, it was after notice, upon a full consideration of all the chances; and, if defendant took the risk under such circumstances, it cannot thereby place upon the complainant an estoppel against inquiry into the truth. Situated as stated, Ballou, the president, bringing with him Mr. Gillette, a mining expert from California, who afterwards became superintendent, and Mr. Grafton, the attorney, and Mr. Welch, who had worked the Big copper mine, visited, February 20th, the grant. Bearing in mind that these men represented over one-half the shares; that, according to Ballou, the company had been organized only 20 days; and that neither conveyance had yet been made, nor payment occurred,—the conclusion is to our minds irresistible that they were there as representatives and agents of the company, to examine the title, to inspect the mines, to view the lines and boundaries, in order to report on their return to the company; and, if it was deemed advisable, then to conclude the purchase, receive the conveyances, pay the purchase money, and set in operation the mills and smelters. The central point in this position is the evidence of the defendant's president that January 28th was the date of organization, and that conveyance of title and full payment of purchase money was not made until after his return from this trip of examination and inspection. It is unreasonable to believe that the defendant would undertake so large an enterprise, without just such an inspection and examination. To conclude otherwise is to believe the company a reckless adventurer, investing hundreds of thousands of dollars without examination or inquiry. Capital is conservative, and would demand just what was here done. The information, notice, and knowledge, hereafter considered, was thus, through its president and agents, brought to the notice of the defendant company. It was not bound thereafter to pay. It could pay or not as it chose, on its own discretion. It was not bound to receive title, with a town holding and claiming to own part of the land; with miners working upon well-known and long-existing mines, claiming to do so by virtue of the laws of the United States, and notifying the defendant's president and agents that this land was public domain. It is true that the defendant might make a calculation of the benefits it could receive; of the ores, and their value, that it might extract; of the advantages of the purchase,—and then, with eyes wide open to the record from Ramirez's grant to the patent, to the change in the boundary lines, to the assertion of title in the United States notwithstanding the survey and patent, to the occupation and claim of the miners, and weighing the advantages on one side against the risk on the other, complete its purchase, take the title, and risk also, and pay the purchase price; but, if it did so, it should not stay the hand of inquiry, or estop investigation into the truth. One who is really an innocent purchaser occupies a favorable position. He is in a situation to concede fraud, but to bar inquiry. He may say: "Yes; the title I hold is founded on malfeasance and villainous conspiracy, but yet I command a halt, and stop investigation, while I hold securely the fruits of conspiracy." The law does place an honestly innocent purchaser in that position; but, before it does so, it demands of him clean hands, unsoiled and unstained. We do not believe one with the notice which defendant had in this case should be regarded as an innocent purchaser. The

temptation to buy was great. The land was well known for its mineral deposits, and subject to the mineral laws, unless it could be acquired under this agricultural grant.

"In actual notice, [such as was obtained by the president of the defendant company on the land,] information is not inferred by any presumption of law. The personal communication of it is a fact, and, like any other fact, is to be proved by the evidence." "The information may be so full and minute and circumstantial that the party receiving it thereby acquires complete knowledge of the prior facts affecting the transaction, or it may fall far short of conveying such knowledge." 2 Pom. Eq. Jur. § 595. "Actual notice need not be full, circumstantial information of every material fact affecting the right of the person receiving it. It is enough if it be information directly tending to show the existence of the fact." *Barnes v. McClinton*, 3 Pen. & W. 67; *Tillinghast v. Champlin*, 4 R. I. 173, 215. "When A. is dealing with B. for the purchase of land, which he knows, sees, or is told to be in possession of a stranger, C., the law presumes that C.'s real interest and claim was communicated." Note 2, Pom. Eq. Jur. § 596. "Whenever A. is dealing concerning certain property with B., who acts as grantor, a definite statement made to A. by a third person, C., that he has or claims some conflicting interest or right, legal or equitable, in the subject-matter, is a sufficient actual notice to affect A.'s conscience. The statement need not be so full and detailed as to communicate to A. complete knowledge of the opposing interest or right; it is enough that it is so definite as to assert the existence of an interest or right as a fact." 2 Pom. Eq. Jur. § 599. Authorities to this point could be multiplied. If A. has been swindled out of his farm, and conveyed it to B., and C. is about to buy of B., it is not necessary that A. should detail to C. all the facts which will make A.'s case when he brings his proceeding to set aside the fraud. It is enough that A. tell C. of the fact that he has been defrauded, and then C. proceeds at his peril. C. need not buy; in good morals, he should not do so, for his act in buying tends to prevent A. from recovering his rights. One who buys with notice is warned in advance, and should not be allowed to buy, and be protected as an innocent purchaser, because he has, after notice, taken the risk, and judged incorrectly as to the ability of the person defrauded to make his case.

When the president of this defendant company was on the ground, and was called upon at San Francisco by the miners, and informed that the land belonged to the government, that they claimed rights under the United States mining laws, it was the duty of the defendant to pause right there, and it should not now be allowed to foreclose inquiry, to cut off investigation, because it would not be warned. This much is clear as to actual notice. It is not claimed or pretended here that notice to a mere promoter, before organization, of a corporation, or to one or more stockholders less than the whole number, will bind a corporation; but it is held that the facts in proof warrant the conclusion that Ballou, as president, Grafton, as attorney, Gillette, as a mining expert, Welch, as a large shareholder, went out as agents of the company to make an examination and inspection of the property before the conveyance was made to it, or the purchase money fully paid, so that the company might know the true value of the property before finally concluding the purchase, and whether to conclude it or not; and the company is bound by the notice received by them, and the facts coming to their knowledge, while making such examination and prosecuting such inquiry.

Independently, however, of this view of the evidence, the defendant, as a purchaser, would be charged with notice of all that appears on the face of the patent; would thereby be put on inquiry, and charged with notice of the facts which such inquiry would develop. The patent would, by its terms, bind the defendant to examine the grant of Ramirez, his application before the surveyor general, the action of that officer thereon, the confirmatory act,

the action of Burdette, and this is sufficient to arouse the grave suspicion of any man of ordinary prudence. "Every person is presumed to read the deed under which he holds." "When a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact." 2 Devl. Deeds, § 1002. "It is a familiar principle that every person taking a deed is charged with notice of all recitals contained in the instruments making his chain of title. The principle of equity is well established, that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title which would be discovered by an examination of the deeds or other muniments of title of his vendor, as to every fact which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record which a prudent person ought to examine to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the fact so contained." Devl. Deeds, § 1000, and note 4. The note contains a citation of numerous cases which fully support the text. "The same rule as to recitals in deeds is also applicable to recitals in patents from the government. A person who traces his title to a patent in charged with the facts in the recitals." Devl. Deeds, § 1003, and note. See, also, *U. S. v. Land-Grant Co.*, 21 Fed. Rep. 24. "Any description, recital of fact, reference to other documents, puts the purchaser upon an inquiry. He is bound to follow up this inquiry, step by step, from one discovery to another, from one instrument to another, until the whole series of title deeds is exhausted, and a complete knowledge of all matters referred to therein is obtained. He is conclusively presumed to have prosecuted the inquiry to its final result. An imperative duty is laid on him to ascertain all the instruments which constitute parts of his title, and to inform himself of all they contain." 2 Pom. Eq. Jur. § 626. *Brush v. Ware*, 15 Pet. 104, is a very instructive case. It appeared Hockaday, a soldier of the Revolution, was entitled to lands for military service. He died. His administrator sold his claim. On the claim, certificates were issued, and finally warrants. Brush bought two of the warrants and entered land thereon. He obtained patents for the land. The heirs of Hockaday brought suit against Brush, and it was held he was not an innocent purchaser. The court say: "The law requires reasonable diligence in a purchaser to ascertain defects in his title." "When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of such fact." The court held that the holder of the patent in that case was bound to know the administrator had no power to assign, and so the patent was void.

Even though the defendant was not bound by the knowledge obtained by Ballou, Grafton, and Welch, upon the visit to the ground, February 20th, it would be compelled by the recitals in the patent to look into the grant papers, and especially that relating to the Big copper mine. Such inquiry would have disclosed, because it was so recited in the patent, that the claim to the Big copper mine, based on the alleged right under the mining ordinances given by the Mexican government to Moradillos, was not recommended for confirmation, but that the surveyor general declined to exercise jurisdiction over it. It could not have believed when the surveyor general said, "No authority is vested in this office to adjudicate on claims to mines," and "No action has been had by this office in the premises," that notwithstanding this disclaimer by the surveyor general, carried by recital into the patent, that he had recommended the conveyance of the mines, and that they were so conveyed, in opposition to and overriding the recitals in the patent.

Notwithstanding the notice, and the infirmities in title apparent in the various documents upon which the patent rests, did the defendant have the right to disregard them all, and repose upon the act of the land-officer, and so to buy and conclude all inquiry as to facts behind the patent, and upon which

it is based? That must depend upon the weight to be given to the action of these department officers. Upon that point, the case of the *U. S. v. Minor*, 114 U. S. 238, 5 Sup. Ct. Rep. 836, is in point, and we think conclusive. The action in that case was to set aside a patent issued to John Minor. The ground of the proceeding was an alleged fraud by the grantee in making affidavits to residence and improvement, when in fact he had neither resided upon the land nor improved it. It was contended by the defendant that the action of the land-officer of the department was in the nature of a judicial act, and conclusive. The observations of the court are quite pertinent here. Speaking of the land-officers, the court says: "For the truth of these statements, they [such officers] are compelled to rely on the oaths of the parties asserting claims, and such *ex parte* affidavits as they may produce. In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the *party applying has it all his own way*. He makes his own statement, and he produces affidavits. \* \* \* In cases where there is no contesting claimant, there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant. When he proceeds, therefore, by misrepresentation, by fraudulent practices, there would seem to be more reason why the United States should have remedy against that fraud—all the remedy the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud is perpetrated." The court then considers whether a ruling held by the court below in deciding the case is applicable; and in referring to *U. S. v. Throckmorton*, 98 U. S. 61, explain that case to have been, where the action of the land-officers was predicated upon the decision of the California commission, a judgment judicial in character. The court then proceeds: "Here, no one question was in issue; no issue at all was taken; no adversary proceedings was had; no contest was made. The officers, acting on such evidence as the claimant presented, were bound by it. They had no means of controverting its truth, and the government had no attorney to inquire into it. Surely the doctrine applicable to the conclusive character of the judgments of courts, with full jurisdiction over the parties and the subject-matter, made after appearance, pleadings, and contests on both sides, cannot be properly applied to the proceedings of the land-office in such cases. \* \* \* We have steadily held that though, in the absence of fraud, the facts were concluded by the action of the land department, a misconstruction of the law, by which alone the successful party obtained a patent, might be corrected in equity, much more so when there was fraud and imposition." In 1876 the supreme court of the United States, in *Tameling v. Freehold Co.*, 93 U. S. 662, consider the distinction between the determination of the commission in that state, and the action of the surveyor general in New Mexico. Mr. Justice DAVIS, in giving the opinion of the court in the case, referring to the tribunal in California, says: "Congress required that all titles to real property in California, whether inchoate or consummate, should undergo *judicial* examination. \* \* \* But congress legislated otherwise, for the adjustment of land claims in New Mexico. \* \* \* It will thus be seen that the modes for the determination of land claims of Spanish and Mexican origin were radically different." It is thus apparent, on authority, that the functions of the surveyor general, exercised in the case before us, were not judicial. There were no adversary parties; no pleadings; no issues; no attorney on either side to ascertain the facts, subpoena and examine witnesses, and cross-examine those of his adversary. None of the safeguards thrown about a judicial proceeding exist. The surveyor general, on behalf of the government, did not act as a court, with adversary parties, an issue, and attorneys, but



ministerially. In *U. S. v. Stone*, 2 Wall. 525, the supreme court say: "The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially."

More faith and credit should be given to the solemn judgment of a court having jurisdiction than to the acts of the land-officers who made this survey, and who issued the patent. To hold that defendant, after receiving notice, might discharge itself of the legal effect thereof by relying on the patent and survey, and by purchasing, notwithstanding the notice, and thus place itself in the position of an innocent purchaser, would be to give to the act of the officers who make the survey and issue the patent as much legal and binding force as a judgment of a court in adversary proceedings. Suppose some officer of the United States, authorized in the premises, had called upon the defendant's board of directors, while in session, negotiating for the purchase of the grant in question, and then had notified the defendant, through its board, that the government was not satisfied with the survey, that it had been fraudulently made, so as to extend the boundaries, and that, if defendant bought, it must do so at its peril, what would be the legal effect of such a notice if so given? Could the defendant, under such circumstances, take up the grant papers, the survey, and Burdett's action thereon, and the patent, and say: "Here is a patent. It is the highest evidence of title. To it full faith and credit should be given. It is not probable the patent can be successfully assailed in a direct attack, and so the purchase will be made and the risk assumed,"—and thereby, because it chose to place such great faith in the patent, place itself in the position of an innocent purchaser? If it could, then there can be no such a thing as a direct attack on a survey to overthrow it for fraud, if the land described in it is in the hands of one who has paid value, and read the patent, and presumed the notice given to him was not well grounded. It seems to us there is a clear distinction between the weight which should be given to the judgment of a court having jurisdiction and adversary parties, and that to be given to officers intrusted with duties not so clearly judicial in character. If the acts of the officers of the land department are to have the force and effect of judgments in a court, with adversary parties before it, practically the power of a court of equity would be limited, in proceedings to set aside for fraud or mistake, to those cases where the land was yet in the hands of first holders; because, under such a rule, the reading of the patent, and presuming it to be correct, would place the party contracting, after his purchase, as an innocent purchaser, beyond the reach of a court of equity. It seems to us the rule is that when the purchaser, before the conclusion of his purchase, or the payment of the purchase money, has notice of an alleged equity in another, it then becomes inequitable for the purchaser to buy, and thus embarrass the true owner in the assertion of his right.

The action of Pelham, and of the confirmatory act, are not in this proceeding to be vacated; but it is the act of the officers in carrying such act into effect which is attacked. If Pelham's act is a judgment, it fixes the land west of the spring; and it would be a hard rule to say the survey is a judgment which cannot be attacked in a direct proceeding. Such a principle would conclude the government where the confirmation was for the N. E.  $\frac{1}{4}$  of a tract, and the patent, by fraud or mistake, conveyed another and different tract, as, for instance, the S. W.  $\frac{1}{4}$ . If the confirmation is a judgment, it is for land west of the spring, and there is no power to convey land east of that point. The action of the officers in this case, in issuing a patent, does not protect one who buys with notice, either in fact, or from the record, which he is bound to examine; so that he cannot be affected by notice of fraud in the survey. Under the circumstance of this case, the defendant is not an innocent purchaser.

The application for perpetual injunction will now be considered. There is a branch of this case not much discussed in the briefs filed, and which is of as

high importance as any other contention in the record. It arises on the following allegations of the supplemental bill: "That said defendant is now and has been in possession of large portions of said tract of land mentioned and described in said original bill of complaint as being the property of the United States, and by said fraudulent survey now included and embraced within the boundaries mentioned and described in the patent of the United States, as set forth in said bill of complaint; and that said defendant is now in possession of many mines, leads, lodes, and veins of mineral-bearing quartz or rock belonging to the United States, and situated upon the said tract of land, the property of the United States. The said mines, leads, lodes, and veins are very rich and valuable for gold, silver, copper, and other valuable ores. The said defendant claims said land, with its mines, leads, lodes, and veins of mineral-bearing rock and mineral deposits, as your orator is informed and believes, by and under the said patent of the United States." After making other averments, there is a prayer that defendant be forever prohibited and enjoined from mining or using or appropriating said ores. The defendant, in its answer to the supplemental bill, admits that it is so mining at what is known as the "Big Copper Mine," and claims said mine to be within the lines of the land conveyed to it, and that, under the patent and survey, it is the legal owner of such mine, and all other minerals within the said tract, and has the legal right to hold, mine, control, and use the same, as against the government of the United States. This supplemental bill, and the admissions in the answer thereto, present an entirely different question from the others which are heretofore discussed. The supplemental matter proceeds in part upon the theory that, even though the whole relief prayed for may not be granted, yet, if the court should hold that the survey and patent cannot under the evidence be set aside, it then must give construction to the patent, and say to whom the mines of gold, silver, and copper lying within the grant lines belong, and whether the defendant shall be enjoined perpetually from working them, and especially from mining in the Big copper mine, which defendant admits it was working when the supplemental bill was filed. This question must depend upon the rights which passed to Ramirez by the patent from the United States; and, as that patent only relinquished to him his right as it existed at the date of the session, it is necessary to examine briefly the law of Mexico, to determine what, as between Ramirez and that government, he then actually owned,—whether only the surface of the land; or that, and also the mines of gold and silver beneath the surface. Certain decrees were in force at the time of the separation of Mexico from Spain, whereby the mines of gold, copper, and silver were held by the crown of Spain. Upon the separation, which resulted in creating Mexico a separate government, the title to all mines within her territory passed to and vested in the Mexican government, including therein what is now New Mexico. A grant of land by the Mexican government did not carry such mines. It did not require a reservation by the government of such mines to prevent them from passing. No interest in such mines, whether in granted or ungranted land, could be acquired by the individual citizen, under the Spanish or Mexican law, except through mining ordinances. The law of those countries recognized the title to all such mines, whether in public or granted land, as in the government, and not subject to be passed out of it by a mere grant. *Rock. Sp. & Mex. Law*, 124-127, 130, 131, 411; *Hall, Mex. Law*, §§ 1210-1213, 1235; *Moore v. Smaw*, 17 Cal. 199, 12 Min. R. 418, 424-428. We conclude, then, that by the grant of the land in controversy by the Mexican government to Jose Serafin Ramirez of the Canon del Agua no interest and title in and to such mines therein contained was vested in him; and as it does not appear by the record that any individual interest in such minerals had been obtained by him, or those claiming under him, by virtue of the mining ordinances of the Mexican government prior to the cession of the territory of New Mexico to the United States,

that these minerals were at that date the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of New Mexico, to and became the property of the United States. *Moore v. Smau*, 17 Cal. 199.

When, then, the lands contained within the limits of this grant passed, by its cession, under the dominion of the government of the United States, the title to such minerals therein contained became vested in the government of the United States. Was such title to those minerals within the Ramirez grant divested by the act of confirmation, passed June 12, 1866? Ramirez had no claim to any more interest than he had obtained by virtue of the grant. It was only the right in the land which had passed by the terms of the grant to the grantee, and which, as we have seen, did not include such minerals therein contained, that congress was asked by him to confirm. The Spanish and Mexican governments reserved the right to the minerals in their lands, unless expressly granted, and they were not by the Mexican government expressly granted to Ramirez. The treaty under which Ramirez had the right to have his interest in the land in question confirmed by our government only contemplated the confirmation by congress of such title thereto as had been conveyed to Ramirez by the government of Mexico, and which did not confer upon him the title to such mines therein contained. These Ramirez did not own when confirmation by congress of this grant was asked, and given by that body. If such confirmation passed the title to these minerals to the grantee, then it not only made good the grant made by Spain and Mexico, but also conveyed additional rights and interests to which he was not entitled, and for which he had not asked, and which, it is believed, was contrary to the whole public policy of the government in respect to its mineral lands and mineral interests. This will be made more apparent by an examination of our laws respecting this interest in the mineral lands of the government. From the date of the ordinance of May 20, 1785, providing for the disposal of the public lands in the "Western Territories," and reserving the interest of the government in the minerals therein, to the present time, through all the acts of congress in any way affecting the public domain, this interest in the mineral wealth of the public lands has been carefully guarded, and special legislation, as applicable to mineral lands, in contradistinction to all other lands, enacted for its protection and preservation; while our present laws governing the acquirement of mineral lands clearly contemplate the disposal of such lands in small quantities, and not in large bodies or tracts, so as to encourage and induce prospectors to make discoveries, and extend and increase the means of their development when made, and the consequent enrichment of the country. Donald. Pub. Dom. c. 26, p. 306 *et seq.*

In his report as secretary of the interior, Mr. Ewing, on December 3, 1849, said: "The right to the mines of precious metals which, by the laws of Spain, remained in the crown, is believed to have been also retained by Mexico while she was sovereign of the territory, and to have passed by the transfer to the United States. It is a right of the sovereign in the soil, as perfect as if it had been expressly reserved in the grant; and it will rest with congress to determine whether in those cases where land duly granted contains gold, this right shall be asserted or relinquished. *If relinquished, it will require an express law to effect the object*, and, if retained, legislation will be necessary to provide a mode by which it shall be exercised." In *Moore v. Smau*, 17 Cal. 216, what seems to us to be the true doctrine, amply sustained by authority, is stated as follows: "The minerals were vested under the Spanish monarchy in the crown, and—after the separation from Mexico, in that nation—did not pass, as we have already stated, by the ordinary grant of land *without express words of designation*. Such grant transferred only an interest in the soil, distinct from that of the minerals. The interest in the minerals was conveyed through the operation of the mining ordinances, by registry of discovery, or by pro-

ceedings upon denouncement, when a mine once discovered had been forfeited or abandoned. \* \* \* They constituted, therefore, at that time, the property of the Mexican nation, and by the cession passed to the United States." "According to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass under a grant by the king under the general designation of lands or mines." *Hicks v. Bell*, 3 Cal. 220.

It thus follows, at the time of the session, that there was a dual interest in the property of the Ramirez grant,—his title or equity in the land, and the paramount title which the United States held in the mines. What title to the mines, under his grant, could Ramirez have asserted against the Mexican government? None. Neither could he have asserted any against the United States as to the mines. The past policy of the government, which has continued without interruption to the present, has been to preserve and protect its interest in the mineral wealth in the public domain. A *résumé* of the legislation of congress respecting the mineral lands will be found in Donald. Pub. Dom. cc. 26 and 32. In *Deffebach v. Hawke*, 115 U. S. 401, 6 Sup. Ct. Rep. 95, is a very full recital of congressional legislation respecting mineral lands. The pre-emption act of 1841 excepts from pre-emption and sale "lands on which are situated any known salines or mines." The act extending to California the privilege of settlement on unsurveyed lands contains a clause that the provisions of the act "shall not be held to authorize pre-emption and settlement of mineral lands." Similar exceptions were made in grants to different states, and in grants to aid the construction of railroads. California was granted 10 sections of land for the purpose of erecting public buildings of that state, but there is a proviso that "none of said selections shall be made of mineral lands." In the grant to the Union Pacific Railroad and its associated companies, all mineral lands other than coal and iron are excepted from the grant. A similar exception is made in grants for universities and schools; and, in the law allowing homesteads, mineral lands are not liable to exemption. It is believed a detailed examination of the several acts of congress will fully establish that in June, 1866, when this grant was confirmed, that it was the settled policy of congress to reserve and protect the mineral interest of the government, and, as time advanced, this policy became more firmly established. So clearly does the legislation of congress evince an intent to reserve the mineral wealth from the operation of the general laws respecting lands, that the supreme court of the United States, after a review of this clearly-defined congressional policy, say: "It is plain, from this brief statement of the legislation of congress, that *no title* from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, copper, or cinna-bar can be obtained under the pre-emption or homestead laws, or the town-site laws, or *in any other way* than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas." This early and continuous manifestation by the law-making department of its purpose to reserve mines should weigh heavily in determining whether, under a general act of confirmation, they intended to direct the conveyance of well-known and long-established mines of gold and silver, thus placing a claimant under a Mexican grant not only in a better position than he had a right to ask, but in a better position than grant-holders from the government. There are California and perhaps other cases holding to the contrary, notably *Moore v. Smaw*; but a careful study of them will prove that there were circumstances in the grant confirmation indicating an intent not disclosed in this case. Here it is well proven that all the country about San Francisco, and east and north-east of the spring, was, in the language of the court in *Deffebach v. Hawke*, *supra*, "well-known mineral land,"—not only to Ramirez, who had mined all about that region, but to hundreds of miners engaged at and in the region from 1842 continuously down to the

present day. It is not to be considered in the light of a grant where the mines were undiscovered and unknown, but in the light of a conveyance, covering a valuable mineral belt, mined over for over half a century, and with miners working openly and notoriously with claims for years, at the very time of the confirmation, survey, and patent; and right at this point the thought will intrude itself that it is passing strange that with this as a well-known mining camp, and the survey as embracing mineral lands well known and very valuable, that such facts were not reported by the surveyor general with the survey, for the consideration of the department, when the survey was extended to embrace mineral land.

The supreme court of the United States in *Deffebach v. Hawke*, *supra*, quite clearly make a distinction between the rule which should be applied to lands *well known* to be valuable for gold and silver mines, and those where there is at the time of the patent no reason to anticipate such a condition. The policy of this government and that of Mexico we believe to be substantially alike in respect to such mineral. In Mexico, such lands and the mines therein were governed by the mining ordinances, and were taken out of the operation of the general laws for the disposition of agricultural lands. So, also, here, one set of laws apply to the sale of land not mineral, and another to the sale of those known to be full of gold and silver. We think the patent sought to be affected in this case stands on an entirely different principle from those referred to in either *Moore v. Smaw*, the *Tameling Case*, or the *Maxwell Land-Grant Case*. In the first of these cases, the patent seems to have been the result of a judicial inquiry. The court in that case say, (17 Cal. 223:) "The object of the act is to ascertain and *settle* private land claims in the state of California. This object is declared in the first section. It is not merely to ascertain, but to *settle*, them; that is, to place them beyond controversy." In the *Tameling Case*, 93 U. S. 662, in referring to the same act, the court say: "It will thus be seen that the modes for the determination of land claims of Spanish and Mexican origin were radically different. Where they embraced lands in California, a proceeding essentially judicial in character was provided, with the right of ultimate appeal. No jurisdiction over such claims was conferred on the courts in New Mexico." It was principally upon this theory that *Moore v. Smaw* was decided. It is true that an additional view was also stated on another point; but the soundness of that view, with due respect to the learned court that made the ruling, may well be doubted. So far as it was there held that the principles which apply against a private individual grantor shall also apply to public grants against the government, we are inclined to question its legal accuracy, and to believe that a grant from the government, unlike that of an individual, should be construed strictly against the grantee, and not liberally in his favor. "According to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under the general designation of lands or mines." It is also the doctrine in the case of *Queen v. Earl of Northumberland*, 1 Plow. 310, that, while mines may pass by the king's patent, they will not do so without the use of "apt and precise words." The great body of our law comes to us from that source, and we can see no reason why this construction as to patents by the government should not also be adopted. "It is an old principle of law that exceptions in a deed and every uncertainty are to be taken favorably for the grantee; but this rule has no application to *grants of the sovereign*." 2 Devl. Deeds, § 848. See also there a large citation of authorities under note 4. "The manner of granting by the king does not more differ from that by a subject than the construction of his grant when made. (1) A grant made by the king *shall* be taken most beneficially for the king, and *against the party*, whereas a grant of the subject is taken most strongly against the grantor." 1 Bl. Comm. 347. "Public grants are to be construed strictly." *Railway Co. v. Railway Co.*, 97 U. S. 497; *Bridge v. Bridge*, 11 Pet. 544. Other

authority to the same effect is abundant, so we feel constrained to hold that, as to grants and patents by the government, a different rule of construction is to prevail from that which obtains against a private grantor. Again, in the California case, there is nothing in the record to disclose that the land granted was well known, either at the time of confirmation or patent, to be mineral; neither was it so known in the grant considered in the *Tameling Case*, nor the Maxwell grant, so far as we have been able to ascertain, this case, in an important feature, bringing it, as we believe, within the principle ruled in *Deffebach v. Hawke*, is to be distinguished from those cases. This is a direct attack by the government itself upon the survey, to vacate it on the ground of fraud and mistake, and also, on the supplemental bill, on the affirmative claim by the United States to the mines of gold and silver, and especially to the Big copper mine. This supplemental bill stands partly on the ground that the patent embraces lands notoriously known to be mineral at the time of confirmation. It is an attempt, under a patent for lands claimed only for agriculture and pasturage purposes, to hold numerous and valuable mines, and a mineral tract which from its richness became so well known as to attract a population of from one to six thousand people, and about which the grantee himself knew for a period of over twenty years. If the principle of strict construction of a patent ever applies to a confirmation, it should, under the facts in this case, do so here.

In *Mining Co. v. Mining Co.*, 2 Nev. 168, 263, the supreme court of Nevada says: "The doctrine of the common law that he who has a right to the surface of any portion of the earth has also the right to all beneath and above that surface has but a limited application to the rights of miners and others using the public lands of this state. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will doubtless lead to many complications. To adhere to the common-law rules on this subject is simply impossible. To attempt to carry out common-law doctrines on this point would either give all the houses in Virginia to the mining corporations, or else all the most valuable mines to those occupying the houses. The well-established custom of miners to locate veins of mineral, claiming to follow them with all dips, spurs, and angles, without reference to occupancy of the surface, has compelled a departure from common-law rules." And in the case of *Mining Co. v. Ish*, 5 Or. 104, it was held by the supreme court of Oregon that a patent from the government of the United States for lands as agricultural lands, but which contained deposits of precious metals, passed no interest in or title to the minerals therein contained. That court says: "But Ish obtained no interest in the mining claims on the lode by the patent. True, by the patent he obtained a given quantity of agricultural lands, and the lode is situate upon said lands, but the known deposits of precious metals did not pass by the patent, for they are expressly reserved from sale under the pre-emption and other land acts." The law under which this case was decided by that court was enacted by congress July 26, 1866,—only a month and fourteen days after the passage of the act of confirmation of the grant of land in controversy in this cause,—and by the act of July 26, 1866, all mineral lands of the United States government are expressly reserved from sale or disposition under the homestead or pre-emption or other land acts; showing the policy of the government to be to protect and guard with special care its mineral interests in the public domain, by specially excepting this class of lands from all others, and providing a special mode of their disposition, distinct from the method of disposition of the remainder of the public domain.

It does not seem to us that congress could have intended to deal more liberally with Ramirez and his grantees, by the act of confirmation of the grant in question here, than by the remainder of the body politic, as shown by the whole legislation in reference to the mineral lands of the government. Be-

sides, if a patent of the lands would not convey the interest of the United States in the mineral therein contained, as was held in the case of *Mining Co. v. Ish*, *supra*, unless such patent were issued under the mineral land laws of the government, or in cases where the minerals are in terms named as granted, and it requires an express law to effect the relinquishment of the government's title to its mineral interest in the lands of the public domain, as was asserted by Mr. Ewing, as secretary of the interior, as early as 1849, then it would seem that the mere relinquishment of the land described by the grant in controversy in this cause to Ramirez cannot be held to carry with it the title to the minerals found within the grant limits; but that by the grant, and its confirmation in the manner such grant was confirmed, only the right to the surface or soil of the land passed to and became vested in the grantees, and that the title to the gold and silver mines therein contained remained in and still is the property of the United States. Especially should this principle apply where the lands claimed, as in this case, were at the confirmation, if the grant is properly surveyed, well-known mineral lands. It may be that this view, if maintained as the law in this case, will result in making the government the owner and possessor of interests in land in connection with individuals; but, if so, that is a matter to be dealt with by another branch of the government, and with which we have nothing whatever to do. We are to declare the law as it is, and let the results be met and disposed of by that department of the government upon which the responsibility for its enactment rests. There is no reason to apprehend that the government intended to deal more generously with Ramirez than with others of her native-born citizens. What claim had he that the government should voluntarily give him a grant he did not already possess? If under the law of Mexico, by which he acquired his right, the gold and silver mines were not included, as we think they were not, why should the value of his right be greatly enhanced by adding thereto, in the nature of a new grant by the United States, rich mineral deposits? Was such the intention of congress in the confirmatory act? The title to the act of confirmation is conclusive on that subject, as it may be looked to in construction. It is "An act to confirm the title of Jose Serafin Ramirez to certain lands in New Mexico." It is not an act to grant to him a new thing or right, but to recognize and confirm an old one. Congress was bound, under the treaty of Guadalupe Hidalgo, to protect him in existing rights, but not under the slightest obligation to give him an additional one. In passing this act, congress was not engaged in the duty of looking up persons entitled to gratuities for some beneficial service rendered the government, as in granting private pensions, but was examining into its duties under a treaty with a sister republic, and in that way discharging only a political duty. Who can suppose for a moment, if a preamble to the bill had read, in substance, this way: "Whereas, Serafin Ramirez holds a grant to land from the government of Mexico, which, under treaty obligations, congress is bound to confirm; and whereas, there is under the surface on said lands rich and valuable deposits of gold and silver, which did not pass to said Ramirez from Mexico by said grant, the title to which is now vested in the United States, but which Ramirez desires to possess to increase his wealth: therefore, as a gratuity to him, be it enacted that the congress of the United States grant unto said Ramirez all the mines of gold and silver under the surface on said land,"—that a single member of that honorable body would have entertained it for a moment? And yet if these mines can be carried to the grantee on the theory that the act of congress, and the patent thereunder, operate as an original grant, that is the preamble which should accompany such legislation. We believe that reason, justice, and law alike are against any such conclusion, but, to the contrary, they all say that congress did not give to Ramirez new rights, but recognized, confirmed, and established only his old ones.

This construction of the confirmatory act is greatly strengthened by the proceedings disclosed in the record. In his application before Surveyor General Pelham, Ramirez says the land he asked for was granted to him "under the *colonization laws* of Mexico and Spain, in force at the time the land was granted." He did not ask this land of Mexico as mineral lands, under the mining ordinances of Old Mexico, but asks it for agriculture and pasturing animals, and as a place whereon he may smelt ore. At the same time, Ramirez invoked the action of the surveyor general as to a certain mine, and filed papers respecting the same, so that in fact his application before the surveyor general was dual; one relating to the land, and the other respecting the mine. The surveyor general, in his report for the action of congress, expressly denies his official power to take action respecting mines. In his report he says: "On the thirteenth of February of the same year (1844) the *grant* was confirmed to him," etc. "The claimant also files with the papers in this case a grant made to his great-grandfather; but, as no authority is vested in this office to adjudicate on claims to mines within the territory, *no action has been had by this office in the premises.*" "The grant to the land situated in the Canon del Agua is made according to the laws in existence at the time it was made, \* \* \* and is fully covered by the treaty of Guadalupe Hidalgo." "It is therefore approved, and respectfully transmitted for the action of congress in the premises." The word "it," as used, clearly does not refer to the claim for the mine; but does refer to the grant of the land. He notifies congress that two claims are before his office,—one based on a claim alleged to have been made, in the language of the surveyor's report, "to his [Ramirez'] great-grandfather," being a mine; and the other, a grant of land to Serafin Ramirez in person,—one an alleged grant to Don Francisco Dias de Moradillos for a mine; the other, to the alleged great-grandson, years afterwards. As to the mine claim, there was no inquiry by the surveyor general about its genuineness, or in regard to the important question whether in fact Ramirez was the great-grandson, or whether at the time of the treaty the right to the mine under the Moradillos claim was not abandoned, extinct, and of no legal or equitable force; but, on the contrary, his report shows that the surveyor general turned away from this inquiry, refused to make it for want of official power, and only recommended the confirmation of the grant made to the alleged grandson, Ramirez. The title of the confirmatory act shows the purpose of congress only to confirm what the surveyor general recommended. And the words of the act are conclusive: "Be it enacted," etc., "that the grant to Jose Serafin Ramirez of the Canon del Agua, as *approved by the surveyor general* of New Mexico, is hereby confirmed." The mind of congress, so to speak, was upon the official act of the surveyor general, and upon the words of his recommendation. The legislative intention was to do what he had recommended to be done. The intention of congress was not to confirm the mineral grant alleged to have been made to Moradillos, for that had not been sent forward for confirmation, but to confirm the land grant which had been sent forward for approval. It was the land grant, as *approved* by the surveyor general, which congress confirmed, and not the mineral grant, which that officer expressly declined to approve. The defendant, in its answer to the supplemental bill, admits that it was taking out ore in the very mine as to which the surveyor general declared he had no power to act, and defendant claims the right to do so under the land grant. The defendant does not justify the act of appropriating these ores on the ground that the land is mineral land, part of the public domain, and possession under the mining laws of the United States, but claims under the Ramirez land grant. This is the correct reasoning on that subject, based on the facts in our opinion. Ramirez presented for confirmation two grants; one, of an alleged mining claim to his alleged great-grandfather. The surveyor general made no investigation into the facts of this claim, or as to its equities, but declined to do so for want of



jurisdiction, and so informed the commissioner of the general land-office, and, through him, congress. Ramirez never appealed from this decision, nor asked or procured a reconsideration or review thereof; so the claim under the alleged mineral grant, on the record, stands decided against the defendant, and therefore it can hold no right under the alleged grant to Moradillos; and the fact that congress confirmed an entirely different grant, made under different laws, to another person, years afterwards, which was claimed to be grazing and agricultural lands, does not carry with it the gold, silver, and copper below the surface. In *McGarrahan v. New Idria Co.*, 49 Cal. 331, it is held: "The patent is evidence of the series of proceedings recited in it, and is a solemn record of the action and judgment of the government with respect to the title of the claimant." If that be so, the patent discloses that the department ruled it had no jurisdiction to determine title to the Big copper mine, and so cannot carry title thereto to defendant.

The lands ceded by Mexico were held by virtue of the cession, and passed to the United States, precisely as they were held by the republic of Mexico, charged with the same equities. Title to these lands was somewhere,—in some legal entity capable of receiving and holding lands, and that entity was the United States government, in its organized capacity. This title was so held by her, charged, under the treaty, with the rights therein owned by citizens of the Mexican government, and no higher right in favor of such citizen. Whatever the government of Mexico would have recognized in such citizen respecting such land, and whatever conveyance or concession in law or equity was due from Mexico as to such lands, was due by the treaty from the United States. If the grant held by the Mexican citizen for land only gave him the right to the surface, and not the gold and silver under it, he stood after the cession clothed with just that right, and no greater, against the United States. The surveyor general's office in New Mexico was not established to convey the gold and silver mines belonging to the general government, or to recommend their conveyance. A patent executed by the president for a Mexican grant, in the absence of a law of congress, would be void. The law is the measure of the president's power to convey. If it says, "Convey only the surface, and not the gold and silver mines," the president cannot enlarge upon the congressional act, and pass title to such mines out of the government. In *McGarrahan v. Mining Co.*, 49 Cal. 331, it is held: "Neither the president nor any officer has other power to dispose of the public domain, or to sign or cause the seal of the land-office to be fixed to patents, than such as is conferred by statutes of the United States." See, also, *Parker v. Duff*, 47 Cal. 554. So, when the surveyor general of New Mexico decided against his jurisdiction to recommend a confirmation of the mine described in the grant to Maradillos, and when congress confirmed the grant to Ramirez as recommended by that officer, it seems to us that this enactment was confirmatory of the whole action of the surveyor general on the entire petition of Ramirez, and excluded the Big copper mine; and even though the patent assumed, as it does not, to convey the same, to that extent it would be void for want of power in the executive to convey, on the ground that the patent conveys only what was confirmed. This would be true, also, of the other gold and silver mines, if the legal effect of the confirmatory act was only to affirm title in the land, and not the mines. In such case the patent as to the mines would be void, as the president had no power by patent to convey what congress did not confirm. It seems to us, in acting on Ramirez's claim, congress should not be regarded as making a new grant, but that it should be considered only as performing treaty obligations, and as carrying to the grantee just the title he held at the time of the cession; and that, in giving construction to the words of the patent, they should be interpreted in the light of the obligation to be performed under the treaty, and in harmony with the legislative intent, manifested in

the terms of the confirmatory act, construed by the action of the surveyor general. Any other construction puts the United States in the attitude of conferring upon the grantee a title which he had no legal or equitable right to ask, which he did not demand, which was not contemplated by the treaty; and of thrusting upon the grantee, out of the property of the United States, a gratuity worth half a million dollars, congress, in confirming the grant as reported, intended that a patent should issue conveying the right confirmed; not other and different property. We believe, in construing the patent in this case, the treaty obligation, the right intended to be, and which was, established by the act of confirmation, the words of the act, the terms of the grant, all must be considered. In this case the patent does recite that the grant claim was filed before the surveyor general, his action and recommendation thereon, and the act of congress confirming the same; and manifestly, by its own terms, conveys only what was thus granted and confirmed. The recital in the patent, of the act of the surveyor general, of the confirmatory act, makes them a part of the instrument, and, in construing any contract or conveyance, every part and word must be considered, and force given to all. So, also, is the report of the surveyor general, copied into the patent, and upon the same legal rule, it must be given effect as a part of the instrument, and as some evidence of intention; and so, in the face of the patent, the grantee is informed, repeating its language, "that there is no authority vested to adjudicate upon claims to mines," and that therefore "no action is taken in the premises;" that is, as to mines, this title is in no way touched, but the grantee is remitted to whatever legal right the law will give him unaided by the patent. How it could be claimed that this mine goes with, and by virtue of, the patent, when there is an affirmative denial of the authority of the surveyor general as to mines written in the face of the patent, is not perceived. It seems to us reasonably clear that it is neither a safe nor proper rule of construction to look alone to the words of the patent. In case of a private grant, the grantor has power to bind himself to any extent he wishes, but the executive cannot, in issuing a patent, add therein a right not given by the law authorizing that instrument, or rise above the law, and by his own unaided act convey a new and additional right. That this view was evidently taken in the *Maxwell Land-Grant Case* is very clear, as in that case not only the act of confirmation, but the title papers and surroundings, were considered in giving construction to the patent.

Another consideration which should not be overlooked is that in this case the act of confirmation and patent provide only for a relinquishment to Ramirez. A relinquishment of what,—of only the thing asked for, or that and more? To say that the relinquishment is to be for an interest or a right not asked for, or considered by the surveyor general, would be to say that when congress confirmed the grant as approved, it did not mean as approved, but did mean to constitute the act of confirmation authority for an original grant. As congress was not asked to make an original grant, we do not believe it intended to make one, but only to authorize a patent carrying to Ramirez such title and interest as he held from the Mexican government at the time of the cession, and such as he could rightfully have asked the Mexican government, under its laws, to regard and protect; and as, under the instrument presented to the surveyor general, the Mexican government would not have protected him in the possession of valuable mines of gold and silver, it is not believed that congress intended to do more than the Mexican government would have done upon the title paper held by Ramirez.

As a result of what has been said, the defendant, upon the averments of the supplemental bill, and the admissions in the answer thereto, had no right, as against the United States, to appropriate, occupy, and hold, and extract ore from the Big copper mine; and so the supplemental bill should have been sus-

tained, instead of being dismissed, and an injunction should have been decreed against the defendant forever enjoining it from appropriating the mineral in said mine.

In the consideration of the questions involved, we have not been unmindful of the importance of land titles, and of the duty of the court to establish and maintain such legal and equitable rules as to give stability to property, and protection to personal rights. Especially has this been before us in considering the acts of the officers of the land department. Such acts are wholly unlike those of a court having jurisdiction over the parties and subject-matter in controversy. In the latter, there is an adversary party brought in upon notice; with the whole power of the judicial machinery to compel the attendance of witnesses, make discovery, and disclose the truth; with adversaries face to face, represented by counsel, scrutinizing every question and act. In such a case the decision is in the full light of open investigation, and one finding a judgment under such circumstances might well conclude that it was properly rendered, and could not be inquired into, and that he might safely buy upon the faith of it; but to apply that rule to those officials who act in making a survey, or in the execution of a patent, would cut off investigation, preclude inquiry, and, instead of building titles on truth and justice, might establish them on the basis of frauds and estoppels. In the acts of such officials there is no notice to adverse parties, no pleading, no attorneys to appear, examine, and cross-examine, and none of the safeguards against mistake or injustice such as surround the proceedings of the judicial tribunals. Under our system of government, such officers frequently change, and often bring inexperience to their duties. The officers in the territories are far removed from their superiors at Washington, and personal communication is difficult and unusual. Between the confirmation of a grant, its survey, and the patent therefor, long periods in the past have often intervened, and are likely to do so the future. Acts partly performed by one officer frequently devolve upon his successor, who takes up the duty thus imposed in ignorance of the facts, usually with but little experience, and with the probability of change in place before him, incident to our system. Courts should be cautious not to hedge about acts performed by such officials with estoppels against investigation and inquiry, giving them the force and dignity of judgments, lest in the anxiety to maintain titles the foundation may be established for fraud and injustice. It is of the utmost importance that honest titles be so firmly established that they cannot be overturned, and that merely whimsical or capricious attacks upon them shall not prevail. It is equally important, when the proof of fraud is clear and convincing, that a court of conscience overturn the wrong, and establish the right, if that can be done without interfering with the rights of innocent purchasers who have bought in good faith without notice. To give effect to proof when clear and convincing is as much a duty as to refuse relief when the evidence is weak and unsatisfactory. Each case must stand upon its own merits. In this cause we have analyzed the evidence, and it is so clear, and so unerringly points to the fraud charged in the bill of complaint, that we should not turn away from it, close our eyes to its significance, or disregard its conclusions, for fear of disturbing the defendant's title. To do so would be to concur in the wrongful inversion of the grant in question; to permit the foundations of a title to be built upon a fraudulent conspiracy involving Miller and Clark, officials, whom the evidence proves to have been faithless to the confidence and trust reposed in them. We fully concur in all that the supreme court of the United States says in the *Maxwell Case* respecting the care which the court should exercise not to unduly disturb titles; but, believing this to be a case both clear and satisfactory, it is the duty of the court, under the evidence, to interpose and grant relief.

This case was argued at the January term, 1886. The record submitted consists of over 700 closely printed pages, with numerous maps and plats in

addition, and the evidence of a large number of witnesses, each one often giving evidence upon several subjects, and the whole thrown together in a record without much reference to form or system. To delve through such a record, select out and systematize the evidence of the several witnesses so that all the proof on each point could be read and weighed by itself, and to classify the questions involved, both of law and fact, so that they could be separately examined, considered, and determined, has been an arduous and responsible work, performed when other duties were pressing for consideration. The magnitude of the task involved in such a record, with the daily demands of work at *nisi prius*, has necessarily postponed the rulings of the case until the present time. While anxious to reduce the opinion within narrow limits, the great interest and importance of the questions involved,—many of them matters of fact, some of them comparatively new,—has made it a duty to consider them all with care, and to give the reasons for the conclusions reached. As a result of such examination and consideration, it is held by the court that the fraud and mistake alleged have been clearly and satisfactorily proven; that the defendant is not an innocent purchaser; and that the supplemental bill should have been sustained in the court below; and that for these errors the case must be reversed, with direction to the court below to set aside and vacate the decree dismissing the bill, and for further proceedings in accordance with this opinion.

BRINKER, J. I concur in the result.

REEVES, J., (*concurring*.) On the twelfth day of February, 1844, Jose Serafin Ramirez petitioned the governor of New Mexico for the grant of a tract of land known as the "Canon del Agua," near the *placer* of San Francisco called the "Placer del Tuerto," and distant from the town about one league, and further described and bounded as follows: "On the north, the road leading from the Placer to the Palo Amarillo; on the south, the northern boundary of the San Pedro grant; on the east, the spring of the Canon del Agua; on the west, the summit of the mountain known as 'My Own.' " Santiago Flores, first justice, etc., certified that he had, according to the decree of Gov. Martinez, put Ramirez in juridical possession of the land known as the "Canon del Agua," in the *placer* of San Francisco, with the boundaries set forth in the petition as follows: "On the north, the road of the Palo Amarillo; on the south, the boundary of the Rancho San Pedro; on the east, the spring of the Canon del Agua; on the west, the highest summit of the little mountain of El Tuerto, adjoining the boundary of the mine known as inherited property;" dated February 15, 1844.

In 1859, Ramirez filed in the office of William Pelham, surveyor general of New Mexico, notice of his claim to the Canon del Agua grant, in which he says that the quantity of the land he claims is "5,000 varas square, making one Castilian league, and bounded on the north by the Placer road that goes down to the yellow timber; on the south, the north boundary of the San Pedro grant; on the east, the spring of the Canon del Agua grant; on the west, the summit of the mountain of the mine known as the property of your petitioner."—reciting that his claim did not conflict with any other lands granted by the governments of Spain and Mexico. The adjudication of this claim before Surveyor General Pelham seems to have been formal and regular in all its parts. The case is entitled "*Serafin Ramirez vs. United States*." In the entry of the proceedings it is recited that the case was set for trial on the tenth day of January, 1860; that the witnesses were present, and duly sworn, and their evidence recorded, and, continuing the recitals, the entry sets forth Ramirez's derivation of title to the land, viz.: that on the twelfth day of February, 1844, Ramirez petitioned Mariano Martinez, the political and military governor of New Mexico, for a tract of land known as the "Canon del Agua," situated in the county of Bernalillo, with the boundaries therein set forth; that on the

thirteenth day of February, of the same year, the grant was confirmed to him by the departmental assembly of the province of New Mexico, and possession given on the fifteenth day of February by Santiago Flores, justice of the peace, and further stating that Ramirez had filed with the papers in the case a grant made to his great-grandfather, of which himself and his brothers were declared by the assembly granting the land to him to be the proper legal heirs; but goes on to declare that, as no authority was vested in the surveyor to adjudicate upon claims to mines within the territory, no action was taken in the premises, and then proceeds as follows: "The grant to the land situated at the Canon del Agua is made according to the laws in existence at the time it was made, and has been proven to have been in quiet and undisturbed possession of the applicant from that date up to the present time, and is fully covered by the treaty of Guadalupe Hidalgo of 1848. It is therefore approved, and respectfully transmitted for the action of congress in the premises." Dated Santa Fe, N. M., January 20, 1860. Signed, William Pelham, surveyor general. On January 11, 1861, the above report was transmitted to congress, and on June 12, 1866, congress confirmed the grant to Ramirez of the Canon del Agua, as approved by Surveyor General Pelham. This was not a floating claim to land that might be removed from one locality to another at the pleasure of the holder, but it was a claim to a particular tract of land with fixed boundaries, and known as the "Canon del Agua Grant," about one league from the town of San Francisco. From the inception of the grant in 1844 to its confirmation by congress in 1866, as approved by Pelham, no change was made in the boundaries, nor were the calls for course and distance brought into question by Ramirez during his long residence of 20 years or more on the land. It is understood that the town of San Francisco is sometimes called the "Placer," or "Plaza," or the "Placer del Tuerto," and that Palo Amarillo, or the "Yellow Timber," is the same place throughout. The southern boundary of the Canon del Agua grant is the northern boundary of the San Pedro grant, or Rancho San Pedro; and without exception, and in the same language, the Canon del Agua grant is bounded on the east "by the spring of the Canon del Agua. The boundary on the west is the summit of the mountain known as 'My Own,' or the highest summit of the little mountain of El Tuerto, adjoining the boundary of the mine known as inherited property, or the mountain of the mine known as the property of your petitioner."

It is contended by Ramirez that the mine called the "Big Copper Mine" is the one claimed by him as inherited property from his great-grandfather, Diaz de Moradillos. It appears from Exhibit B, attached to the complainant's bill, that on April 12, 1846, formal registry was made of a mine described as situated in the Placer del Tuerto by Mariano Varela and Luis Aguilar, called the "Nuestra Senora de los Dolores." It further appears from Exhibit P, filed with defendant's evidence, that the mine applied for by Jose Caceldo Lopez de Viera, as attorney of Don Francisco Diaz Moradillos, was the "Santo Tomas de Villianueva Lode," in the Tuerto mountains, about eight leagues from Las Muertas, and which counsel for defendant contends, in his brief, would locate it about where the Big copper mine is situated. The description given of these mines shows that they cannot be the same mines. The vein of the Nuestra Senora de los Dolores, registered by Varela, or Barela, and Aguilar in April, 1846, is described as running from north to south; the vein of the Tomas de Villianueva mine is described as running from east to west. The claim of Jose Serafin Ramirez to this mine by inheritance from his grandfather, Moradillos, is denied by his brother, Melquiades Ramirez, who testified, as a witness in the case, that he never knew of any grandfather or great-grandfather by the name of Don Francisco Diaz de Moradillos. This witness proved that he knew Mariano Barela and Antonio Jacquez in 1846, and said that they and their associates worked a mine which lies south-east from the town of San Francisco, and about one and a half miles from that town. That the

mountain in which this mine is situated is called by different names. It was called "La Sierrita del Tuerto," "La Sierra de Bonanza," or "La Sierra del Placer." Ramirez further testified that in 1853 or 1854 he and his brother worked this mine, claiming it by denouncement as an abandoned mine, and said that he never heard his brother make any other claim to it; that they worked it from 1853 or 1854 to 1863; that it was called "the Big Copper Mine;" and that it is the same that was worked by Mariano Barela and Auguilar and their associates in 1846. This witness further stated that this mine was never claimed by him as belonging to any grandfather or great-grandfather in his family. He denies that he made the oath or statement purporting to be made by him and his brothers, Jose Serafin and Sisto, to the effect that they declared that Francisco Diaz de Moradillos was their grandfather; that he (witness) never signed it; and that his brother Sisto could not write. Witness Antonio Jacquez identified the Big copper mine as the same mine that he and his associates, Barela and Auguilar, worked in 1846, and that they continued to work it until the forces of the United States came into New Mexico. It is alleged in complainants' bill that the land described in the survey includes valuable gold, silver, and copper, and other ores, and which the defendant in its answer admits, but claims the land, with its mines, under the grant from Mexico and the patent from the United States.

By the laws of Spain and Mexico, farming, stock-raising, and mining were different branches of industry. A distinction was also made between lands suitable for farming or planting, on account of the facility for irrigation, and lands proper for stock-raising. Mines were reserved to the crown or the government, and did not pass with the grant of the land unless mentioned in the grant, or unless by prescription. Rock. Sp. & Mex. Law, c. 5, pp. 49, 50, § 4; Id. pp. 165, 166, 172, 174, § 5, 6; Id. p. 176. Also, Hall, Mex. Law, pp. 356, 511, § 1668; Id. p. 104, § 263; Id. p. 123, § 364. See report of Hon. Thos. Ewing, secretary of the interior, 1849, in Rock. Sp. & Mex. Law, 410. Also, 1 Bl. Comm. 274, as shown by Rockwell, 514; "Forfeiture or Renouncement of Mines," Rock. 313; Id. § 11, p. 320; and Hall, p. 376, §§ 1288-1290, etc. The mines were disposed of according to such ordinances and regulations as might be from time to time adopted. Rock. pp. 49, 50, 410, 411. Also, Hall, p. 356. Lands were classified for distribution, and in order to fix the different values. Similar provisions are found in the laws of the United States. Rev. St. § 2325. This was a matter of revenue to the government in all such cases. Hall, Mex. Law, p. 79, § 203; Id. p. 80, § 208; and Id. c. 23, p. 98. The statutes asserting paramount title in the United States to mineral lands are in harmony with the laws and practice of other countries on the same subject. It is known to be the practice of this government in the grant of lands to the states, and to corporations to aid in the construction of railroads, and for other purposes, not to include mineral lands, but such lands are reserved to the United States, unless it is otherwise provided in the act making the grant. Rev. St. U. S. c. 6, tit. "Mineral Lands and Mining Resources," p. 430, § 2346. Mineral lands are also reserved from entry and settlement by the pre-emption and homestead statutes, but open to purchase by citizens of the United States. Rev. St. U. S. §§ 2258, 2302, 2318. A claim for mineral lands must be accurately described by reference to natural objects or permanent monuments, and the description must be incorporated in the patent. Id. § 2325. Under the laws of Spain and Mexico, the surveys of the public lands were made in squares, noting streams of water and lakes, pools, mountains, mineral regions, salt regions, climate of the locality, the character of the soil, and everything else which might give an idea of the improvement of which they might be susceptible. Hall, Mex. Law, p. 122, §§ 354, 357; Id. p. 72, § 173. The statutes of the United States contain substantially the same provisions. Rev. St. tit. "Survey of the Public Lands," § 2395, and subds. 7, 8.

Rights acquired before the treaty of Guadalupe Hidalgo were recognized by our government, and provision has been made to ascertain and protect those rights, and also to protect the rights of the government under the treaty. For that purpose congress on the twenty-second day of July, 1854, passed the act to establish the offices of surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes. By section 8 of this act, it was made the duty of the surveyor general, under instructions of the secretary of the interior, to ascertain the origin, nature, character, and extent of all claims to land under the usages and customs of Spain and Mexico, and report on the claims that originated before the cession of the territory to the United States by the treaty of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of the same under the laws, usages, and customs of the country before its cession to the United States. 10 St. at Large, p. 308. This report was necessary for the intelligent action of congress, by furnishing what was intended to be reliable information, with a view to confirm *bona fide* grants, and to give full effect to the treaty between the United States and Mexico. Lands covered by these claims were reserved from sale, and donations granted by the statute, until congress acted on the said claims; that being the last or final action on the claims, and so called to distinguish it from the previous action of the surveyor general and officers of the land department of the government. The donations above referred to were lands granted to actual settlers, but not extended to lands covered by *bona fide* grants before the treaty with Mexico, and not extending to mineral and other lands reserved from settlement. 10 U. S. St. at Large, 309. In *Moore v. Robbins*, 96 U. S. 530, the court says: "The decisions of the officers of the land department, made within the scope of their authority, on questions of this kind, [a contest between a purchaser at a public sale by the officers of a land-district, and another who set up a prior pre-emption right,] is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that, as the fact on which their decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice, when the title afterward comes in question; but that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, and to relieve against frauds and impositions." In *Shepley v. Cowan*, 91 U. S. 340, the court said: "If they [the officers of the land department] err in the construction of the law applicable to any case, or if fraud is practiced upon them, or if they themselves are chargeable with fraudulent practices, their rulings may be reversed or annulled by the courts."

The land department directs the administration of the land laws generally, and especially it has full power and authority to issue all needful rules and regulations for fully carrying into effect the provisions of the act of July 22, 1854. Under authority of this act, the commissioner of the general land-office, on August 21, 1854, instructed the surveyor general of New Mexico to collect information from authentic sources in reference to the laws of the country as to minerals, and ascertain what conditions were attached to grants of land embracing mines, whether absolute or not, and in every case to ascertain from the parties, and to require testimony, as to whether the tracts claimed were mineral or agricultural, and to make the necessary discrimination in his proceedings. Instructions to Surveyor General Pelham, August 21, 1854. As before stated, Pelham declined to adjudicate upon claims to mines, for want of authority, as he says. The survey made by Deputy-Surveyor Griffin includes a body of land of more than ordinary value. In his description of this land he says it includes the greater part of the Sierrita del Tuerto mountains; that the cultivable part of the land is of excellent quality, with considerable pine timber suitable for lumber, with abundant timber and fuel for ordinary purposes, and good grass on almost every part of the grant.

There is abundant water at the Tuerto. The Sierrita del Tuerto is rich in the precious metals, particularly in gold and copper. Neither the act of congress confirming the grant to Ramirez, as approved by Surveyor General Pelham, nor the patent from the United States to Ramirez, contains the above description of this land. Surveyor General Pelham approved the grant to Ramirez for the land situated at the Canon del Agua, and transmitted his approval for the action of congress, and congress confirmed the grant to Ramirez as approved by Pelham, surveyor general of the territory, as above mentioned.

It is admitted by the defendant in its answer, and shown by Deputy-Surveyor Griffin in his report accompanying his survey, that he disregarded the call for course and distance, and was governed by landmarks and natural objects in making his survey. The principle that landmarks and natural objects will control the calls for course and distance when inconsistent must be understood in a reasonable sense; the intention being to establish the grant if it can be done by any of the calls, and not to defeat it by rejecting all of the calls. In defense of the survey made by Griffin, it is contended by counsel for the defendant that the mine claimed by Ramirez, and the mountain given as the western boundary of the Canon del Agua grant, lie entirely eastward of the Canon del Agua springs, instead of west, as claimed by the complainant, and that there was a mistake in the calls of the boundaries of the grant, and that the natural objects did not lie in the exact position as called for by Ramirez in his petition for the grant, and the act of juridical possession. Though the evidence is in some respects conflicting, it appears with reasonable certainty that there is a mountain to the west called the "Little Tuerto," answering to the call for the western boundary of the Canon del Agua grant. With this mountain to control the call of the survey of the western boundary of the grant, and the Canon del Agua spring to control the survey of the eastern boundary, it is evident that so much of the survey made by Griffin as lies east of a line drawn due north and south, passing through the spring, is improperly included within the boundaries of the Canon del Agua grant as approved by Surveyor General Pelham, and confirmed by congress.

The principle is well settled that the United States has the same remedy in equity to set aside a patent obtained by fraud that an individual has to set aside his deed obtained by fraud. It is true, the decisions referred to were rendered in cases arising out of the homestead and pre-emption laws; but the same principle would seem to be applicable to patents issued on the confirmation of Spanish and Mexican grants obtained under like circumstances. In California the adjudication of land titles was not the same as in this territory. The decisions of the land department can only bind adverse claimants with notice or parties claiming under them. That there were adverse claimants to the land included in the survey and in the patent to Ramirez was afterwards shown by a petition signed by a great number of citizens, and addressed to the secretary of the interior, asking that legal proceedings be instituted in the name of the United States for the purpose of vacating the patent to Ramirez. The grounds for this request were: (1) That the survey as patented included the tract of land on which was situated the town of San Francisco, and which, as they state, was in existence at the date of the treaty by which New Mexico was acquired by the United States. They further state that though there was no direct grant from the Mexican government to the town, yet, as it was settled in accordance with the laws, customs, and usages of Spain and Mexico, it acquired all the rights, privileges, and immunities that pertain and belong to a Spanish or Mexican town, which was the right to the commons adjoining the town for the distance of one league in each direction from the center of the main square or plaza of the town, for the use and benefit of its inhabitants. (2) That the survey is erroneous, in that it includes a large tract of land not within the boundaries of the grant as con-



firmed, and which is public domain. The inhabitants of the town of San Francisco were engaged in commercial pursuits, and the town was a place of some importance long before the cession of the country to the United States. One witness testified that the population of the town was not less than 1,000; the names of many of the prominent merchants living there at that time are given; there was a chapel for divine worship; lots of ground for building and residence were acquired on application to the alcalde, as seems to have been usual at the time in other towns of the country. Tr. pp. 140, 141, 160, 162.

The act of July 22, 1854, made it the duty of the surveyor general to report all pueblos in the territory, showing the extent and locality of each, the number of inhabitants, and the nature of their titles to the land. 10 U. S. St. at Large, pp. 308, 309. The supreme court of California, in *Welch v. Sullivan*, 8 Cal. 165, 187, said: "Each pueblo was entitled in property to certain tracts of land within the limits of the town, to be set apart by them, called 'commons,' 'pasture grounds,' and 'municipal lands,' by virtue of their organization as pueblos." To the same effect is the decision of the supreme court of the United States in *Townsend v. Greeley*, 5 Wall. 326, 337, and *Grisar v. McDowell*, 6 Wall. 363. It is further held that these rights were not divested by the treaty of Guadalupe Hidalgo. Mr. Hall, in his treatise on the laws of Mexico, contends that the courts erred in holding that four square leagues of land was the quantity assigned to a town, but says that the quantity was in the discretion of the viceroys and governors. Chapter 7, tit. "Pueblos or Towns," § 118, etc.

It may be doubted whether the survey made by Griffin ever had the deliberate sanction of the officers of the land department. Commissioner Burdett at first refused to approve the survey, because of the manifest difference between the calls for boundaries contained in the original title papers and their location by Griffin. Commissioner McFarland became satisfied that the land-office erred in deciding that the survey conformed to the boundaries of the grant as confirmed by congress, its action being based on testimony entirely *ex parte* in character; and he proceeds to show that the survey locates the road on the north-west, when, according to the grant, it should be north; and the spring on the south, when it should be on the east; and the San Pedro grant on the west, when it should be on the south,—the remaining boundary, according to the grant or juridical possession, being "the highest summit of the little mountain of El Tuerto, joining the boundary of the mine known as 'Inherited property,'" which was on the west. Commissioner Burdett finally approved the survey, but he did so, as shown by Commissioner McFarland, on testimony *ex parte*. The above statement was made by Commissioner McFarland after the patent was issued, when the land department had no control over the title; and his statement is referred to as showing his reasons for recommending suit to vacate the patent, and which appear to be well founded. Mr. Griffin admits that the survey was not made in accordance with what he regards as the correct rule of surveying, but he said it was made under instructions of the surveyor general.

This is not a suit asserting a claim to lands reserved from sale or donation under the treaty between the United States and Mexico, but is a suit to vacate the patent based on the survey made by Griffin, and which includes other and different lands from the lands granted to Ramirez as approved by Surveyor General Pelham, and approved by congress. But it is contended by counsel for defendant, in their brief, that a patent issued by proper authority raises the presumption that all prerequisites have been complied with. This, like all presumptions, is not conclusive in all cases. Fraud or mistake in obtaining a patent is recognized as an exception to the rule. *Moore v. Robbins*, 96 U. S. 530; *Hughes v. U. S.*, 4 Wall. 232. But the defendant is not in a position to deny the right of the complainant to redress while said defendant is claim-

ing the benefit of a mistake, as alleged, in the boundaries of the grant to Ramirez.

Another ground of defense set up in the answer of defendant is that said defendant purchased the land in good faith, and without notice of any fraud. The defendant was affected with notice of Ramirez's title, under which said defendant claims by the boundaries set forth in his grant, and the accompanying title papers, and by Pelham's approval of the grant according to said boundaries, and by its confirmation by congress, and by the recitals in the patent from the United States to Ramirez. The defendant was also charged with notice that mineral lands did not pass under a grant for agricultural or pastoral or grazing lands. The chain of title under which defendant claims shows that the land contained mines and valuable ores. The United States is bound, under the treaty with Mexico, to protect the inhabitants of the town of San Francisco in the enjoyment of the commons and pasture lands belonging to the town; of which treaty, and the laws regulating land grants, the defendant, and the parties it claimed under, were charged with notice. If it could be shown that these proceedings did not give full notice, they were sufficient to put the defendant and its agents on inquiry, and to charge them with knowing all that they might have known by further investigation; besides, the patent protects the rights of adverse claimants.

It is not necessary in the case to invoke the rule that neither laches nor limitation is applied to the government. The rule as applied to individuals will protect the government. The facts were brought to the notice of the attorney general in August, 1881, and the suit was filed in the clerk's office in September following. The petition of the citizens to the secretary of the interior, and the correspondence between the government officials, seem to have led to the investigation that follows, and to the discovery of the fraud. The suit was brought in a reasonable time after notice of the fraud. *Meador v. Norton*, 11 Wall. 458; *U. S. v. Minor*, 114 U. S. 238, 5 Sup. Ct. Rep. 836; *Moore v. Robbins*, 96 U. S. 530.

The suit was properly brought in the name of the attorney general, in behalf of the United States; so far, at least, as the government is interested in the property as vacant land. *Mowry v. Whitney*, 14 Wall. 439; *U. S. v. Minor*, 114 U. S. 238, 5 Sup. Ct. Rep. 836. In *Moore v. Robbins*, 96 U. S. 530, the court said: "The courts are as open to the United States to sue for the cancellation of the deed, or the reconveyance of the land, as to individuals, and, if the government is the injured party, this is the proper course." *Insurance v. Weide*, 11 Wall. 439; *Hughes v. U. S.* 4 Wall. 232; *U. S. v. Minor*, 114 U. S. 238, 5 Sup. Ct. Rep. 836.

The case before the court differs in its facts from a class of cases in which it is held that, for errors of judgment upon the weight of the evidence in a contested case before the officers of the land department, the only remedy is by appeal from one officer to another of the department. *Shipley v. Cowan*, 91 U. S. 340; *U. S. v. Minor*, 114 U. S. 238, 5 Sup. Ct. Rep. 836; *Throckmorton's Case*, 98 U. S. 61.

As the case is presented by the record, my opinion is that the survey and patent ought to be set aside and vacated, as prayed for in the bill of complaint. I concur in the opinion and judgment of the court.

HENDERSON, J., (*dissenting*.) I am unable to agree with the majority in the opinion delivered in this case. The record is very voluminous, and will not be reviewed in this dissent except in a brief manner, upon the grounds stated as reasons for withholding my assent to the opinion of the court. The original and supplemental bills are both grounded upon alleged frauds committed by the officers of the government, and by the grant claimants.

Ramirez was a claimant under a grant or concession from the republic of Mexico of 5,000 varas square of land lying in New Mexico, and situated within

certain boundaries called for in the concession. After the passage of the act of congress establishing the office of surveyor general of New Mexico, and in obedience to that act, Ramirez filed his claim to the land, and submitted to the surveyor general his title papers and proofs to establish the *bona fides* of his claim and the validity of his title. The records of the surveyor general's office show that the assertion of this title by Ramirez took the form and was in fact an adversary proceeding. It was entitled "*Ramirez vs. The United States.*" Proof was taken, and a decision had thereon by the surveyor general, approving and establishing the title, both as to its validity and extent, as fully as that officer had power under the act of congress to do. The report of this officer approving the grant was forwarded to the general land-office at Washington, and, after approval by the commissioner and secretary of the interior department, it was submitted to congress, and approved *as recommended*.

The grant having been confirmed by congress, it became the duty of the general land-office to cause the grant to be surveyed, and, in pursuance of authority given to that department, a survey was ordered, so as to definitely set apart the lands to which Ramirez was entitled. After taking some proofs in the form of affidavits by the surveyor-general, or a subordinate of his office authorized to act in his stead, a survey was made, and a plat thereof returned to the commissioner of the general land-office, who, after examination, set it aside, on account of some discrepancies between calls in the grant papers and the survey so made. The surveyor general was ordered to make a further survey, which was done; but little change, however, was made between that and the first. With this second survey before him, accompanied by a map or plat thereof, and after full opportunity to examine the affidavits taken before Griffin and Miller, as well as those taken by the special agent, Treadwell, he approved the survey, and in express words found that the surveyed limits or area contained in the grant thus surveyed was within the boundaries described in the juridical or actual possession delivered to Ramirez when he took formal possession under the Mexican government. With the survey, plats, original title papers, and all the proofs taken from first to last in the case before him, knowing that one of the calls for courses contained in the original concession had been disregarded, the commissioner of the general land-office approved the survey. The secretary of the interior also approved it, and thereupon the patent issued.

The grantee took no *ex parte* proofs to deceive the surveyor general. Such affidavits as were taken were made by witnesses called upon by the officer of the plaintiff, in order to aid him in surveying the grant according to the true intent and purpose of the parties to the concession. This officer was bound to look for the landmarks, in order to locate the grant. At most, whether looking to the conflicting statements of the witnesses before Miller and Griffin, the special agent, Treadwell, or the record before us, it cannot be affirmed, in the light of the evidence, that any fraud or mistake was made in placing the Tuerto mountain east of the Canon del Agua spring. The evidence preponderates, in my judgment, in favor of the survey, to the extent at least of locating the Tuerto mountain east, instead of west, of the spring. I cannot discover in what way the United States has been, or could have been, defrauded, or its officers deceived, or in any way misled, when the facts were known, *at the time the survey was approved* and patent issued, as fully as the court has been advised by the pleadings and proofs before us.

I am forced to the conclusion that a bill would not lie at the suit of a private person or corporation to set aside a deed made under like circumstances as the patent is here shown to have been issued. Some force must be given to the acts of the officers, acting within the scope of their admitted powers, and upon a subject-matter confided to them by express legislation of congress. If, in any case before the department, a claim asserted by a citizen growing

out of a Spanish or Mexican grant case be said to be adversary proceeding, this is one. The title claimed by Ramirez was against the United States, not by purchase, or as a pre-emptor or homesteader, but in opposition to it, under a title paramount from a different sovereignty. The United States submitted itself to the jurisdiction of a tribunal of its own creation, and there can surely be no reason, in law or justice, for favoring it in such case, unless, under like circumstances, an action would lie at the suit of a citizen. Indeed, this view is taken by the supreme court of the United States in *U. S. v. Minor*, 114 U.S. 233, 5 Sup. Ct. Rep. 836. In *Vance v. Burbank*, 101 U.S., 514, it was held that, where there was a hearing, rehearing, and issues made and tried between the parties in such a case, the decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute. The later case of *U. S. v. Minor* in express words approves the doctrine announced in *Vance v. Burbank*, *supra*.

If, therefore, the facts disclosed in this record are sufficient to bring this case within the principles declared in *Vance v. Burbank* and *U. S. v. Minor*, there can be no escape from the conclusion that the bill should be dismissed, unless other and different grounds of relief can be shown. I have, I think, demonstrated from the confessed facts in the record that the claim filed and passed upon in the surveyor general's office was, both in form and substance, a suit against the United States to assert a title under an older and superior title to that acquired under the treaty of 1848; that proofs were taken, and, upon full consideration, in strict compliance with the laws of congress, the grant was approved; that the proceedings to ascertain the exact lands to which Ramirez was entitled was conducted by the plaintiff through its own officers; the first survey having been unsatisfactory, a second one was ordered, and, after a thorough knowledge of all the facts, the officers of the executive department approved the final survey, and patented the lands. If such a proceeding is not an adversary one, if the government was not an active adverse party in interest in such case, I cannot well imagine any state of case in which the United States could be an adversary party in that department. If, however, under any view of the facts, a bill will lie, and the government can escape that final determination, and come into court for the purpose of setting aside and canceling this patent, it will not be pretended that such relief will be granted, as against an innocent purchaser for value, without notice of the alleged frauds.

The defendant corporation, as appears by its certificate of incorporation, was organized as a corporation, with power to do business, on the twenty-second day of March, 1880. The certificate or articles show that this company was created under the General Statutes of Connecticut. By that general law, the filing of a certificate of incorporation, showing the name of the corporation, its capital stock, and other details, is made a condition precedent to its power of exercising or assuming any corporate franchises. Page 108, Gen. St. Conn. 1838. In other words, the filing of the certificate is the act of creating the artificial being known as a corporation. Before that is done it has no legal existence, and it follows that until that period it could neither bind itself nor be bound as a corporation by the act of any of its promoters. After this date, and before the purchase, it is not even pretended that notice was in any manner given of the alleged actual fraud charged in the bill. Not one line can be found in the evidence to warrant the conclusion that there was actual notice given to any of the defendant's officers in such manner as to impart legal notice to the corporation. It is true that Ballou, Welch, and Grafton were upon the grant in the month of January or February, 1880, but there is nothing to show that they were acting for or on behalf of the defendant. In fact, the defendant company was not then in existence. Take the statements and conversations of these persons with the miners then upon the grant, and what do they amount to as notice, in the most liberal and general sense? They claimed

rights under the United States adverse to the patentee, or his grantees, and were promised protection. This was notice to these persons and individuals that there were many people then upon the grant who had made mining locations within the surveyed boundaries of the land, and that such titles were claimed in opposition to the patentee of the United States. It might even be conceded, for the sake of argument and illustration, that notice to these persons was in legal effect notice to the defendant corporation, and still such notice would be wholly insufficient to bind the defendant, or to deny it the right to plead and rely upon its title as a grantee through mesne conveyances from the patentee. Taken in its broadest sense, there would be notice; not of any fraud or fraudulent contrivances on the part of the grantees to obtain a patent, and that the fraud so committed by the patentee induced the United States to confirm the grant, and to survey and patent the particular lands described in the patent. As between the United States and the defendant corporation, there is not the slightest evidence to induce a belief that the government had been deceived and imposed upon by the patentee. I cannot find any evidence tending to show that the United States had been defrauded by the survey.

But the majority think that the company is constructively put upon inquiry by the chain of title under which it holds, and is therefore affected with notice of the *incorrectness* of the survey. This line of reasoning is to my mind somewhat strained and forced, to a degree unwarranted by the authorities. Even if a purchaser be bound, as decided in this case, to look to all antecedent acts or documents leading up to the patent; and if, by an inspection of such elements of title, such as the original grant papers in this case, he should find that there is evidence or information to the effect that the lands granted were improperly surveyed,—then the purchaser is bound to take notice that there were frauds and perjuries committed by the patentee, and the witnesses who swore that the true boundary was to the east of the spring, because the landmark called for in the original papers was to the west, instead of the east. No authority has been cited to support such an extreme position, nor do I think a case can be found. Had not any citizen of the United States a right to conclude that the United States was bound and finally concluded by the patent? It was issued at the end of a long controversy with the government itself as a party. The patent does not injuriously affect any adverse claimant, whether as a citizen of the town of San Francisco or a mine-owner. Whatever legal validity there was in the possession or ownership of any class of property within the surveyed limits of the grant held or owned adversely to the patentee, is, in the express words of the patent, not concluded or bound by it. The patent does not preclude them from asserting in the courts whatever right they then owned, unless barred in some way since that time. The United States sued in her own right, and very wisely saved the titles of adverse claimants from the operation of the patent, notwithstanding it included lands, houses, and mineral rights of persons residing upon the granted premises. The naked question is therefore presented: Should the United States stand concluded on the facts shown in this record by her own solemn conveyance made in the manner recited? My answer is that she should be.

I concur in so much of the opinion and judgment as declares that the patent did not operate to pass the precious metals under the surface of the earth. There is nothing to show that Ramirez ever claimed the principal mine, over which so much controversy has arisen, *under the patent*, as his original source of title. The claim asserted by him for recognition by the United States arose under the mining ordinances of Mexico. That title was a separate and distinct estate from the agricultural grant he solicited and obtained from the government at a later period. Congress confirmed his claim for a grant, but took no action whatever to either grant or confirm him in a title to a mine.

The legal title to the mine or mines located upon the grant can be determined in a court of law; but until some sort of title to the mine has been in

some way established the United States can protect herself by injunction to restrain a mere claimant who has in no way lawfully appropriated the ground or the minerals by discovery and locations as prescribed by law. Such a title is essentially a legal one. Equity has no jurisdiction, unless to stay waste, or enjoin a wanton and destructive injury by a naked trespasser.

#### APPLICATION FOR REHEARING.

(January Term, 1888.)

LONG, C. J. The defendant has filed a petition for rehearing, assigning therein 12 reasons why the same should be granted.

The first, second, third, and fifth points made are but a repetition of those urged both in the oral argument and in the printed briefs, and already fully considered and determined. They present no new consideration, and are fully met by the opinion.

The fourth proceeds upon a misapprehension of the consideration stated in the opinion of the court. The court does not ignore what is claimed in the petition to be the well-established rule "that when there is any conflict between monuments and landmarks named in a description of property, and the courses and distances given, the latter must give way to the former," but on the contrary, from a careful consideration of the evidence, finds there is no such conflict, and so no reason for the application of any such rule.

As to the sixth point, the court takes the statement of George William Ballou, president of the defendant company, as to the date of organization, to-wit, January 28, 1880, as being the truth; and presents facts, circumstances, and information given to him as president, before the conveyance was made to defendant, sufficient, as we think, to constitute notice.

As to the matter presented under the eleventh specification, it would seem, if the defendant is not an innocent purchaser, the case should be considered on its original facts, independently of any presumptions arising from the patent. If defendant occupies the position of an innocent purchaser, buying and receiving conveyance for value without notice, he cannot be affected by the fraud, and that ends the inquiry about it as to that branch of the case. But we do not think the defendant is in position to be protected from inquiry, and to hold notwithstanding the fraud alleged and proven. Under the authorities already cited, it is not necessary that defendant should have knowledge before purchase of each and every fact necessary to be proven to make out a case on final trial. A familiar illustration of this principle is where bidders at a public sale are notified in general terms of some outstanding equity in a third party, without stating the evidence which will support the claim when brought into court. Under such circumstances, the purchaser is not bound to buy. He may do so, but if he does so, he assumes the risk. This is not a case, as it has impressed itself upon us, where mere doubt is cast upon the survey, but rather one where the evidence clearly proves it wrong, and willfully so.

The other questions raised on the petition relate to ruling on the supplemental bill, and may be considered. The averments of the bill and answer clearly make an issue as to the right to the precious metals, especially of the Big copper mine. Nothing appears in the record to show the exact points considered below, but it must be assumed all matters in issue were determined. The defendant in the issues does not place its possession and right to mine upon any claim under the mining laws of the United States, but does assert its right under the grant. It is not apparent how this issue, clearly on the face of the record, could be ignored. To have decided against the complainant would have estopped her by a solemn judgment from claiming the precious metals. The adjudication would constitute a bar to any future assertion of right to such minerals. The supplemental bill does not seem to have been in any way carried out of the record in the court below. An issue

is made upon it by the defendant, and it is thereby treated as properly in the case. It is urged the court should reconsider its position as to the legal effect of the confirmation. The language of the eighth reason in the petition for rehearing indicates some misapprehension as to the point decided. It is the intention of congress in the confirmatory act relating to the grant of Ramirez only which is passed upon. That the title to mines under the Mexican law at the date of the Ramirez grant did not pass by an agricultural grant is, it seems to us, so well established that it is beyond doubt. If the distinction between the construction which should be placed upon a public grant, and that which is given to a private grant from one individual to another, stated in the opinion, is correct, there can be but little doubt as to the construction which then, under such a rule, must be given to the act of confirmation. If it be true, as said by an eminent authority, "according to the common law of England mines of gold and silver were the exclusive property of the crown and did not pass under a grant by the king under a general designation of lands," it would seem the rule of construction heretofore stated is correct.

Blackstone has said: "A grant made by the king shall be taken most beneficially for the king and against the party receiving the grant." The supreme court of the United States has also said: "Public grants are to be construed strictly." Devlin on Deeds lays down the rule, and supports it with a very large number of citations, that the grant of the sovereign is to be construed strictly against the grantee. In the case of *Bridge v. Bridge*, 11 Pet. 536, cited in the original opinion which we are asked to reconsider, the principle above stated is clearly announced. Such able lawyers as Mr. Webster and Mr. Greenleaf were in the case, and the opinion was delivered by Chief Justice TANNEY, who commences his opinion as follows: "The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. \* \* \* " Considering the question of the construction to be applied, the able chief justice proceeds: "It would present a singular spectacle if, while the courts in England are restraining within the strictest limits the spirit of monopoly, and exclusive privileges in the nature of monopolies, \* \* \* the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public and to the rights of the community than would be done in a like case in an English court of justice. But we are not left to determine for the first time the rules by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction above stated fully established. In the case of *U. S. v. Arredondo*, 6 Pet. 738, the leading cases on this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized that in grants by the public nothing passes by implication. The rule is still more clearly and plainly stated in the case of *Jackson v. Lamphire*, 3 Pet. 288." The same question was before the supreme court of the United States as lately as 1883, in the case of *Slidell v. Grandjean*, 111 U. S. 437, 4 Sup. Ct. Rep. 475, where it was said by Justice FIELD, who delivered the opinion of the court: "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that the construction should be adopted which will support the claim of the government, rather than that of the individual. Nothing can be inferred against the state. As a reason for this rule, it is often stated that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to. The rule has been adopted and followed in this court in many instances in the construction of statutes of this description." And then come citations as follows: *Bridge v. Bridge*, 11 Pet. 420-536; *Railroad Co. v. Litchfield*, 23 How. 66-88; *Minot v. Railroad Co.*, 18 Wall. 206. And the court continues:

"The rule is a wise one; it serves to defeat any purpose concealed by a skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

Bearing in mind that, under the law, before confirmation of his grant Ramirez had no right to the precious metals under his agricultural grant, and applying the principle of strict construction to the confirmatory act, it seems to be perfectly clear that the mines of gold and silver did not, under the confirmatory act, pass to him, and especially so in view of the express declination of the surveyor general to act on his application for the mine.

The petition for rehearing is overruled.

(75 Cal. 360)

DOANE v. HOUGHTON. (No. 9,732.)

(Supreme Court of California. March 26, 1888.)

1. PLEADING—AMENDMENT—STRIKING OUT NAMES OF DEFENDANTS NOT SERVED.

An action was dismissed, on trial, as to certain defendants, and the court directed the complaint to be amended by simply striking out of the caption the names of said defendants. *Held* no error, there being no showing that the defendants dismissed were ever served.

2. MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—ACTION TO ENFORCE LIEN.

In an action to enforce a street-assessment lien, the work ordered by the board was curbing and sidewalking. The notice, bids, and contract mentioned corners, but it did not appear whether the corners were part of the sidewalk or parts of a crossing. *Held*, that it would not be presumed that any part of a crossing was included in the assessment.

3. SAME—PLEADING.

Under act Cal. April 1, 1872, relating to the enforcement of liens for street assessment, a complaint in an action to enforce such lien need not set out any of the proceedings prior to the issuance of the assessment, want of jurisdiction to order the work being a matter of defense.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

*Taylor & Haight*, for appellant. *J. M. Wood*, for respondent.

PATERSON, J. This action is to enforce the lien of a street assessment. Defendant appealed from the judgment. At the trial, on motion of plaintiff, the action was dismissed as to certain defendants, and the complaint, by direction of the court, was amended by striking out of the caption thereof the names of said defendants, without filing an amended complaint.

1. This method of amending a pleading cannot be commended. It is irregular, and such mutilations are not only slovenly, but dangerous. These defendants, however, were not prejudiced by the action of the court. Upon the evidence, the court found that the property was owned by the remaining defendants only. We think the court committed no error in allowing the amendment. Sections 469, 470, Code Civil Proc. Even if the order had not been made, the judgment on the findings could not have been against the other defendants, whether served or not. There is nothing to show that the defendants dismissed from the case were ever served. The authorities cited, therefore,—*Clarke v. Porter*, 53 Cal. 410, and *Millikin v. Houghton*, 4 Pac. Rep. 914,—do not apply. Furthermore, there is no bill of exceptions, and the judgment does not show that there was any objection made by appellant.

2. The work ordered by the board was for curbing and sidewalking Second street, from Folsom to Harrison. The notice, bids, award, and contract mentioned the corners; but it does not appear whether the corners mentioned were a part of the sidewalk, *i. e.*, a part of the work ordered, or whether they were portions of a crossing. They were between the points named, and no mention is made in the assessment of anything except curbs and sidewalks. We cannot say from the judgment roll that any part of a crossing is included in the assessment.



3. Section 13 of the act of April 1, 1872, under which this work was done, provides that "the complaint need not show any of the proceedings prior to the issuance of the assessment, diagram, and certificate; but it shall be held legally sufficient if it shows the title of the court in which the action is brought by the parties, plaintiff and defendant, the date of the issuance of the assessment, the date of the recording thereof, the book and page where recorded, a general statement of the work done, a description of the lot or lots sought to be charged with the assessments, the amount assessed thereon, that the same remains unpaid, and the proper prayer for relief." Want of jurisdiction to order the work is one of the defenses allowed by the act. St. 1871-72, p. 816. We think the complaint states sufficient facts. The judgment is affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.

(75 Cal. 371)

QUAN CHICK v. COFFEY. (No. 12,486.)

(Supreme Court of California. March 27, 1888.)

CERTIORARI—WHEN LIES—OFFICER IN CUSTODY OF RECORD.

Under Code Civil Proc. Cal. § 1070, providing that the writ of *certiorari* must be directed to the tribunal, officer, or person having the custody of the record or proceeding to be certified, the action of a magistrate in issuing a search-warrant cannot be reviewed on *certiorari* directed to him, after he has returned all papers and proceedings had before him to the proper superior court.

In bank. Application for writ of review.

This is an application by Quan Chick for a writ of *certiorari* to review the action of Hon. J. V. Coffey, judge of the superior court, acting as a magistrate, in issuing a search-warrant on which certain proceedings were afterwards had.

H. H. Lowenthal, for applicant. Matt. I. Sullivan, for respondent.

McFARLAND, J. On September 23, 1887, the respondent, Hon. J. V. Coffey, who was a superior judge, acting as a magistrate, issued a certain search-warrant, and certain proceedings were afterwards had thereon. The warrant was issued upon the affidavit of a complainant, made upon information and belief. It is contended that no witnesses were examined, and no depositions were taken which "set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist," as required by sections 1526, 1527, Pen. Code. It is also contended that for this reason (as well as for other reasons not necessary to be here stated) the respondent exceeded his authority and jurisdiction in issuing said writ; and it is sought, in this proceeding, to review his action through a writ of *certiorari*. It appears, however, that long before the date of the filing of the petition for this writ, which was January 12, 1888, the respondent, in pursuance of sections 1536, 1541, *et seq.*, Pen. Code, had returned to the proper superior court all the papers and proceedings filed with or had before him in the matter of said search-warrant; that no proceeding in said matter is now pending before him; and that he has no possession of any paper or record therein. Section 1070, Code Civil Proc., provides that the writ of *certiorari* must be directed to the tribunal, officer, or person "having the custody of the record or proceeding to be certified." It is evident, therefore, that the acts of respondent here sought to be reviewed cannot be reached by this writ. Proceeding dismissed.

We concur: SEARLS, C. J.; THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.

(75 Cal. 364)

PARKE *et al.* v. FRANK. (No. 9, 959.)

(Supreme Court of California. March 27, 1888.)

1. PRINCIPAL AND AGENT—AGREEMENT NOT TO REVOKE FOR REASONABLE TIME—EFFECT.

Where a principal, for a valuable consideration, agrees with his agent not to revoke the agency for a reasonable time, and from the nature of the contract a rea-

sonable time can be ascertained, the agency is not within Civil Code Cal. § 2356, providing that, unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by revocation.

**2. SAME—REVOCATION—INSTRUCTIONS.**

In an action for damages arising from the revocation of a contract of agency, where the evidence shows no definite term of agency, but does show an agreement by the principal not to revoke, the refusal of the court to charge that if the jury believe, from the evidence, that no definite time was agreed upon between plaintiffs and defendant for the contract to endure, then said contract could be terminated by either party at any time, is not error.

**3. SAME—BREACH OF AGREEMENT NOT TO REVOKE—DAMAGES.**

In an action for damages caused by an alleged breach of a contract of agency, the plaintiff failed to prove with reasonable certainty the amount of damage sustained, but left such damages to be fixed entirely by the jury. *Held* sufficient ground for a new trial.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Lyman C. Parke and Benjamin T. Lacy, against A. H. Frank, doing business as A. H. Frank & Co., to recover for damages arising out of a breach of a contract of agency. Judgment for plaintiffs, and defendant appeals.

*Charles P. Eells*, for appellant. *H. C. Newhall* and *E. N. Deuprey*, for respondents.

**McKINSTRY, J.** The main contention of the appellant in the court below was that the contract of agency, not being for any definite term, was revocable at the will of the principal. Appellant claims that the rulings of the superior court alleged to be erroneous are exemplified by the portion of its charge to the jury which reads: "No period of time was mentioned. \* \* \* Where employment is proved, and no time is specified, the law presumes it shall last and endure for a reasonable time. What would be a reasonable time is a question for you to determine;" and by the refusal of the court, on request of defendant, to charge: "If the jury believe, from the evidence, that no definite time was agreed upon between plaintiffs and defendant for the contract of agency to endure, then said contract could be terminated by either party thereto, at his option, at any time." The Civil Code provides: "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by its revocation by the principal." Section 2356. The interest which can protect a power after the death of the person who creates it must be an interest in the thing itself, and not an interest in that which is produced by the exercise of the power. *Hunt v. Rousmanier*, 8 Wheat. 174. It may be conceded that, by the section of the Civil Code, a revocation by the principal terminates the agency in every case where his death terminates it, and that the plaintiffs herein had no such interest in the subject of the agency as rendered the agency irrevocable. Nevertheless, if, for a valuable consideration, the defendant agreed not to revoke the agency for a reasonable time, and in view of the circumstances and nature of the contract a reasonable time could be ascertained, he had no legal right to revoke it during such time. "Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it." *Hunt v. Rousmanier*, 8 Wheat. 203. In such case, if he fails to comply with his contract, he becomes liable to the agent as such. Even if, however, it should be conceded that, under the Code, the principal retains the right to revoke a power, at his option, in every case where the agent is not vested with an interest in the subject of the agency, this would not render illegal a collateral agreement whereby the principal should agree, for a con-

sideration, not to exercise the power for a definite period, or for a reasonable time ascertainable. In case of such an agreement, if the agency is revoked by the principal, and the agent is thereby deprived of authority further to act as such, the principal is liable in damages by reason of the breach of his promise not to recall the agency. Whether, therefore, it be considered that the defendant violated his contract by refusing to make consignments to the plaintiffs, or violated it by revoking the agency, he would be liable upon proper pleading. And in each case the rule of damages would be the same, that is, the plaintiffs would be entitled to recover the direct or approximate damages sustained by reason of defendant's depriving them of the benefits of the agency.

The court below did not err in refusing to give the instruction asked by defendant, because that instruction ignores all evidence tending to show that the defendant agreed not to revoke the agency. But the instruction given, while abstractly correct, suggests that, independent of any express promise or implied promise arising out of the nature of the contract, the defendant had no legal right to put an end to the agency until the expiration of a "reasonable time."

There should be a new trial of the issue as to damages. It seems not infrequently to be lost sight of in the trial courts that, in actions upon contracts, the amount of damages caused by an alleged breach is to be proved as a fact. It is impossible to ascertain from the statement for new trial upon what facts, taken as proved, the jury based their verdict for \$4,843.90, or why the verdict was reduced by the court to \$3,100 rather than to any other sum. We find no evidence which will sustain a judgment for either amount. This is not an action for a tort; the amount of the recovery was not to be left, upon general principles, to the "sound discretion" or "dispassionate judgment" of the jury. It is an action to recover the actual and proximate damages caused to plaintiff by a failure of defendant to perform his contract. Where there is a legal measure of damages the jury must determine the amount as a fact; otherwise the law which so measures the damages would be of no avail. 1 Suth. Dam. 2. It is often said to be a paramount principle that the person injured shall receive compensation commensurate with his injury, and no more. By reason of the breach of his contract, if he did break it, the defendant here became liable for the full amount of damages which resulted "naturally" (that is, in usual course of things) and proximately from the breach. These were to be proved with reasonable certainty. The particulars of damages were so far capable of ascertainment, and upon the plaintiffs was imposed the obligation of proving them. The matter should not have been left to the conjectures of jurymen. The number of shipments, or quantity of machinery to be sent, was not fixed by the parties, and the plaintiffs very properly made no effort to establish the profits they might have made, during any definite period, had defendant complied with his contract. From the nature of the case, such damages must have been purely speculative. But there is nothing in the record to indicate but that they could have proved, with reasonable certainty, what necessary expenses they were induced to incur, by reason of defendant's promise, for the purpose of carrying out their contract with him, as distinct from their contracts, if any, with the R. W. Gardner & Lehigh Valley E. W. Company; or what special damages pleaded, if any, they sustained by reason of loss of profits upon orders of defendant for machinery which the latter refused to fill, in case the evidence showed such machinery had been ordered from them by responsible third parties, or would have been sold had it been received in due course. The plaintiffs were not entitled to recover the difference between the manufacturer's prices for machines and the enhanced prices paid by them for the purchase of machines from other persons in the east. These were independent transactions, which were not the direct consequence of the breach of the defendant's agreement, and cannot, as matter of law, be said to have been contemplated by him.

On the whole case, we think the interests of justice demand a new trial. Judgment and order reversed, and cause remanded for new trial.

We concur: SEARLES, C. J.; PATERSON, J.

(75 Cal. 411)

PEOPLE v. COLLINS. (No. 20,378.)

(*Supreme Court of California. March 28, 1888.*)

1. CRIMINAL LAW—CONTINUANCE—ENGAGEMENTS OF COUNSEL.

A motion for continuance on the ground that counsel had been prevented from making due preparation for trial by a prior engagement is addressed to the discretion of the court, and will not be reviewed except for abuse.

2. SAME—WITNESS—IMPEACHMENT—HARMLESS ERROR.

Defendant having been called as witness, error in admitting testimony impeaching him will be disregarded where it does not prejudice his case.

In bank. Appeal from superior court, city and county of San Francisco; W. C. VAN FLEET, Judge.

Appeal by defendant from a judgment and order refusing a new trial.

John D. Whaley, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

SHARPSTEIN, J. We are urged by appellant's counsel to reverse the judgment and order denying defendant's motion for a new trial, on two grounds, neither of which, in our opinion, is tenable.

1. The defendant's motion for a continuance on the ground that his counsel had been unable, in consequence of another and prior engagement, to make due preparation for the trial of defendant's case, was one which addressed itself to the sound discretion of the court below, and ought not to be interfered with unless we could see clearly that there had been an abuse of discretion, which is not in this case apparent to us.

2. Defendant was examined as a witness in his own behalf; and for the purpose of impeaching him the prosecution called one Adams as a witness, and, after he had testified to having known the defendant about four years, the prosecuting attorney asked him if he knew the defendant's general reputation for truth, honesty, and integrity in the community in which he lives. The witness answered: "I don't know, as I never heard." The witness was then asked by said counsel to say whether he knew it or not. He answered: "I do not." Some other questions elicited from him the statement that he did not know where the defendant lived, and therefore could not state what his reputation was where he lived. The district attorney then asked the witness this question: "Do you know his reputation for honesty and integrity in this community of San Francisco?" The question was objected to, and the court overruled the objection. The witness answered in the affirmative; and to the question, "What is it?" answered, "Bad." This question is not in the approved form, and the court should have sustained the objection to it. But the error, in our opinion, did not prejudice the defendant's case, and therefore must be disregarded. The other witnesses to whom the questions were put in proper form testified that defendant's reputation was bad in the community where he lived. In view of the character of the other evidence in the case, we think the evidence as to the defendant's reputation superfluous.

Judgment and order are affirmed.

We concur: SEARLES, C. J.; MCFARLAND, J.; PATERSON, J.

(75 Cal. 388)

## PEOPLE v. MYER. (No. 20,388.)

(Supreme Court of California. March 28, 1888.)

## 1. LARCENY—WHAT CONSTITUTES—ASPORTATION.

Evidence that defendant was found in possession of an overcoat taken from a dummy, but still fastened to it by a chain through the sleeves, the dummy being on the sidewalk, and tied to the building by a string, as there was no asportation, does not show larceny under Pen. Code Cal. § 484, defining larceny to be the felonious stealing, taking, or carrying away the personal property of another.

## 2. CRIMINAL LAW—DEFENDANT AS WITNESS—CROSS-EXAMINATION.

Pen. Code Cal. § 1823, provides that defendant in a criminal action cannot be compelled to be a witness against himself; but, if he offer himself as witness, may be cross-examined as to all matters about which he was examined in chief. Defendant testified in chief merely that he had been drinking, and, as he was walking along, fell over something, and the first thing he knew somebody grabbed him. Questions, on cross-examination, if he had ever gone under an *alias*, or had ever been convicted of felony, held permissible. McFARLAND and PATTERSON, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

On information against defendant, Frank Myer, for stealing an overcoat, defendant was convicted, and appeals.

*John D'Arcy*, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

SHARPSTEIN, J. The defendant was tried on an information in which it was charged that he willfully, unlawfully, and feloniously stole, took, and carried away one overcoat of the value of \$20, the personal property of Harris Joseph and Lewis Joseph. On the trial Lewis Joseph testified as follows: "I had, as usual, placed and buttoned an overcoat upon a dummy which stood on the sidewalk outside of my store. I was inside the store, and heard the chain of the dummy rattle, and on coming outside found defendant with said coat unbuttoned from the dummy, and under his arm, the same being entirely removed from the dummy, and about two feet therefrom and from the place where it had been originally placed on the dummy by me; and the accused was in the act of walking off with said coat when grabbed by me, he being prevented from taking it away because said coat was chained to the dummy by a chain which ran through the coat-sleeve, and the dummy was tied to the building by a string." This was the only evidence introduced to prove the charge of larceny. The jury, on this evidence, returned a verdict of guilty of petit larceny as charged; and the defendant, having pleaded guilty of prior convictions of other petit larcenies, was sentenced to imprisonment in the state prison for the term of two years. He moved for a new trial, which was denied, and from that order and the judgment this appeal is taken.

Appellant insists that the verdict is contrary to the evidence, which, it is claimed, does not prove that the defendant carried away the coat which he is charged with having stolen, but proves that he did not. "Larceny," as defined in the Penal Code of this state, "is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." This is substantially the common law definition, under which it was held that it must be shown that the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment. Thus where goods were tied by a string, the other end of which was fastened to the counter, and the thief took the goods and carried them towards the door as far as the string would permit, and was then stopped, this was held not to be a severance from the owner's possession, and consequently no felony. 3 Greenl. Ev. § 155. "In the language of the old definition of larceny," says Bishop, "the goods taken must be carried away. But they need not be retained in the possession of the thief, neither need they be removed from the owner's premises. The doctrine is that any removal, however slight, of the entire article, which is not attached either to the soil or to anything not re-

moved, is sufficient; while nothingshort of this will do." 2 Bish. Crim. Law, 794. The attorney general admits that this is the doctrine of the English cases. In *State v. Jones*, 65 N. C. 395, the court says: "There must be an asportation of the article alleged to be stolen, to complete the crime of larceny. The question as to what constitutes a sufficient asportation has given rise to many nice distinctions in the courts of England, and the rules there established have been generally observed by the courts of this country." *People v. Williams*, 35 Cal. 671, was not so clearly within the rule as this case is; but the court said that it did not feel at liberty to depart from a rule so long and so firmly established by numerous decisions. Tested by that rule, the evidence in this case was clearly insufficient to justify the verdict, and the defendant is entitled to a new trial on that ground.

There is another alleged error which we deem it our duty to pass on, particularly as the case must be remanded for a new trial. The defendant testified, in his own behalf, that he had been drinking, and as he was walking along fell over something, and the first thing he knew somebody grabbed him. This was all he testified to on his examination in chief. On cross-examination he was asked what was his true name. He replied, "Frank Myer." He was then asked, against his counsel's objections, the following questions: "Did you ever go by the name of Frank Miller? Did you ever go by the name of Frank Smith? Did you ever go by the name of Otto Meyer? Have you ever been convicted of a felony in this city and county?" These questions were all answered in the affirmative, and had a tendency to throw discredit on defendant's testimony. "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but, if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." Pen. Code, § 1323. In *People v. Chin Mook Sow*, 51 Cal. 597, the defendant, on cross-examination, was asked if he had not previously been convicted of a certain felony. He answered that he had not, and the district attorney was permitted, against the objection of defendant's counsel, to introduce in evidence a record of such prior conviction. The ruling of the lower court was sustained by this court, and we think the case directly in point here. There are expressions to be found in the opinions of courts for which we entertain the highest respect which seem to militate against this view of the matter, but none in which the precise question here presented was involved. Judgment and order reversed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.

McFARLAND, J. I concur in the judgment; but I dissent from the latter part of the opinion of the court, which holds that certain questions were properly allowed to be asked defendant on his cross-examination. The limit of cross-examination of ordinary witnesses is not marked with any great accuracy or distinctness. Questions are frequently allowed which strictly do not refer to the matters about which the witnesses testified in chief. Great latitude is given trial courts in passing upon the admissibility of such questions; and their discretion is rarely interfered with by appellate courts. Now, if the legislature had intended to put a defendant in a criminal case, testifying for himself, upon the same footing as other witnesses, it could easily have signified that intention in one of two ways: *First*, by saying nothing about it; or, *second*, by saying, affirmatively, that he should be subject to cross-examination as other witnesses. But the language of section 1323, Pen. Code, is that he may be cross-examined "as to all matters about which he was examined in chief." Therefore either no signification at all must be given to this language,—which would be to violate a cardinal rule of construction,—or else it must be held to be a limitation of the general practice on cross-exam-

ination, and the establishment of definite boundaries within which the cross-examination of a defendant must be confined. And that the latter is the true construction seems to me to be most obvious and clear. I cannot understand how the language can be held to mean anything else. It must be remembered that the privilege given a defendant in a criminal case to testify for himself is by no means an unmixed blessing. There are cases where an innocent defendant could do himself no good, and might do himself harm, by going on the witness-stand. But his refusal to do so will be construed to his injury by the average jurymen, in spite of any instruction the court may give on the subject. And, then, if he does testify, his temptation to commit perjury will be considered so great that he will rarely be credited with telling the truth. But if he cannot go upon the stand for the mere purpose of stating a fact which will explain some suspicious circumstance, without being forced, upon cross-examination, to lay bare the whole history of his life, he had better keep away from it, unless, indeed, instead of having a human character, he is a miraculous bundle of virtues, with no vice, and with nothing which men call a vice. And, no doubt, these and similar considerations induced the legislature to throw around him the slight protection, at least, which is contained in the section of the Code under consideration. I do not understand that in *People v. Chin Mook Sow*, 51 Cal. 597, anything more was intended to be decided than that, when a defendant is a witness, he may be impeached, by independent evidence, of his bad reputation for truth, etc., or of his conviction of a felony, as provided in section 2051, Code Civil Proc. But other provisions inconsistent with section 1323, Pen. Code, should be construed as not including those who have the dual character of witness and defendant. I think that the objection to each of the questions asked of defendant on cross-examination should have been sustained.

I concur: PATERSON, J.

(75 Cal. 376)

BARNEY v. VIGOUREAU *et al.* (No. 9,892.)

(*Supreme Court of California.* March 28, 1888.)

1. WRITS—SERVICE BY PERSON OTHER THAN OFFICER—AFFIDAVIT—SUFFICIENCY.  
Under Code Civil Proc. Cal. § 410, providing that affidavit of service of summons by any person other than the sheriff must allege that such person was over 18 years of age, where such affidavit does not allege that affiant was over 18 years of age at the time of such service, judgment by default cannot be sustained thereon.
2. EXECUTION—RELIEF AGAINST WRONGFUL SEIZURE—VACATING JUDGMENT.  
Where the property of a person not party to the action is taken and sold under an execution issued in such action, such person has no remedy by motion to vacate the judgment.

Department 1. Appeal from superior court, city and county of San Francisco; I. C. CARY, Judge.

Judgment against A. W. Vigoureux, defendant and appellant, on action by A. S. Barney to recover debt on promissory note. Affidavit of service did not allege that affiant was over 18 years of age at time of service.

I. N. Thorne, for appellant. W. H. Allen, for respondent.

MCKINSTRY, J. The summons was not served on the defendant A. W. Vigoureux. *Maynard v. MacCrellish*, 57 Cal. 355; *Howard v. Galloway*, 60 Cal. 10; *Weil v. Bent*, Id. 603; *Doerfler v. Schmidt*, 64 Cal. 265; *Lyons v. Cunningham*, 66 Cal. 43, 4 Pac. Rep. 938. Nor did A. W. Vigoureux appear in the action before or after the judgment. The superior court had no jurisdiction to enter the judgment against him.

W. A. Vigoureux, calling himself "one of the defendants" in the action, gave notice of a motion to vacate the judgment, quash executions issued thereon, etc. The notice was accompanied by an affidavit made and submitted.

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scribed W. A. Vigoureux, wherein the affiant swore that he was one of the persons named as defendant in the action *B. A. Barney v. A. W. Vigoureux et al.*; and that the summons in that action was on the 30th September, 1878, returned and filed, "with an affidavit of a pretended service thereof on the affiant;" that a judgment was entered "in favor of plaintiff, and against this affiant;" that an execution was issued on the judgment, under which the sheriff had sold "all the right, title, and interest of this affiant, defendant as aforesaid," in certain described land and premises, of which the affiant is owner and in possession. The affidavit proceeds to state facts showing that the affiant was not served at all, and to aver that he had no notice or knowledge of the action, or that a judgment had been entered against him, until after the sale of certain personal property of his, under an execution running to Santa Clara county. However persistent the effort of W. A. Vigoureux to make himself by affidavit a defendant in the judgment, he did not succeed in the attempt. A. W. Vigoureux has appealed from the order of the superior court denying the motion of W. A. Vigoureux. He can hardly complain that, under a judgment against him, the sheriff has levied upon and sold property of W. A. Vigoureux. Had W. A. Vigoureux been served with summons, the judgment would perhaps have bound him, notwithstanding a misnomer, if there was one, in the absence of a plea in abatement. But there was no service upon any defendant in the action other than Banks, and no judgment was entered against W. A. Vigoureux. Nevertheless, as the complaint was not answered by A. W. Vigoureux, nor by any person served as A. W. Vigoureux, the affidavit or proof of service was a necessary part of the judgment roll. Code Civil Proc. § 670. Thus it appears on the face of the judgment roll that the court never acquired jurisdiction of the person of the defendant Vigoureux. On this fact being called to the attention of the court below in any manner, the judgment should have been vacated; but, under the circumstances, no costs should be allowed appellant, who took no steps to set aside the judgment in the court below, but acquiesced in the making of his debt out of the property of another person. The foregoing assumes that A. W. and W. A. Vigoureux are two men, and not the same man, because such is the fact, so far as appears from the judgment roll.

The order appealed from is reversed, and the court below is directed to enter an order vacating and setting aside the judgment, and the proceeding taken under it, without costs to the appellant, either in this court or in the superior court.

We concur: SEARLS, C. J.; PATERSON, J.

(75 Cal. 379)

*In re ROMERO'S ESTATE.* (No. 12,866.)

(*Supreme Court of California.* March 28, 1888.)

**HOMESTEAD—WHO ENTITLED—ADOPTED CHILDREN.**

On an application to set apart a homestead it appeared that petitioner was the child of a woman who was divorced from her husband. It did not appear that at the time of his birth his mother had separated from her husband, and was living with deceased, nor was there any evidence of his adoption by the latter. *Held*, that the petitioner must be taken to be the child of the lawful husband, and therefore not entitled to the order claimed.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Edwardo Romero presented a petition asking to have a homestead set apart for himself and Carrie Romero, alleging themselves to be the minor children of Ramon Romero. Petition refused. Petitioner appeals.

*N. A. Dorn and W. M. R. Parker*, for appellants. *R. M. F. Soto and Hermann & Soto*, for respondents.



BELCHER, C. C. This is an appeal from an order refusing to set apart a homestead. Edwardo Romero presented a petition to the court below, asking to have a homestead set apart for the use of himself and his sister, Carrie Romero, who were alleged to be the minor children of Ramon Romero, deceased. A brother and sister of the deceased objected to the homestead being set apart, and, as the ground of their objection, alleged that the said Edwardo and Carrie were not the children of deceased; that he was never married, and that he left surviving him at the time of his death no child or children, either legitimate or illegitimate. At the hearing it was shown for the petitioner that Ramon Romero died intestate, in the county of Monterey, on the 18th day of May, 1884, and that administration on his estate was afterwards taken out, and an inventory was returned, showing personal property belonging to the estate of the value of \$381, and real property of the value of \$700. A declaration of homestead made by the deceased was then introduced in evidence. The declaration was dated April 30, 1881, and was properly acknowledged and filed for record on the same day. In it the claimant declared "that I am the head of a family, consisting of myself and my two minor children, Edwardo and Carolina, and I do now, at the time of making this declaration, actually reside with my said family on the land and premises hereinafter described." The petitioner was then sworn as a witness, and testified as follows: "I knew Ramon Romero in his life-time; he was my father. Myself and my sister, Carrie Romero, lived with him all the time, up to the time of his death, on the land described in the petition. We lived there for the last ten years. We were living on said land on the 30th day of April, 1881, and for a long time before. We have lived on said land ever since the death of my father, and live there still. I am twenty years of age, and my sister is sixteen years of age. At the time my father made his declaration of homestead, in 1881, myself and my sister were living with my father on the said land, and there were no other children living with him. My mother is still living with us on the same land. Her name is Maria de Los Angeles Botiller." For the contestants a witness was called who testified that he had lived in the town of Monterey for about 25 years, and had been well acquainted with Ramon Romero, who had also lived in the town the greatest portion of that time; that he never knew or heard that Romero was married; that he knew the mother of Edwardo Romero, and her name was usually called Maria de Los Angeles Botiller. The judgment roll in a case commenced by Maria de Los Angeles Botiller against José Joaquin Botiller, in the district court of Monterey county, was then introduced and read in evidence. The complaint was filed on the 6th day of November, 1872, and alleged that the parties were married in 1855, and were still husband and wife, and asked for a divorce on the ground of desertion. The summons was personally served on the defendant on the 12th day of the same month. The court found, among other things, that plaintiff had "in all respects conducted herself towards the defendant as became a kind, affectionate, and faithful wife." The decree was entered March 20, 1873, and granted the plaintiff the divorce prayed for. The foregoing are all the facts appearing in the record, and upon them the Court denied the petition. If the petitioner and his sister were the minor children of the decedent, they were entitled to have the homestead set apart for their use. Code Civil Proc. § 1465. But if they were not his children in fact, or by adoption, they were not entitled to have the homestead set apart. Whether they were his children or not, was then the single issue to be determined. The evidence shows that the youngest of them was born more than 16 years prior to the time of the hearing, which was on the 28th of February, 1887. They were the children of Maria de Los Angeles Botiller, who, at the times of their birth, was the lawful wife of José Joaquin Botiller. They are presumed, therefore, to be legitimate and the issue of their mother's husband. Civil Code, §§ 193-195. There was no evidence showing that they had been

adopted by their alleged father in the manner prescribed by law, (Civil Code, §§ 221-230,) and in the absence of such proof no presumption that they had been adopted can be indulged. No written findings were filed, but the court must have found all the material facts against the appellants, and there are no specifications of errors or particulars wherein the evidence was insufficient to justify the decision. The decision is presumed to be right, and the order must be affirmed unless error is affirmatively shown by the record. We find no error in the record, and therefore advise that the order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

McFARLAND, J. I concur in the judgment, because it does not appear (although it was probably the fact) that at the time of the birth of the children their mother had separated from her husband, and was living with the deceased. Had this fact appeared, it would, with the other evidence, have been sufficient to overcome the presumption, (not conclusive,) based upon the marriage, that they were the children of Botiller. It seems to be a hardship to take this little home away from these children, for whom the deceased intended it, and give it to mere collateral kin; but I see no way to avoid it. If the court below had given judgment the other way, even upon the meager evidence offered, I should not have felt like disturbing it. If they are the children of the deceased, they were publicly recognized as provided in section 230, Civil Code, and no other adoption was necessary.

(75 Cal. 407)

PEOPLE v. BENTLEY. (No. 20,364.)

(Supreme Court of California. March 28, 1888.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE—RES GESTÆ.

On a trial for assault to commit murder, evidence as to acts and declarations of a third party, tending to show a conspiracy between him and defendant to commit the crime, is admissible as part of the *res gestæ*.<sup>1</sup>

2. SAME—CONVICTION FOR LESSER OFFENSE.

Under an information charging assault to commit murder, defendant may be convicted of assault with a deadly weapon.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

W. A. Gray and Oregon Sanders, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

SEARLS, C. J. The defendant was convicted of an assault with a deadly weapon, upon an information charging him with an assault to commit murder. The evidence at the trial tended to show that the prosecuting witness, Moore, and one Baker were, on the evening of May 3, 1887, at Tulare, and were desirous of going to Broder's ranch, which was in the direction of, but not on, the direct road leading from Tulare to Visalia. One Ward was speaking of going to Visalia, and Moore contracted with him to take him (Moore) and Baker to the ranch in his (Ward's) buggy. On reaching a point on the road towards Visalia, where the road to the ranch diverged, Ward made some objections to going to the ranch, affecting to believe that it was further than had been represented; the outcome of which was that the parties agreed to go to Visalia direct. On the way, and after passing the forks of the road, Ward stopped at the house of a Mrs. Bentley, where, leaving Moore and Baker in

<sup>1</sup> Upon the general subject of the *res gestæ*, and when declarations are a part thereof, see *Dismukes v. State*, (Ala.) 8 South. Rep. 671, and note.

the buggy, he entered, and stayed some 10 minutes. The defendant and one Ridgeway, arrested with him, were stopping at this house, which was really not on the most direct road to Visalia. All these things occurred in the night. After leaving the Bentley house, Ward turned from the Visalia road, and drove off for perhaps 150 yards, changed his course, and affected to be lost; turned back towards the Visalia road; drove a short distance, when his passengers got out of the buggy, he told them to go up to some trees, and he would "drive on to see," and would be back in a minute. He did not return, and was not again seen that night. Moore and Baker walked to the trees, about 150 yards distant, where they met two men, who commanded them to hold up their hands, turn their backs, and give up their money. The robbers had pistols, and threatened to shoot if resisted. Moore succeeded in getting a knife out, resisted the man who had him more particularly in charge, cut him, knocked him down, and seems to have been in a fair way to conquer, when his antagonist called upon his companion, who came to the rescue, struck Moore with a pistol over the head, and rendered him senseless. Two shots were fired by the would-be robbers; one by the assailant of Moore, which struck the latter, and the other by Baker's assailant. The assault occurred about 2 o'clock A. M. Moore recognized Ridgeway, whom he cut, and swore that in size and general appearance the other man resembled defendant. Ridgeway and defendant were arrested the next morning at the Bentley house, the former wounded by cuts. Their pistols were found each with a shot discharged, and that of defendant bloody and broken. The assault was made within a quarter of a mile of the Bentley house, which latter place seems to be about one mile from Visalia. Bentley and Ridgeway were seen together at Visalia as late as 9 P. M. on the night of the assault, and were usually seen together. Ward was a frequent visitor at the Bentley house. The foregoing statement contains so much of the testimony as is essential to an understanding of the legal propositions involved in the case.

It is objected here, as it was at the trial, that the declarations, acts, and knowledge of Ward were not admissible in evidence, for the reason that no proper predicate had been established by showing the existence of a conspiracy, between him (defendant) and Ridgeway. A conspiracy, like most other facts, may be proved by circumstantial evidence; indeed, it is not often that the direct facts of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main, central object, and tending to convince the mind, reasonably and logically, of the existence of the conspiracy. In the language of Greenleaf: "If it be proved that the defendants pursued by their acts the same object, often by the same means,—one performing one part, and another another part of the same, so as to complete it,—with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object." 3 Greenl. Ev., § 93; *U. S. v. Doyle*, 6 Sawy. 612, 5 Fed. Rep. 680. The evidence to which the defendant's counsel objects under this head was almost exclusively directed to the establishment of the fact of a conspiracy by the inferential or circumstantial method, and beyond such result had no tendency to convict the defendant. The details of the agreement with Ward, and their travels towards Visalia, were well enough to an understanding of the surroundings of the main facts, and as showing the minor facts which led up to and illustrated the former, and thus constituted a part of the *res gestæ*. They were not, however, acts which would or could militate against the defendant, except to show the probability of an understanding between him and Ridgeway, on the one hand, and Ward, on the other, that the latter should afford an opportunity, and the former should embrace it by attempting to rob Moore and Baker. These acts did not prove, or attempt to prove, the attempted robbery. That was proven by other and direct evidence as to the fact, and identity of Ridge-

way, and by circumstances tending to show defendant as one of the perpetrators. The acts complained of tended to establish the conspiracy, and were therefore admissible.

There was no error in the withdrawal from the jury of the instruction given inadvertently to the effect that they must find the defendant guilty of an assault with an intent to commit murder, or acquit him. Under the information, the defendant could be found guilty of an assault to commit murder, an assault with a deadly weapon, or acquitted. The court had already, and in other parts of his charge, instructed the jury fully as to the necessity of being convinced of the guilt of the defendant beyond a reasonable doubt; had explained to them the meaning of a reasonable doubt; and had covered everything involved in the instruction withdrawn, except as to the various forms of verdict which they were authorized, under the information, to render. We need not stop to discuss the propriety of the instruction given by the court below upon the question of an assault to commit murder, for the reason that, if conceded to be erroneous, (which we do not decide,) the defendant, who was convicted of the lesser offense of an assault with a deadly weapon, could not have been injured thereby.

The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

(75 Cal. 329)

*In re GIBSON'S ESTATE.* (No. 11,796.)  
(Supreme Court of California. March 22, 1888.)

**WILLS—CONSTRUCTION—DESCRIPTION OF LEGATEE.**

The residuary clause of a will was as follows: "I devise the remainder of my estate to the Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital." It was shown that a corporation named the "Sisters of Mercy" conducted an establishment generally known as "St. Mary's Hospital," of which one department was called the "Old Ladies' Home," and that there was no other Old Ladies' Home in the vicinity of Rincon Hill. *Held*, that testatrix meant to make such corporation her residuary legatee, and that the bequest was valid. TEMPLE, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

*W. S. Goodfellow*, for appellants. *John M. Burnett* and *James Gartlan*, for respondents.

PATERSON, J. The will of the testator contained the following residuary clause: "I give and devise the remainder of my estate, after the above legacies have been paid, to the Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital." The evidence, against the introduction of which there was no objection, shows that the establishment conducted by the corporation respondent was generally known as "St. Mary's Hospital," and that one department thereof is called the "Old Ladies' Home," and is devoted to the care and protection of old ladies. The Old Ladies' Home was originally in the same building with the hospital, but was recently removed into another building, erected by the corporation on the same lot, about 50 feet from the hospital. The expenses of the Old Ladies' Home have always been paid by the corporation, and it is under its control. There is no other Old Ladies' Home in the vicinity of Rincon Hill. The name of the corporation is the "Sisters of Mercy." It is claimed by the appellant that there is no legatee competent to take, and, no trust having been created, the bequest to the Old Ladies' Home fails.

Our Code provides that "the misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended." So long as the testator suffi-

ciently indicates the institution intended, the bequest is good; and if from the will itself, or evidence *aliunde*, the object of the testator's bounty can be ascertained, a misnomer of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision. *Lefevre v. Lefevre*, 59 N. Y. 434. It was held in a case quite similar to this that a charitable gift to a hospital should be sustained notwithstanding the misnomer of the corporation, and that it would take and hold the gift on the trust named by the donor. *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392. The court found "that the testatrix meant and intended by her said will, and especially by the twelfth article thereof, to make said corporation, called the 'Sisters of Mercy,' her residuary legatee, intending thereby especially to benefit the department thereof which provides for the care, protection, and comfort of old ladies; and the testatrix knew that the only conduit of her charity was the corporation called the 'Sisters of Mercy.'" We think these findings of the court are justified by the evidence. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.

I dissent: TEMPLE, J.

(75 Cal. 337)

FRICK v. SINON. (No. 9,868.)

(Supreme Court of California. March 24, 1888.)

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—TENANTS IN COMMON.

Plaintiff's predecessor was in actual, exclusive, adverse possession, under color of title, of certain land the fee of which was in three persons as tenants in common. Before such adverse possession ripened into absolute title under the statute of limitations, one of the co-tenants brought suit in ejectment for the land against plaintiff's predecessor, the complaint alleging that said co-tenant was sole owner thereof. While the action was pending, said co-tenant, for a valuable consideration, executed to the defendant therein a deed of the whole of the premises in dispute, and dismissed the action. Held, that the reception of this deed did not make the grantee therein a tenant in common with the two co-tenants of the grantor; and plaintiff's predecessor, having held actual, exclusive, adverse possession of said land for five years after the reception of said deed, acquired a complete title thereto, under the California act of limitations of 1863.<sup>1</sup>

2. SAME—OFFER OF COMPROMISE—ESTOPPEL.

An offer to buy out a hostile claim, after one has acquired title by adverse possession, will not estop the party making such offer from asserting his title so acquired.

3. SAME—ADVERSE POSSESSION—EVIDENCE.

In an action to quiet title, where plaintiff claims under one who acquired title by adverse possession, it is not error to admit evidence of the payment of street assessments and insurance premiums on the property. Although not admissible to prove the fact of possession, such evidence tends to show that the actual possessor claimed the whole title.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action to quiet title, brought by Fredericke Frick against William Sinon. Judgment was rendered for plaintiff. Defendant appeals.

Wm. Pierson, for appellant. J. Foulds, for respondent.

MCKINSTRY, J. An action to quiet title, commenced October 29, 1883. The court below adjudged, in effect, that the plaintiff had acquired the legal title to the land described in the complaint by an adverse possession continued for the statutory period. Appellant contends, it appears from the evidence, that the plaintiff and defendant were at the commencement of the suit, and at the trial, tenants in common of the premises. There was evidence that

<sup>1</sup> As to what constitutes adverse possession, see *McLaughlin v. Del Re*, (Cal.) 16 Pac. Rep. 381, and note. As to what constitutes color of title, see *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12, and note.

the predecessor in interest of the plaintiff had the actual, exclusive, and adverse possession, under color of title, of the whole of the land in controversy, from the year 1862 up to the 17th day of April, 1868, at least. Such possession, however, unless it continued to April 21, 1868,—five years from the approval of the act of limitations of 1863,—did not bar the right of possession of defendant's grantors. On the 17th day of April, 1868, W. H. Campbell, J. B. Crockett, and Gwyn Page were the owners in fee-simple, as tenants in common, of the land the title whereof is here in dispute. On that day Campbell commenced an action of ejectment against the predecessor of the plaintiff for the recovery of the possession of the land, averring in his complaint that he was the sole owner thereof. The defendant in the ejectment, by answer, denied the title of the plaintiff therein. While the ejectment was pending, and on the 6th day of March, 1869, Campbell, for a valuable consideration, executed and delivered to the defendant therein a deed "of the whole of the premises" described in the complaint therein and herein. The action of ejectment was thereupon dismissed.

It is contended by appellant that the reception of the deed by plaintiff's predecessor made him a tenant in common with defendant's grantors, Crockett and Page. Had Campbell been in the sole possession of the premises, and had he delivered the possession of the whole to the plaintiff's predecessor, the entry by the predecessor would have been in the assertion of an exclusive right in severalty, and equivalent to an express declaration on the part of the grantee that he entered, "claiming the whole to himself." It would have been such a disseizin as would have set the statute of limitations in motion in his favor. *Bath v. Valdez*, 11 Pac. Rep. 727. The grantee in the deed was in the adverse possession of the whole of the land prior to the execution and delivery of the deed. Crockett and Page could not say, nor can their successors say, that they had no knowledge of the deed, and, in the same breath, that the deed made the grantee a tenant in common with them. Taking notice of the deed, the subsequent possession of plaintiff's predecessor was, to their knowledge, referable to the deed, and was a possession with a claim of the whole title. The continued possession under the deed was as much a disseizin as would have been an entry under it. The mere commencement of the action of ejectment by Campbell, subsequently dismissed, did not deprive the plaintiff's predecessor of the benefit of his adverse possession begun in 1862, and which was continued for a period of five years,—a period completed before the deed was executed by Campbell. Even if the taking of the deed was any evidence tending to prove that the possession, begun in 1862, was not previously adverse, yet the taking of the deed, and possession under it, was a denial of any right in Crockett and Page from the date of its delivery and acceptance. It follows that plaintiff's predecessor did not become a tenant in common with Crockett and Page by receiving the deed from Campbell.

There is ample evidence that plaintiff's predecessor was in the actual, exclusive, and adverse possession of the land in controversy, claiming title to the whole thereof under the deed aforesaid, for five years next succeeding the 6th day of March, 1869. The defendant testified that, say, in November, 1876, (more than seven years after the execution and delivery of the Campbell deed,) he suggested to plaintiff's predecessor that they together should buy "the outstanding one-fifth" of the property; to which the latter responded he could not afford it,—had no money. Also that, shortly before the commencement of this action, (more than 14 years after the Campbell deed,) the agents of the plaintiff asked defendant what he would take for his interest in the property; that he replied "\$600;" and that the agents thereupon declared they would not give him \$60 for it. It was for the court below to determine the credibility of the witness. An offer to buy out a hostile claim in 1876 or 1883 could not invalidate the title of plaintiff or her predecessor. *Furlong v. Cooney*, 14 Pac. Rep. 12. Here is no question of estoppel. Having acquired

the title by adverse possession, plaintiff, while she remained in possession, could be divested of such title only by conveyance in writing. And even if it should be conceded that the declaration was made by plaintiff's predecessor in 1876, as testified to, and that it constituted some evidence tending to show that, during the five years of possession immediately following the Campbell deed, the occupant had not intended to hold adversely, it was but evidence, and very slight evidence; and the court below was justified in holding it did not overcome the effect of the clearly established, open, notorious, and exclusive possession of the land under the deed purporting to grant the entire title.

Nothing was decided in *Carpentier v. Mendenhall*, 28 Cal. 484, which is in conflict with the views above expressed. There, the adverse possession of the defendants commenced in 1858. A special verdict found that the defendants "became tenants in common" with the plaintiff in 1860. The supreme court said that, when the defendants became tenants in common with the plaintiff, their possession lost its hostile character. In *Miller v. Myers*, 46 Cal. 535, the appellant did not complain of the judgment letting the plaintiff into the possession as tenant in common, but for a judgment for mesne profits, claiming there was no ouster of the plaintiff prior to the commencement of the action.

The court below did not err in admitting evidence of the payment by plaintiff and her predecessor of street assessments and insurance premiums. Although, perhaps, not admissible as evidence of the fact of possession, they tended in some degree to show that the claim of the actual possessor was to the whole title. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

(75 Cal. 273)

BATCHELDER v. BRICKELL *et al.* (No. 11,185.)

(*Supreme Court of California*. March 28, 1888.)

MORTGAGES—DECREE OF FORECLOSURE—MODIFIED DECREE—EFFECT.

A decree of foreclosure was defective only in providing for a personal judgment against one of the defendants. A modified decree, prepared and entered as of the date of the original decree, as directed by an order of the supreme court, was in the language of the original decree except that the word "defendants" was changed to "defendant," and the name of the defendant, wrongfully included in the personal judgment, was omitted from the clause providing for such judgment. Held, that the original decree, or a sale made thereunder, was not vacated or set aside by the modified decree, the manifest intention of the court being to correct the error, and not to constitute a new decree.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

*Quint & Newman and Fox & Kellogg*, for appellant. *E. J. & J. H. Moore* and *A. N. Drown*, for respondents.

TEMPLE, J. This is an action of ejectment, and the only question is whether defendants succeeded in showing title under certain foreclosure proceedings in which Brickell, the principal defendant here, the others being his tenants, was plaintiff, and this plaintiff and her husband were defendants. In that case a decree was duly entered and a sale of the mortgaged premises had, at which Brickell, the plaintiff in that action, became the purchaser. After the sale the case was appealed to this court by the defendants in that suit, but no stay-bond was given, and, pending that appeal, the sheriff's deed was executed and Brickell entered into possession under it. The decision on the appeal in the foreclosure case is reported in 62 Cal. 623. The conclusion of the court is as follows: "It follows from the above that the court below erred in rendering a personal judgment against Mrs. Batchelder on the note of June 1, 1874, and the interest on it, and the decree will be modified in that

regard. In other respects the judgment is correct, and is affirmed. Counsel for respondent will prepare a decree, modified in accordance with the views herein expressed, and present it, on notice, to the chief justice of this court." There was no personal judgment against Mrs. Batchelder, and, so far as we can ascertain, no such point was made on the appeal. The decree, however, contained the usual provision for docketing judgment for any deficiency, and did direct such judgment to be docketed against Mrs. Batchelder. Of course it is this provision which is referred to as a personal judgment against Mrs. Batchelder, and the intent that the decree shall stand except as to that provision is quite plain. The direction to respondent's counsel to prepare a decree modified in accordance with the views expressed, meant simply to write out the decree as modified, more plainly to indicate to the court below the modification intended. Under the circumstances it cannot be justly claimed that it was intended to vacate the decree or set it aside. A contrary intent is expressly stated: "The decree will be modified in that regard. In other respects the judgment is correct, and is affirmed." It was not directed that the modified decree should be submitted to the court for approval, and apparently it was not. This supports the idea that it was not intended to constitute a new decree. The chief justice approved the form of the decree as modified, and it was transmitted to the lower court and there entered, and no steps whatever were ever taken by any one to have the decree as there entered corrected and made to conform to the judgment of this court, if, in fact, it was not in conformity with the judgment here. That decree, entered as modified, after briefly reciting the conclusion of this court, states: "Now, therefore, in accordance with said judgment and order of the supreme court, on motion of E. J. & J. H. Moore, counsel for plaintiff, and on due notice thereof to counsel for defendants, it is ordered and adjudged the decree of the former district court of the Twenty-Third judicial district of this state, of date November 25, 1878, be modified as of that date so to read and stand modified in the words and figures following, which the court below is ordered to enter as of the date of the judgment above mentioned, to-wit." Then follows the original decree in *totidem verbis*, except that the word "defendants" is changed to "defendant," and the name of Mrs. Batchelder is omitted from the clause providing for docketing judgment for the deficiency. We think the decree was not vacated or set aside or the sale rendered void by the judgment of this court. The record does not seem to justify the point that the San Francisco property was sold for more than the decree ordered.

Judgment and order denying plaintiff's motion for a new trial affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

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BATCHELDER v. BRICKELL *et al.* (No. 9,770.)

(*Supreme Court of California.* March 28, 1888.)

Department 1. Appeal from superior court of the city and county of San Francisco: J. V. COFFEY, Judge. See *Batchelder v. Brickell*, *ante*, 441.

PER CURIAM. On the authority of *Batchelder v. Brickell*, *ante*, 441, No. 11,185, this day filed, the judgment is affirmed.

(75 Cal. 434)

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CUMMINGS v. CUMMINGS *et al.* (No. 11,881.)

(*Supreme Court of California.* March 29, 1888.)

1. DIVORCE—DECREE FOR ALIMONY AND ACCOUNTING—CONFORMITY WITH PLEADINGS. The plaintiff, in an action for divorce and an accounting, alleged in her complaint that a conveyance, purporting to be a deed, was made with the intent to defraud plaintiff and was without any consideration whatever; but the court, upon the trial, found that the conveyance was a mortgage, based upon a valuable consideration.



*Held*, that a decree under this complaint ordering a division of the mortgaged property in payment of plaintiff's claim for alimony is inconsistent with the case made out and should be reversed.

2. SAME—PARTITION OF LANDS—MORTGAGEE IN POSSESSION.

A decree in an action for divorce cannot order a partition of the common real estate of the parties thereto, where a mortgagee is in the lawful possession of the property under a mortgage covering the whole of the land.

3. SAME—NECESSARY PARTIES.

In an action for divorce, wherein plaintiff asked for an accounting, a nonsuit was granted to one of the defendants, whom the decree showed held a mortgage on the property of the defendant husband, and was a necessary party to the accounting. *Held* that, although the decree might be valid as to the other defendant, yet it should be reversed, and the discharged defendant made a party to the suit, in order to settle the rights of third persons.

4. SAME—APPOINTMENT OF RECEIVER.

A mortgagee, in the lawful possession of mortgaged lands, and authorized to receive the rents and profits of the same to apply on his mortgage, cannot, in the absence of evidence showing he has committed waste or abused his position, be succeeded by a receiver, who is given the power to subordinate the claims of the mortgagee to claims of the divorced wife of the mortgagor, for alimony, etc.

In bank. Appeal from superior court, Santa Cruz county; McCANN, Judge.

Action for divorce and an accounting by Mary R. Cummings against William N. Cummings, Morgan L. Ketchum, James L. Simpson, and the Bank of Watsonville. Judgment for plaintiff, and defendant Morgan L. Ketchum appeals.

A. P. Kittredge, for appellant. Goldsby & Jettie, for respondent.

McKINSTRY, J. The appeal is by the defendant Morgan L. Ketchum from portions of the judgment, and no point is made by respondent that the judgment of the superior court is not final and appealable. It is not necessary to decide whether the court below did or did not err in overruling the demurrer to the complaint of the defendants Ketchum and the Bank of Watsonville. If it be conceded the demurrer was properly overruled, the portions of the judgment appealed from must still be reversed. And even if, upon the complaint, a judgment decreeing an accounting and for a redemption from the mortgages of the defendants Ketchum and the bank would, under any circumstances, have been justified, the portions of the judgment from which an appeal has been taken must be reversed. The superior court decreed a dissolution of the marriage between plaintiff and the defendant William N. Cummings; that plaintiff was entitled to the custody of the infant daughter, sole issue of the marriage; and that defendant Cummings pay to the plaintiff \$50 a month as alimony, and a sum as suit money. And further decreed that the property described in the complaint was at the commencement of the suit charged with the mortgage in the judgment afterwards referred to; that the said property or tract of land be divided equally, share and share alike, etc., between the plaintiff and the defendant Cummings, and, in case they cannot agree upon a partition, Bart Burke, Esq., be appointed a commissioner to make and report such a partition, etc.; that the share set apart to the defendant Cummings be charged with the payment of costs, alimony, and counsel fees awarded to the plaintiff, and the same be a lien thereon; that the instrument of the 18th of May, 1876, purporting to be a deed from defendant Cummings to defendant Ketchum is, and was intended to be, a mortgage to secure the payment of \$1,500 and interest, and not a deed conveying the land, otherwise than as security, and that the instrument was and is a valid and binding mortgage, free from fraud; that the property is subject to and bound for the payment for the unpaid portion of the mortgages of the Bank of Watsonville and Ketchum; that Ketchum is entitled to a lien on the land for the sum of \$1,500 and interest thereon from 10th day of June, 1874, to the 10th day of February, 1876, at the rate of  $1\frac{1}{2}$  per cent. per month, and with legal interest thereon from the last date to the entry of decree, "less whatever sums of

money he may have received as rent or otherwise from the premises held by him under the said instrument, herein declared to be a mortgage, over and above what he has expended thereon for taxes, repairs, and in payment of the principal or interest on the Bank of Watsonville mortgage;" that, for the purpose of ascertaining, etc., Bart Burke is appointed a referee to ascertain and report the amount of reductions, if any, to be made, "and to make and state said account between said Ketchum and his said receipts from said property," etc.; that, as between said plaintiff and defendants Cummings and Ketchum, and those claiming under them, the part or half of the premises awarded to plaintiff be chargeable with the payment of "one-half of the Ketchum and Bank of Watsonville mortgages;" that Bart Burke, Esq., be appointed a receiver to receive the rents, profits, and issues of the land, until further order, to be paid out by him under direction of the court—*First*, for taxes; *second*, for repairs; *third*, for the support of plaintiff and her child; *fourth*, for costs and counsel fees; *fifth*, for interest due and accruing on the Bank of Watsonville mortgage. The judgment recites that the plaintiff, having introduced her evidence in chief, a nonsuit was granted as to the defendant the Bank of Watsonville. The dismissal, or nonsuit, in favor of the bank, of itself, might, perhaps, only show that the bank had no interest in or lien upon the property. But the final judgment declares that the property described is subject to and bound by the unpaid portion of the mortgage of the Bank of Watsonville, and that the defendant Ketchum is entitled to a lien for the amount of his mortgage, less what he may have received as rents, etc., over and above what he has expended for taxes, repairs, and in the payment of principal or interest "on the Bank of Watsonville mortgage." Further, that the referee ascertain what Ketchum has paid for principal or interest of the bank mortgage. And the receiver is directed to pay out the rents by him received, the alimony, and the costs and counsel fees awarded, before paying interest on the mortgage of the bank.

It is apparent that the bank is a necessary party to the accounting. Its mortgage is recognized as valid in the judgment, and no decree could properly be entered determining what sums had been paid to it by the defendant Ketchum, or giving priority to the alimony or suit money, in the absence of the bank. The mortgage of the bank would seem to be a mortgage executed by defendant Ketchum; and, in view of the nonsuit and the recognition of the mortgage in the decree, it cannot be presumed that it was taken with notice that the instrument from the defendant Cummings to Ketchum was other than it purports to be,—a deed absolute. Even, therefore, if the decree, as between the plaintiff and appellant Ketchum could have been upheld if the bank had not been a party defendant, it should be reversed with directions to the court below to cause the bank to be brought in and reinstated as a defendant, as being a necessary party without whose presence the rights of the other parties could not be finally determined. The portion of the decree which provides for a commissioner to make partition of the land described would, in any event, be reversed. In an action for divorce the court may, in certain instances, "divide" the common real estate. Civil Code, § 146. But this does not authorize an actual partition of the land in every instance. Here the land was in the rightful possession of Ketchum, who had a valid lien extending to every portion of it, and there should have been no decree for a partition until the lien was satisfied or redeemed. Aside from the fact that such entry and partition would be an unlawful interference with the occupation of a mortgagee in the rightful possession, the rights of the respective spouses in the property may depend upon and be affected by the fact that the one or the other shall redeem the mortgages. Nor, in any view of the case, could that part of the decree which provides that the one-half of the property awarded to the plaintiff shall be chargeable with the payment of only one-half of the Ketchum mortgage, be permitted to stand. The defendant Ketchum having a valid

mortgage upon all the land, the court was not justified in attempting to limit or change the liability created by it, or in altering in any way his rights or the obligations of the community under his contract. And so of that part of the decree relating to a receiver. Ketchum, a mortgagee in good faith, and in possession, was authorized to remain in possession with the equitable right of protecting his security by paying the taxes and keeping the property in repair, and of applying the excess of the rents and profits to the payment, first, of the interest, and then of the principal of his mortgage. Yet, without any averment or finding that he had committed waste or abused his position, the court appointed a receiver to collect and receive the rents and profits, and to pay them out, giving priority to alimony and counsel fees over the claim of the mortgagee. But the portions of the decree above specified must be reversed for another reason: They are not based upon any pleading in the cause. The complaint, filed April 28, 1883, avers that the defendants Cummings and Ketchum combined and confederated together for the purpose and with the intent of cheating and defrauding the plaintiff out of her rights and interests in a certain described tract of land,—part of the community property of herself and defendant Cummings; and that, to carry out such fraudulent design, on the 18th of May, 1876, the defendant Cummings executed and delivered to the defendant Ketchum, and the latter received, an instrument purporting to be a deed of conveyance of the property described, the consideration therein recited being \$8,000; that, in truth and in fact, no consideration whatever was paid therefor, the sole purpose of the parties to the instrument being to cheat and defraud the plaintiff as aforesaid, and to cover up and conceal the title of the community in said land. The answer of the defendant, Ketchum, denies the allegations of the complaint. The court found that, in the execution and acceptance of the deed of the 18th of May, 1876, there was no design or plan on the part of William N. Cummings and Morgan L. Ketchum, or either of them, to impair or defeat or affect in any way the rights of the plaintiff. But the court also found that the deed, although absolute in form, was executed by said Cummings and received by said Ketchum as security for a debt of \$1,500, which sum, and the interest thereon, remains unpaid; and, as conclusion of law, that there was no fraud in the deed from Cummings to Ketchum, but that the same was a mortgage and a valid lien for \$1,500, and interest. The complaint herein is not framed as a bill to redeem the Ketchum and Bank of Watsonville mortgages, or either of them, and it contains no averments on which can be founded a decree for redemption. Nor are there allegations that defendant Ketchum is a mortgagee in possession on which could be based a decree that he account for the rents and profits. This, independent of the mere fact that the plaintiff does not offer to redeem. No supplemental complaint was filed or offered containing allegations such as would justify the decree entered as against the defendant Ketchum. On the contrary, the complaint expressly denies that Ketchum has any interest in the premises, averring that the deed purporting to convey the legal title was void, made in fraud of the plaintiff's rights, and without consideration. Where a defendant has answered, the court may grant the plaintiff "any relief consistent with the case made by the complaint, and embraced within the issue." Code Civil Proc. § 530. Here the relief which the court below attempted to grant the plaintiff, as against the appellant, was neither consistent with the case made by the complaint nor embraced within the issues made by the answer. In *Gregory v. Nelson*, 41 Cal. 278, it was held that if a judgment in equity decrees the existence of facts not within any issues made or tendered by the pleadings, and then pronounces the judgment of the court upon such facts, such part of the judgment "is superfluous and nugatory." In *Burnett v. Stearns*, 33 Cal. 474, the supreme court said: "The province of the court with respect to facts is to determine, but not to raise the issue." A judgment for the plaintiff must be limited by the facts

stated in the complaint. Where the defendant has answered, the court may, under the general prayer, grant any relief consistent with the complaint, with the facts alleged in the complaint; but, under the general prayer, no relief can be granted in equity beyond that which is authorized by the facts stated in the pleadings. *Carpentier v. Brenham*, 50 Cal. 549. The court below would have been justified in decreeing that the property specifically described was, as between the plaintiff and defendant Cummings, at the commencement of the action, community property of the spouses, to the extent of any estate therein which had not been conveyed or transferred by the defendant Cummings. The cause is remanded, and the court below is directed to modify as above indicated the part of the judgment which decrees the property described as community property, or by otherwise expressly saving and preserving the estates in the premises, if any they have, of the defendants other than defendant Cummings, and all or any rights the said defendants, or either of them, other than Cummings, may have in or upon said premises by way of mortgage, lien, or incumbrance. The other portions of the decree appealed from are reversed, and the court below is directed to enter instead thereof a judgment in favor of the appellant.

We concur: SEARLS, C. J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.

McFARLAND, J. I concur in the judgment; although I have great doubt about plaintiff's right to make Ketchum and the bank defendants at all. The only proper parties to a divorce suit are, generally, the husband and wife. If, when such a suit has been commenced, or is about to be commenced, one of the parties, having such suit in view, colludes with a third party, with intent to cover up community property, such third party may, perhaps, be made a defendant for the purpose of keeping the property *in statu quo* until after the determination of the action. But I am not clear that in this case either of the other defendants was properly joined with the husband.

(75 Cal. 496)

MOGK v. PETERSON. (No. 12,381.)

(*Supreme Court of California*. March 31, 1888.)

1. INSOLVENCY—ASSIGNMENT—PROPERTY EXEMPT FROM EXECUTION.

In an action by the assignee of an insolvent to recover the value of property claimed to have been transferred to defendant in fraud of creditors, the findings stated that a certain part of the property was exempt from execution. The judgment gave plaintiff none of such part. After more than 60 days, plaintiff appealed from the judgment. *Held*, that under Code Civil Proc. Cal. § 939, sub. 1, providing that a decision or verdict can only be reviewed as to facts, on appeals from judgments, when such appeal is taken within 60 days, the findings must be taken as true; and under Insolvent Act Cal. 1880, §§ 17, 21, prohibiting assignees of insolvents from taking property exempt from execution, the judgment is correct.

2. SAME—SUFFICIENCY OF PETITION—COLLATERAL ATTACK.

An objection that a petition in insolvency proceedings did not sufficiently state the necessary facts cannot be raised by the defendant in a subsequent suit, brought by the assignee of the insolvent, to recover certain property for the benefit of creditors.

3. SAME—BOND OF ASSIGNEE.

The defendant in an action by an assignee of an insolvent estate to recover certain property for the benefit of creditors, cannot raise the question as to whether the assignee's bond was filed properly within the time allowed by statute, the creditors and debtor having acquiesced in such bond.

4. SAME—ASSIGNMENT BY CLERK OF COURT.

Insolvent Act Cal. 1880, § 17, provides that "the clerk of court shall \* \* \* assign and convey to the assignee all the estate, real and personal, of the debtor." The clerk in an assignment, after styling himself "party of the first part," proceeded to convey "all the property, etc., of the said party of the first part." The instrument is entitled, "*In the matter of A. B., an insolvent debtor.*" It recites the steps in the insolvency proceedings, and that the instrument is made by the assignor as clerk of the court; also that it is in obedience to the insolvent act. *Held*,

that it is evident, from the recitals in the instrument, that it was intended to convey the insolvent's property, and that the words "part of the first part" may be held to mean the clerk acting under the statute as assignor of the insolvent's estate.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

Action by John C. Mogk, as assignee of William J. Coombs, an insolvent debtor, against Peter Peterson, to recover certain property for the benefit of creditors.

*H. M. Albery*, for plaintiff. *Richard Bayne*, for defendant.

HAYNE, C. Action by the assignee of an insolvent to recover the value of certain property which is claimed to have been transferred to the defendant in fraud of the rights of the creditors. The court below gave judgment for a portion only of the amount claimed, and each side appeals.

Upon the appeal of the plaintiff the question is whether the court was right in holding that part of the property transferred was exempt from execution, and therefore not a part of the property to which plaintiff was entitled as assignee. The findings state that all this portion of the property consisted of "farming implements," and that, "at the time of the transfer of said property, said Coombs was by occupation a farmer, and used all of said last described articles in his business of farming;" and that each article thereof "was, at the time the same was sold and transferred by said Coombs to said defendant, exempt from forced sale and execution." The appeal was from the judgment alone, and was not taken within 60 days from its rendition; hence the findings must be taken as conclusive. Code Civil Proc. § 939, sub. 1. Taking the above finding to be true, it is manifest that this part of the judgment was correct. For the statute provides that "such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution," (section 17;) and that the assignee shall have power to take possession of "all the estate of such debtor except property exempt by law from execution," (section 21, sub. 2.) The clerk had no authority to transfer exempt property to the plaintiff, and therefore the plaintiff can claim nothing by virtue of the transfer.

Upon the appeal of the defendant several points are made:

1. It is said that the petition in insolvency does not show the facts necessary to confer jurisdiction upon the court in which the insolvency proceeding was commenced. The particular matters in which the petition is claimed to be insufficient are, in the first place, that it merely alleges that the insolvent was "indebted" to the petitioners, etc., without stating the facts out of which such indebtedness arose, and that hence it is within the rule laid down in *Re Russell*, 70 Cal. 132, 11 Pac. Rep. 622; and, in the second place, that it does not show that the debtor was insolvent within the meaning of the act, because it merely alleges that he "was on the 29th day of September, 1884, insolvent, and has suffered his property to remain under attachment or legal process for more than four days, and attempted to conceal some of his property to avoid its being attached," without showing that he was insolvent at the time he suffered his property to remain attached; and, further, that the allegation as to concealment was not that he did conceal, etc., but that he attempted to conceal. Probably these matters would have been ground for a demurrer by the insolvent to the petition. As to that we express no opinion. But they certainly cannot be raised by a third party in a collateral proceeding. Even if the position that the superior court acts in such proceedings as a court of inferior and limited jurisdiction be assumed to be true of the present statutes, nevertheless it does not follow that the objections to the petition must prevail. The objections are, in effect, not that there is a total absence of essential facts, but only that the facts are not sufficiently stated. That is not an objection which a third party can raise in a collateral action. This conclu-

sion is strengthened by the provision of the act to the effect that, "In suits prosecuted by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue." Section 18.

2. It is said that no bond was filed by the assignee within the time allowed by the act. It appears that the bond filed on December 17, 1884, which was within the time specified, was defective, and that thereupon the court made an order allowing a new bond to be filed "as of date December 17, 1884," and that thereupon a proper bond was filed. We are inclined to think this was sufficient for all purposes. But, however this may be, the defendant cannot raise the question. As was said in *Luhrs v. Kelly*, 67 Cal. 291, 7 Pac. Rep. 696, "the creditors and debtor were alone interested in the amount and sufficiency of the bond, and they acquiesced in the bond given."

3. It is contended that the assignment was insufficient to pass the title to the assignee. This point is based upon the careless language of the assignment. The act requires that when the assignee is appointed and qualified, "the clerk of the court shall by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto," etc. Section 17. In complying with this provision the clerk executed an instrument in which he styled himself "the party of the first part," and, after reciting the insolvency proceedings, proceeds to "grant, assign, transfer, and set over unto the said party of the second part \* \* \* all the \* \* \* property, estate, and effects of the said party of the first part." And it is argued that this is an assignment of the property of the clerk of the court, and not of the insolvent. It is apparent from the recitals, however, that the intention was to transfer the property of the insolvent. And, if a suit had been brought to reform the instrument, it would not have been necessary to introduce any evidence to show that such was the intention. And, this being the case, we think it is not straining the language too much to hold that the assignment is an assignment of the insolvent's property. The paper is a paper in the proceeding. It is entitled: "*In the Matter of Wm. J. Coombs, an insolvent debtor*;" and recites the various steps in the insolvency proceedings, referring to the act by its title, and further recites that the assignment is made by the assignor as clerk of the court, and "in consideration of the premises, and of the benefits of said act, and in pursuance of and in obedience to the above recited order and the said act," and "for the uses and purposes in the said act declared." In view of these recitals we think the words "party of the first part," in the beginning of the paper, may be construed to mean, "William H. Miles, clerk of the superior court, acting under the statute as assignor of the estate of the insolvent;" and that the subsequent words referring to the property of the party of the first part, may be taken to mean the property which, by virtue of the authority conferred upon him by the statute, he was authorized to transfer.

4. Finally, it is urged that the evidence is insufficient to show fraud. The court finds that, at the time of the transfer, the said Coombs was insolvent, and unable to pay his debts; and that such transfer "was made with the intent and purpose on the part of said Coombs to hinder, delay, and defraud the general creditors of the said Coombs;" and that the defendant "had reasonable cause to believe that said Coombs was at said time insolvent, and that said assignment, transfer, and conveyance was so made by said Coombs with a view to prevent the last described property from being distributed ratably among his creditors, and to defeat the object of, and to hinder, impede, and delay the operation of, and to evade the provisions of, the insolvent act of 1880." We think this a sufficient finding to avoid the transfer. Insolvent Act, § 55. The counsel, however, says that the finding is not supported by the evidence, and that "appellant's testimony shows positively that he did not have such knowledge or notice." But, as remarked by Judge BALDWIN in

*Blankman v. Vallejo*, 15 Cal. 645, "we do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears." And this is peculiarly true of questions of mere knowledge or intent. In the present case it is not much disputed that the intention of the assignor was in fraud of the act. The main contention seems to be that the defendant was not aware of such intention. But, if such was the assignor's intention, it is exceedingly improbable that he would have concealed it from the assignee. And the haste with which the transaction was concluded tends to cast a shade over it. Besides, the defendant admits that he knew Coombs was in want of money; and there was evidence that defendant had made declarations to the effect that some other persons had "got the best of him on the thrashing bill last year, and he didn't propose they would this year; that he had taken wheat enough." Upon the whole evidence we cannot say that the court below was not justified in its conclusions as to the facts.

The other matters do not require special notice.

We therefore advise that the judgment and order appealed from be affirmed in all respects.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(75 Cal. 502)

SCHWARTZ *et al.* v. WILSON, Auditor. (No. 11,399.)

(*Supreme Court of California*. March 31, 1888.)

COUNTIES—LIABILITIES AND INDEBTEDNESS—EXCESS OVER AMOUNT ALLOWED BY LAW. Under Const. Cal. art. 11, § 18, which provides that no county shall incur indebtedness exceeding for any year the income provided for such year, without a special election, etc.; and the California county government act, § 36, which provides that the board of supervisors shall not allow, nor the auditor or treasurer pay, any such indebtedness,—a petition for a writ of mandate to enforce the payment of a claim for supplies furnished said county, which had been ordered paid by the board of supervisors, is deficient if it fails to show that the debt was ordered paid out of funds provided for such purpose for the fiscal year in which the supplies were furnished and the claim filed.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

*J. M. Wilcoxon* and *R. B. Treat*, for appellants. *Graves, Turner & Graves*, for respondent.

SEARLS, C. J. This is an application for a writ of mandate to compel the respondent, Wilson, as auditor of the county of San Luis Obispo, to draw his warrant on the county treasurer in favor of Schwartz & Beebe for \$195.30. A demurrer was sustained to the petition in the superior court, and, appellants electing to stand upon such petition without amending, judgment dismissing the application was entered, from which judgment this appeal is taken. It appears from the verified petition filed on application for the writ that Schwartz & Beebe, as copartners, on the 20th of March, 1884, sold and delivered goods, wares, and merchandise to the value of \$195.30 to the county of San Luis Obispo. That on April 20, 1884, the demand therefor, duly itemized and verified, was filed with the clerk of the board of supervisors of said county. That on the 7th day of January, 1885, the demand was by the board of supervisors allowed for the full amount thereof, and ordered paid "out of the funds of road-district No. 1." At the date of the sale and delivery of the goods, there was money unappropriated, and in excess of all outstanding indebtedness of said road-district No. 1, in the county treasury to the credit of

said road-district; and this claim, together with the other liabilities before that time accrued, were not in excess of the revenue actually provided for the year 1884 for said road-district. The goods were sold and delivered to and for road-district No. 1. On or about August 19, 1884, road-district No. 1 was changed to road-district No. 7, which latter district succeeded to all the rights, funds, and liabilities of No. 1. On the 14th day of July, 1885, the claim of petitioner being unpaid, the board of supervisors entered the following order: "It appearing to this board that there is a surplus of money in road fund of road-district No. 7 for the fiscal year ending June 30, 1885, and there is no outstanding claims against road-district No. 7 for fiscal year ending June 30, 1885, and that \$804.75 is remaining in said fund: Now, under the power invested in us under subdivision 20, section 25, of 'An act to establish a uniform system of county and township government,' approved March 14, 1883, we hereby order that \$334.85 belonging to and in said road-fund district No. 7 for fiscal year ending June 30, 1885, be, and the same is, transferred to the general road fund, and to pay the claims No. 60, Phelix Dolan, for \$26.50; No. 64, Patrick Murphy, for \$7; No. 71, Albert Smith, \$29; No. 73, Schwartz & Beebe, \$195; No. 583, T. J. Williams, \$77.35. And the county auditor and county treasurer of San Luis Obispo will make the proper entries in their books, and otherwise comply with this order. By the board of supervisors of San Luis Obispo county, Cal." That on the day last aforesaid the said board of supervisors, by an order duly made and given, made and passed their order in the words and figures following, to-wit: "Whereas, this board did on the 7th of January, 1885, examine, allow, and order paid from the district No. 1 fund (road fund) the following claims, to-wit: No. 60, claim of Phelix Dolan for \$26.50; No. 64, claim of Patrick Murphy, \$7; No. 71, claim of Albert Smith, \$29; No. 73, claim of Schwartz & Beebe, \$195; No. 583, claim of T. J. Williams, \$77; and whereas, it appears that at the time of said allowance of said claims that there were no funds belonging to or in district No. 1 (road) fund; but that the same was an impoverished fund and road-district: Now, the said orders, so far as they order said claims paid from district No. 1 (road) fund, are hereby revoked, and said claims are examined, allowed, and ordered paid out of the general road fund of the county, as follows: No. 60, claim of Phelix Dolan, for \$26.50; No. 64, claim of Patrick Murphy, for \$7; No. 71, claim of Albert Smith, for \$29; No. 73, claim of Schwartz & Beebe for \$195; No. 583, claim of T. J. Williams, for \$77.35. By the board of supervisors, San Luis Obispo county, Cal., July 14, 1885." Duplicate lists of the claims allowed, and orders for the payment of money, were prepared as by law provided, and, duly signed, were delivered to the auditor in due time, and a demand was made upon the auditor for a warrant on the treasurer in favor of appellants, which was refused, and thereupon, and on the 9th day of November, 1885, the application for a writ was filed.

From the foregoing statement, it clearly appears that the supplies were furnished, and the claim therefor filed, April 12, 1884; that is to say, during the fiscal year which ended June 30, 1884. There was at that time sufficient money in the fund of road-district No. 1 to pay the demand. The petition shows that it was ordered paid on the 14th of July, 1885, out of the general road fund of the county which had been provided for the fiscal year 1885; or, at least, it fails to show, as it should have done, that the claim was ordered paid out of the funds provided for such purpose for the fiscal year ending June 30, 1884. In *San Francisco v. Brickwedel*, 62 Cal. 641, it was said: "Each year's income and revenue must pay each year's indebtedness and liability; and no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." The eighteenth section of article 11 of our constitution provides that, in cases like the present, no indebtedness or liability shall in any manner, or for any purpose, be incurred exceeding in any year the income and revenue provided for such year. Sec.



tion 36 of the county government act contains substantially the same provision as the constitution, and, after providing a method by which to estimate and determine the amount which may be allowed against each fund, then proceeds to declare, in reference to supervisors, as follows: "The board shall have no power to make allowances against any fund which, with allowances previously made, and salaries and liabilities fixed by law payable therefrom, shall exceed the auditor's estimate of revenue for the year. \* \* \* Any allowance made contrary to the provisions of this section shall be null and void, and the auditor shall not draw his warrant therefor, nor the treasurer pay the same."

Under section 2651 of the Political Code, it was proper for the board to order petitioners' claim paid out of the general road fund, instead of out of the fund of district No. 1; or, what is the same thing, its successor, No. 7; subject, however, as therein provided, to the proviso that the appropriation should not be in excess of the estimated receipts of the current year. Were the question discussed in *San Francisco v. Brickwedel* a new one, we might hesitate in reaching the conclusion arrived at there; but in view of the very salutary influence it is calculated to exercise over public affairs, and in view of the fact that since 1882 all persons having dealings with these municipalities must be presumed to have done so in view of the constitutional construction given in that case, we are not inclined to overturn it. We deem it conclusive of the present case, and the judgment appealed from is affirmed.

We concur: PATERSON, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

(7 Mont. 320)

BEATTIE *et al.* v. PARROT SILVER & COPPER CO.

(*Supreme Court of Montana.* January 13, 1888.)

LANDLORD AND TENANT—ASSIGNMENT—WHAT CONSTITUTES—ACCEPTANCE.

The assignee of a lease, after having been in possession and paid rent for nine months, by indorsement on the lease reassigns his interest therein to the original lessee, but without the latter's knowledge or consent, and went out of possession, and notified the lessor thereof, and of the reassignment, and requested him to look to the original lessee for the rent. *Held*, that the reassignment was of no effect, and that the assignee was still liable for the rent.

Appeal from district court, Silver Bow county; before Justice GALBRAITH. *James W. Forbis*, for appellants. *Wm. H. De Witt*, for respondent.

MCLEARY, J. This action was begun in the court of a justice of the peace of Silver Bow county, where judgment was rendered in favor of the defendant, and an appeal taken thence to the district court of Silver Bow county, which resulted in the same way. The case was tried before the court, sitting without a jury, on an agreed statement of facts, which was substantially as follows: That the plaintiffs, on the 19th day of November, 1885, leased to Robert H. Aiken a certain piece of ground for a period of two years, reserving a monthly rental of \$25 therefor; that Aiken held possession and paid rent for three months, and on the 18th day of February, 1886, by indorsement on the lease, assigned the same to the defendant in this case, the Parrot Silver & Copper Company. The defendant paid rent to the plaintiffs in this case, and held possession of the ground, for nine months following the assignment, and then, by indorsement on the lease, reassigns its interest to Robert H. Aiken. It was recited in the statement of facts "that, so far as the plaintiffs or defendant know, said Aiken was never cognizant of said last assignment; that said defendant had had no understanding or dealings whatever with the said Aiken concerning said last assignment; that, within the knowledge of defendant, said Aiken never accepted or knew of or consented to the last assignment, and that no consideration ever passed between defendant and

said Aiken therefor; that from some time prior to said assignment to the present time defendant has had no dealings whatever with said Aiken, nor did defendant know the whereabouts of said Aiken during said time; that since the 18th day of February, 1886, said property, or the lease or the assignment thereof, has never been in the possession of said Aiken, or out of the possession of the defendant, and neither was ever delivered to said Aiken." The defendant also, at the date of the reassignment, gave notice to the plaintiffs of the reassignment, and that they had no more use for the ground, and requested the plaintiffs to look to Aiken for the rent after the current month. These are all the facts material to the consideration of this case. Judgment having been rendered in favor of the defendant, the plaintiffs appeal to this court.

The only question presented for our consideration, as the case appears in the record and briefs of the parties, is whether or not the defendant, by the assignment to Aiken, relieved itself of its responsibilities under the lease, and its obligation to pay the rent. It is not disputed that if the assignment had been properly made to and accepted by Aiken, or if it had been made to a third person, and properly accepted by him, the defendant would have been released from further liability. What, then, is the effect of the assignment of the lease made by the defendant to Aiken? It is contended that it was not necessary for Aiken to accept the assignment, or even to know of its existence, inasmuch as he was already liable under the lease for the payment of the rent by privity of contract, and that, "the reason of the law failing, the law itself ceased." We do not think this position tenable. If Aiken was liable, under the lease, by privity of contract, that does not give the defendant the right to put upon him an additional liability, through this assignment, without his consent, as a second assignee. The assignment to Aiken stands in no other light than any other contract; it could not be made by the defendant alone, without the consent of the assignee. The delivery of the lease might not have been necessary; but the acceptance of the assignment by Aiken, either express or implied, was certainly requisite to its validity. *Maynard v. Maynard*, 10 Mass. 457; *Townson v. Tickell*, 5 E. C. L. 31; Wood, Landl. & Ten. § 339; 3 Washb. Real Prop. p. 314, c. 4, § 2, par. 34; 38 Amer. Dec. 577, note. But the agreed statement of facts recites that he did not even know of the existence of the assignment, much less did he accept it; and that the lease itself was never redelivered to him, with or without the indorsement thereon. But it appears that the assignment from the defendant to Aiken was made by an indorsement on the lease, written and signed by defendant's attorney, and that the paper itself remained in the office of the attorney until it was produced in court. This transaction certainly lacks one of the material requisites to the completion of a valid assignment, to-wit, the acceptance of the same by the assignee. For this reason we think there was error in the judgment of the court below, and that judgment should have been rendered, on the facts stated, in favor of the plaintiffs. Therefore it is accordingly ordered that the judgment of the district court be reversed, and judgment here rendered in favor of the plaintiffs for \$25, and interest from the 18th day of November, 1886, at the rate of 10 per cent. per annum, and all the costs of this court and the courts below.

McCONNELL, C. J., and BACH, J., concur.

(5 Utah, 528)

LOSEE v. REAM *et al.*

(Supreme Court of Utah. March 1, 1888.)

CORPORATIONS—ORGANIZED UNDER UNITED STATES LAWS—GARNISHMENT.

A railroad corporation is a domestic corporation of a territory where it does business, though organized under the laws of the United States; and a writ of garnishment served on it in the territory will operate to hold the debt attached, though it were contracted in another territory. BOREMAN, J., dissenting.

Appeal from district court, First district; before Justice HENDERSON.  
*P. L. Williams*, for garnishee, appellant. *A. R. Heywood*, for respondent.

ZANE, C. J. The respondent, H. Losee, commenced this action on the 14th day of September, 1887, in the First district court of Ogden, Utah, against the defendants, Ream and McCarty, and afterwards obtained a judgment against the former for the sum of \$497. At the time of commencing this action, the plaintiff also sued out a writ of attachment therein against Ream, that was served upon the Union Pacific Railway Company as garnishee. The company answered that it was indebted to Ream in the sum of \$204, but that the indebtedness was contracted in Idaho territory, and that it was not subject to garnishment, therefore, in Utah. It appears from the record that the Union Pacific Railway Company is a corporation under the laws of the United States, and is operating its road and doing business in this territory, where the service of the writ was made on it. It must therefore by this court be regarded as a domestic corporation of Utah. 2 Mor. Priv. Corp. § 984. Being a domestic corporation of this territory, the writ of attachment issued out of the First district court was rightfully served on it in that district, and the debt was properly garnished. The order appealed from is affirmed.

HENDERSON, J., concurs. BOREMAN, J., dissents.

(5 Utah, 530)

FARRELL v. PINGREE.

(*Supreme Court of Utah*. March 2, 1888.)

APPEAL—REHEARING—ERRORS NOT RAISED ON FIRST HEARING.

An application for a rehearing cannot be based on alleged errors in the court below. If deemed important, the attention of the court should have been called to them on the original hearing.

Appeal from district court, First district; before Justice HENDERSON.

On application for a rehearing. For former report of this case, see 16 Pac. Rep. 843.

*C. C. Richards*, for appellant. *Smith & Smith*, for respondent.

BOREMAN, J. This application is based upon an alleged error in the lower court. It is too late to bring such a matter to the attention of this court at this time. It should have been brought to our attention at the former hearing, if it was deemed important. Rehearing is denied.

ZANE, C. J., and HENDERSON, J., concur.

(2 Ariz. 371)

CLOUGH v. WING.

(*Supreme Court of Arizona*. February 20, 1888.)

1. INJUNCTION—WHEN GRANTED.

The claim of a right by a defendant will not be sufficient for the exercise of relief by injunction; there must be an injury done or threatened.

2. WATERS AND WATER-COURSES—WATER-RIGHTS.

A person has no right to water he does not use for some beneficial purpose.

3. SAME—APPROPRIATION—EXTENT OF RIGHT.

A person may appropriate to his use the waters of a non-navigable stream, and maintain his right thereto against everybody to the extent of his use. Others may appropriate subject to his right.

4. SAME—WHAT CONSTITUTES.

Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use, and consummated without unnecessary delay.

5. SAME.—RIGHTS OF RIPARIAN OWNERS.

The rights of riparian owners in the waters of a non-navigable stream, as defined by the common law, do not exist in this territory. In Arizona, all the waters of non-navigable streams are devoted to agriculture by means of irrigation.

## 6. SAME—EVIDENCE—JUDICIAL NOTICE.

The courts take knowledge of the "local customs, laws, and decisions of courts" as to the use of water.

(*Syllabus by the Court.*)

Appeal from district court, Yavapai county; SHIELDS, Judge.

Bill filed by A. S. Clough to enjoin James E. Wing from using water from Granite creek, to his injury. Judgment for defendant, and plaintiff appeals.

*John A. Rush* and *E. W. Wells*, for appellant. *Herndon & Hawkins*, for appellee.

BARNES, J. This was a complaint filed by Clough in which he sought to enjoin defendant, Wing, from taking water from Granite creek, to his injury. He alleges that he has occupied a tract of land, about 200 acres, describing it, and has for some 15 years cultivated the same in cereals, and has set out orchards and vineyards, and that the same have by his husbandry become of great value; that except by irrigation these results could not have been accomplished, and without constant continuance of the same all would be lost; that in the year 1869 he located and appropriated sufficient of the waters flowing in Granite creek to properly irrigate the same by building flumes and digging canals in which to convey the said water from said creek upon his lands, and so he did convey the water from said creek, and did use said water as aforesaid until now; that, in 1884, defendant, knowing of plaintiff's prior right and appropriation of said water, settled upon and occupied lands on said creek above plaintiff, and placed dams and other obstructions to the flow of the water in said creek, and constructed flumes and ditches for the purpose of diverting said water, and irrigating his lands; that between the 15th and 29th of June, 1885, he was thereby deprived of sufficient water to irrigate his lands. He prays that defendant be perpetually enjoined from using any of the water of Granite creek when needed by plaintiff as aforesaid. Defendant sets up his appropriation of water in 1884, and his use thereafter of enough to irrigate his lands, and that he has made valuable improvements, set out orchards, etc., and he alleges that plaintiff's flumes and ditches were out of repair, and wasted the water; that plaintiff in 1885 made further and additional appropriation of water by widening and building up his dam, but so that the water seeped through the same, and was lost; and denies that the water appropriated and used by him hindered plaintiff in the use of the amount of water appropriated by him, and to the use of which he had a right. Issues were framed in the form of eight questions, and a jury was impaneled to try said issues. The evidence is very voluminous as to the amount of water flowing in Granite creek, and as to whether defendant's use deprived plaintiff of the water he needed; as to the capacity of his flume, etc.,—all directed to the question whether he was injured by defendant's use of the water. The jury answered the questions, but the court saw fit to disregard the verdict of the jury, which, as an issue out of chancery, could be only advisory, and decided the case.

The court found that the evidence showed that "at the time of the alleged wrong, and at all times since defendant went upon his lands, there was and has been water enough for both parties." A careful consideration of the evidence leads us to the same conclusion. This fact settled, the plaintiff had no right to the relief he sought. *Barnes v. Sabron*, 10 Nev. 217; *Atchison v. Petersen*, 20 Wall. 507; *Basey v. Gallagher*, Id. 670. In the former case the court say: "If the plaintiff did not require the full amount of his appropriation, he could not hold the defendant responsible in damages for not turning it down to him; he was only entitled to as much water within his original appropriation as was necessary to irrigate his land, and was bound under the law to make a reasonable use of it. In a dry, arid country like Nevada, where the rains are insufficient to moisten the earth, and irrigation becomes necessary for the successful raising of crops, the rights of prior appro-

priators must be confined to a reasonable and necessary use. The agricultural resources of the state cannot be developed, and our valley lands cannot be cultivated without the use of water from the streams to cause the earth to bring forth its precious fruits. No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law; and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. The law which recognizes the vested rights of prior appropriators has always confined such rights within reasonable limits." And in the latter case the same proposition: "For this right to water, like the right by prior occupancy to mining grounds, is not unrestricted. It must be exercised with reference to the general condition of the country, and the necessities of the people; and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual." Again, in the same opinion, it is further stated: "We think the rule is well settled, upon reason and authority, that, if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person or persons may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in the week, or during a certain number of days in a month, then defendants would be entitled to its use in the other days of the week or the other days in the month."

These cases state a doctrine very different from the common law. That law had its origin in the island of Great Britain, under conditions of climate peculiar to its position, in the path of the Gulf stream, in an atmosphere laden with moisture, which is precipitated with lavish profusion upon that favored spot. That law gave to the servient and dominant heritage the right to the natural flow of the water. The riparian owner might use the water in its course to turn his water-wheel, or for other purposes, but was required to restore the same to its natural course. While he might not hinder the flow so as to injure those below him, he might depasture his domestic animals so as to drink therefrom, and take water for domestic uses. He might not drain his land so as to increase the flood to injure those below, or dam the water back upon the lands above him. 1 Inst. 4; 2 Bl. Comm. 18; Ang. Water-Courses, 8; 3 Kent, Comm. 561; *Elliott v. Fitchburg Co.*, 10 Cush. 193; *Wright v. Howard*, 1 Sim. & S. 190; *Luz v. Haggin*, 4 Pac. Rep. 919; *Weiss v. Steel Co.*, 11 Pac. Rep. 255; *Hill v. Lenormand*, (Ariz.) 16 Pac. Rep. 266; *Ware v. Allen*, (Mass.) 5 N. E. Rep. 629; *Mason v. Cotton*, 4 Fed. Rep. 792; *Dumont v. Kellogg*, 29 Mich. 420; *Jones v. Adams*, (Nev.) 6 Pac. Rep. 442; *Pyle v. Richards*, (Neb.) 22 N. W. Rep. 370; *Van Orsdale v. Railway Co.*, (Iowa,) 9 N. W. Rep. 379; *Railway Co. v. Dyche*, (Kan.) 1 Pac. Rep. 243; *Red River Co. v. Wright*, (Minn.) 15 N. W. Rep. 167; *Creighton v. Irrigation Co.*, (Cal.) 7 Pac. Rep. 658; *Moore v. Clearlake Co.*, (Cal.) 5 Pac. Rep. 494; *Wilcox v. Hausch*, (Cal.) 3 Pac. Rep. 108; *Larimer Co. v. People*, (Colo.) 9 Pac. Rep. 794; *Garwood v. Railway Co.*, 83 N. Y. 400; *Railroad Co. v. Miller*, (Pa.) 3 Atl. Rep. 780; *Total v. Bonnefoy*, (Ill.) 14 N. E. Rep. 687; *Peck v. Herrington*, 109 Ill. 611. The problem there to be solved was how best to drain the water off the land, and get rid of it; not how to save it, to be conducted upon the land in aid of the husbandman. The latter has been the problem in the arid portions of the earth. From "time whereof the memory of man runneth not to the contrary," the rights of riparian owners were settled in the common law; and the right to appropriate and use water for irrigation has been recognized longer than history, and since earlier than tradition. Evidences of it are to be found all over Arizona and New Mexico in

the ancient canals of a pre-historic people, who once composed a dense and highly civilized population. These canals are now plainly marked, and some modern canals follow the track and use the work of this forgotten people. The native tribes, the Pimas and Papagoes and other pueblo Indians, now, as they for generations have done, appropriate and use the waters of these streams in husbandry, and sacredly recognize the rights acquired by long use, and no right of a riparian owner is thought of. The only right in water is found in the right to conduct the same through their canals to their fields, there to use the same in irrigation. The same was found to prevail in Mexico among the Aztecs, the Toltecs, the Vaquis, and other tribes at the time of the conquest, and remained undisturbed in the jurisprudence of that country until now. It existed, also, in Peru, though there the appropriation was by the state, which constructed and maintained the canals so as to provide water for the use of the tillers of the soil. The Spanish conquerors brought the same ideas with them from Spain, where they prevailed then as now. Escriche, tit. "Agua," §§ III., IV., and "Acequia." "The Lombard kings, following the Roman practice, encouraged and extended irrigation in Italy. From Lombardy the art extended to France; while the Moors encouraged it in Spain, Sicily, and Algeria." Ency. Brit. (9th Ed.) "Necessity required it in the districts which comprise parts of the south of Spain, Portugal, and Italy, including Sicily and Greece." Id. Ruins of ancient irrigating works are found in Spain. Id. In Egypt, and in some parts of Persia, India, and China, this form of husbandry has been practiced from time immemorial, and still continues. Under the civil law, water was *publici juris*, and by that law the "first person who chooses to appropriate a natural stream to a useful purpose has title against the owner of the land below, and may deprive him of the benefit of the natural flow of the water." Per DENMAN in *Mason v. Hill*, 5 Barn. & Adol. 1.

Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such systems; and a higher antiquity, a better reason, and more beneficent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil. Recognizing these principles, the act of congress March 26, 1866, extended them over the public domain wherever applicable; and all patents (16 St. U. S. § 17) to land are subject to these rights to the use of water. By that act it is provided that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." The legislature of Arizona at its first session, in 1864, enacted that (C. L. 3240) "all rivers, creeks, and streams of running water are hereby declared public, and applicable to the purposes of irrigation and mining; [3242] all the inhabitants who own or possess arable and irrigable lands shall have the right to construct public or private *acequias* [canals] and obtain the necessary water for the same from any convenient river, creek, or stream of running water;" (3243) and prohibits the obstruction of such canals, "as the right to irrigate the fields shall be preferable to all others." Up to about a third of a century ago, and but recently before this enactment, the territory of Arizona had been subject to the laws and customs of Mexico, and the common law had been unknown; and that law has never been, and is not now, suited to conditions that exist here, so far as the same applies to the uses of water. *Atchison v. Petersen*, *supra*; *Basey v. Gallagher*, *supra*; *McClintock v. Bryden*, 5 Cal. 100; *People v. Canal Appraisers*, 33 N. Y., 482; *Barnes v. Sabron*, *supra*; *Ophir Co. v. Carpenter*, 4 Nev. 534; *Loddell v. Simpson*, 2 Nev. 274; *Strait v. Brown*, 16

Nev. 317; *Crane v. Winsor*, 2 Utah, 248; *Schilling v. Rominger*, 4 Colo. 100; *Canal Co. v. Hoyt*, 57 Cal. 44. See *Lux v. Haggin*, 4 Pac. Rep. 919; *Judkins v. Elliott*, (Cal.) 12 Pac. Rep. 116; *Kaylor v. Campbell*, (Or.) 11 Pac. Rep. 301. For a discussion of the Mexican law, see *Lux v. Haggin*, 10 Pac. Rep. 705-719; Editorial Notes, (Pomeroy,) 1 and 2 West Coast Rep.

The "local customs" of the act of 1866, so far at least as it refers to rights to the use of water, is not a mere usage or custom, requiring proofs of undisturbed continuance beyond the memory of man. 1 Greenl. Ev. § 128. The courts take knowledge of them as of the public laws. "The general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognized, without proof, by the courts of all civilized nations." 1 Greenl. Ev. § 5, and cases cited. In *Atchison v. Petersen* the court, without proof, took knowledge of the existence of these customs; so, of judicial decisions. The court below did not err, therefore, in excluding the judgment roll offered by plaintiff; and the oral proof of local custom could do no harm, but was not necessary.

What constitutes such appropriation is largely a question of fact. The supreme court of California defines the word "appropriation" as follows: "This appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use," (*McDonald v. Bear River Co.*, 13 Cal. 220;) and the supreme court of Colorado, quoting, approves this definition. "When the individual, by some open, physical demonstration, indicates an intent to take for a valuable or beneficial use, and, through such demonstration, ultimately succeeds in applying the water to the use designed, there is such an appropriation." "While a diversion must of necessity take place before the water is actually applied to the irrigation of the soil, the appropriation thereof is, in legal contemplation, made when the act evidencing the intent is performed. Of course, such initial act must be followed up with reasonable diligence, and the purpose must be consummated without unnecessary delay." *Larimer Co. v. People*, (Colo.) 9 Pac. Rep. 794; *Lehi Co. v. Moyle*, (Utah,) 9 Pac. Rep. 867. We think the appropriation of water as alleged was clearly established by both plaintiff and defendant. The judgment is affirmed.

WRIGHT, C. J., concurs.

(2 Idaho [Habb.] 452)

HAYWARD v. BOLTON *et al.*

(*Supreme Court of Idaho*. March 6, 1888.)

Appeal from district court, Bear Lake county; before Justice HAYS.  
*Richard Z. Johnson*, for appellant. *Ensign & Stull*, for respondents.

BRODERICK, J. The same questions are involved in this case which were presented in the case of *Innis v. Bolton*, *ante*, 264, just decided by this court; and for the reasons given therein, and upon the authority of that case, the judgment of the court below in this case is hereby affirmed.

HAYS, C. J., and BUCK, J., concur.

(2 Idaho [Habb.] 397)

OREGON S. L. RY. CO. v. YEATES, Assessor.

(*Supreme Court of Idaho*. February 20, 1888.)

RAILROAD COMPANIES—TAXATION—MACHINE AND REPAIR SHOPS.

Where machine and repair shops are situate upon lands other than the right of way, but are connected with the main line of the railroad by side track, *held*, that under section 1463, Rev. St., they should be assessed by the local assessor rather than by the territorial board of equalization.

(*Syllabus by the Court*.)

Appeal from district court, Alturas county; before Justice BRODERICK.

Bill for injunction by Oregon Short Line Railway Company against W. W. Yeates, assessor of Alturas county. Injunction granted, and defendant appeals.

*V. Bierbower and R. Z. Johnson, for appellant. P. L. Williams, for respondent.*

HAYS, C. J. By the act of congress of March 3, 1875, (1 Supp. Rev. St. U. S. 187,) the right of way was granted through the public lands of the United States in this territory to any railway company duly organized under the laws of any state or territory, upon certain conditions, to the extent of 100 feet on each side of the center line of said road, "also grounds adjacent to such right of way for station buildings, depots, machine-shops, side tracks, turn-outs, and water stations,—not to exceed in amount twenty acres for each ten miles of road." The respondent company was duly organized, and obtained the right of way, under said act, through the lands of the United States in this territory, and built their road thereon. Section 1463 of the Revised Statutes of this territory is as follows: "The president, secretary, superintendent, or other principal accounting officers of any railroad or telegraph company having property in this territory, whether incorporated under the law of this territory or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list for assessment and taxation, verified by the oath of the person so listing, all the following described property belonging to said corporation within the territory, viz.: Road-bed, superstructure, right of way, and all structures situate thereon, rolling stock, side track, telegraph lines, furniture and fixtures, and personal property, belonging to such corporation. Such list shall contain, first, the number of miles of such railroad or telegraph line in the territory, and the number of miles of the same in each organized county therein; and such return must be made to the territorial comptroller on or before the 1st day of April, annually. If the return aforesaid be not received by said comptroller by the 3d day of April, he must thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for that same purpose may address a written communication to the corporation, or to some officer of the corporation, who has failed or refused to make the return aforesaid. As soon as practicable after the comptroller has received said return, or procured the information to be set forth in said return, a meeting of the territorial board of equalization, consisting of the governor, territorial treasurer, and comptroller, shall be held at the office of said comptroller; and the said board must then value and assess the property of said corporation for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of said road or line. In making up such valuation or assessment, the said board shall examine and consider the return herein required to be made, or the information procured by the comptroller in default of such return, together with such other reliable information relative thereto as they may be able to procure. Said board shall not assess the value of any machine-shop or repair-shop or other buildings not situated on said right of way or grounds or other real estate of any corporation or company within this territory; but it shall be the duty of the assessor of the county, city, or district in which said machine or repair shops, or other buildings or grounds, or other real estate is situated, to assess the same, and make return thereof, in the manner provided for the assessment and return of real estate belonging to individuals, on or before the second Monday of May, or as soon thereafter as the said board, or any two thereof, shall have made and determined said valuation and assessment. The territorial comptroller must certify to the clerks of the boards of county commissioners of the several counties in which property of the aforesaid corporations, or any part thereof, may be situated, the assessment



per mile so made on the property of any such corporation, specifying the number of miles, and amount, in each of said counties. The county commissioners must thereupon divide and adjust the number of miles, and the amounts, falling within each precinct, city, town, school-district, or other division, in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property, or assessment rolls, returned by the several assessors. The comptroller must certify whether a return was made to him by such corporation, or proper officer thereof, or whether the information required in and by such returns was procured by himself; and in case the return was not made as required by this act, or, being made, was not sworn to, it is the duty of the county commissioners to add any amount not exceeding ten per cent. to the valuation thus brought before them."

The officers of the railroad company, in listing its property, pursuant to this statute, for assessment by the territorial board of equalization, listed, together with their road and right of way, the machine and repair shops, and the other property described in the complaint, which is situate at Shoshone in Alturas county. The said board assessed the right of way, and such property as they found to be thereon, but did not assess the property described in the complaint, because they thought the same was not upon the right of way, and that they had no authority, under the statute, to do so, and notified the assessor of Alturas county of this fact. The county assessor then assessed the same, and made return thereof. The respondent then brought this action to restrain this appellant from assessing or collecting any tax on the property described in the complaint. The case coming on to be heard, the facts were stipulated as follows: "(1) It is hereby stipulated, by and between the parties hereto, that the machine and repair shops, round-house, and other buildings, mentioned in the pleadings herein, and situated at Shoshone station, in said county, are more than one hundred feet from the main track of plaintiff's railway, and within four hundred feet thereof; that the said main track, at and near shops and other buildings, runs in an easterly direction, and said shops are on the south side of said main track; that there are three side tracks, running through or near said shops and buildings, which are united, by means of switches, both to the east and west thereof, into a single side track; and such single track unites, by means of switches, with the said main track both east and west of said shops. (2) That said side tracks, so extending to, through, and near said shops and other buildings, afford the means of running locomotive engines and cars from said main track into and out of the said shops and round-house, and connect with a turn-table situate between said main track and said round-house, constructed and used for the purpose of turning engines. (3) That said side tracks, so extending to said shops, round-house, and turn-table, and the said turn-table and buildings, are used by the plaintiff for changing its engines and cars, affording the means of necessary repairs, and also to enable the plaintiff to supply its engines with coal from a large coal platform situated west of and near to said shops, and on either side of which there is one of said tracks extending to and near said shops and other buildings. (4) That said shops, round-house, turn-table, and tracks leading thereto, are used by the said plaintiff exclusively with, and in connection with, the operation of its said railway, and are necessary for such operation, but are not used for the purpose of running trains over the same, or for the transaction of its business as a common carrier." The injunction prayed for was granted, and an appeal taken to this court.

We are now called upon to construe the statute above quoted, so far as it relates to this action. In construing statutes of this nature, Judge Cooley, in his very excellent work on taxation, says: "The underlying principle of all construction is that the intent of the legislature should be sought in the words employed to express it; and that when found it should be made to govern not only in all proceedings which are had under the law, but in all

judicial controversies which bring those proceedings under review. Beyond the words employed, if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent, but the legislature must be understood to intend what is plainly expressed; and nothing then remains but to give the intent effect." *Cooley, Tax'n*, (2d Ed.) 264. We fully approve the above rule of construction. It is contended by respondent that a statute almost identical with ours has been construed by the supreme court of the United States in *Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. Rep. 601. If such was the case, we would follow the construction placed upon it by that court, implicitly. After a careful examination of that case, we do not so understand it. There the territorial board of equalization had assessed the right of way, as it was clearly their duty to do; but the city authorities, disregarding such assessment, sought by virtue of their corporate power to assess the same property, and the question there litigated was as to which assessment was correct. The court there holds in favor of the assessment by the territorial board of equalization. We do not understand that the question in the suit at bar was litigated in that case. We presume that all of the machine-shops and other buildings there assessed were upon the right of way, otherwise the territorial board would not have assessed them. The respondent contends, however, that notwithstanding the property described in the complaint herein is not upon any of the lands obtained by congressional grant, and is more than 100 feet from the center line of said road, yet, because said machine-shops, repair-shops, etc., are connected with the main track of their road by switches and side tracks, that therefore the land upon which they stand all becomes right of way, and should be assessed as such, and, in support of this claim, cites us to *Keener v. Railway Co.*, 31 Fed. Rep. 126; *Pfaff v. Railway Co.*, 29 Amer. & Eng. R. Cas. 181; *Railway Co. v. Goar*, Id. 189. In the first case the court says: "The term 'right of way' has a twofold signification. It sometimes is used to mean the mere intangible right to cross,—a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its road-bed." They there only determine how it is used in their statute, and how the term is to be construed under the facts in that case. In the last two cases cited, the courts hold, in substance, that, under the revenue laws of their respective states, the term "railroad track" includes lands occupied by a railroad company with its main track, side tracks, depot, round-houses, coal sheds, and water-tanks. The reason for so holding is because they are so designated by their statutes. Hence they give us no light, except perhaps to impress upon our minds the necessity of looking to our own statutes to ascertain the true legislative intent. If the position taken by respondent is correct, then, as a sequence therefrom, we must give no force or effect to that portion of the legislative enactment which provides that the territorial board shall not assess any machine or repair shops not situate on said right of way, but that it shall be the duty of the assessor to assess the same,—unless we further find that the legislature presumed that the railroad company would have machine and repair shops which would not be connected with the main track by some kind of a railroad track. It is our duty to give force and effect to all parts of the enactment, where we can. It follows, we think, that the legislature intended that where the railroad owned machine and repair shops, or other buildings, not situate on that strip of land designated by the act of congress as a right of way, or where they owned other grounds than the right of way, that the assessor should assess the same, and that it should not be assessed by the territorial board. Of course, if the railroad company had obtained the strip of land 200 feet wide, or less, for constructing its main line or buildings thereon, through private property, it would still be "right of way," and assessed, with buildings thereon, by the territorial board. We do not think that the legislature expected the railroad

company to have machine-shops and repair-shops without having a track to connect the same with the main line; and when they enacted that the territorial board "shall not assess the value of any machine-shop or repair-shop or other buildings not situate on said right of way or grounds or other real estate of any corporation or company within this territory, but it shall be the duty of the assessor of the county, city, or district in which said machine or repair shops or other buildings or grounds or other real estate is situated to assess the same," their intent seems plain, and that, under the facts of this case, we must therefore hold it was the duty of this appellant to assess the property in controversy. It has been ably argued that it would be better that the territorial board should assess all railroad property. Conceding such to be the case, that argument should be addressed to the legislature rather than the court; for it is not our province to pass upon the wisdom of the enactment, but rather to give effect to the legislative intent.

For the reasons before given we think the judgment of the district court should be reversed. It is so ordered.

BUCK and BRODERICK, JJ.. concurring.

(23 Or. 10)

*In re Estate of HOUCK et al.*

(Supreme Court of Oregon. February 29, 1888.)

1. EXECUTORS AND ADMINISTRATORS—SALES OF REAL ESTATE—APPLICATION—RIGHTS OF HEIRS.

At the hearing by the county court of an administrator's application to sell his intestate's real estate to pay unsatisfied claims against the estate, as provided by Code Or. 1874, §§ 1110, 1118, 1117, parties claiming to be heirs can show only relevant causes why a sale should not be made, and cannot raise questions of heirship, or object to any delay or irregularity in the settlement of the estate, and the court being satisfied that there are outstanding claims, and that the personal property is exhausted, should order a sale of so much of the real estate as will satisfy said claims.

2. SAME—ALLOWANCE OF CLAIMS—DEBT DUE ADMINISTRATOR.

The fact that an administrator has not filed his undertaking as administrator is no valid objection to the allowance by the county court of a claim held by him against the estate.

Appeal from circuit court, Linn county.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Linn, affirming a decision of the county court for said county in probate proceedings. It appears from the transcript that Henry Meyer, on the 17th day of June, 1875, died, at said county of Linn, intestate; that at the time of his death he was a resident of said county; was a partner with one Christopher Houck, under the firm name of Houck & Meyer, and was seized and possessed of real and personal property, a part of which he owned individually; but the greater part thereof belonged to the firm of Houck & Meyer; that he left no widow, or known heir; that he was a German by birth, but had resided in the state for nearly 20 years; that on the 22d day of June, 1875, J. A. Crawford, of said county, applied to the said county court to be appointed administrator of the individual estate of the deceased, and was accordingly appointed administrator thereof; that he thereupon duly qualified as such administrator, and filed an inventory, including both the individual and partnership estate; that said Houck failed to apply to be appointed administrator of the said copartnership estate within the time required by law; whereupon the administration thereof devolved upon said Crawford, as provided in the statute; but he failed to file his undertaking as administrator of the copartnership estate until the 8th day of May, 1877; that on the 15th day of September, 1881, said Crawford, as administrator of the copartnership estate, filed his petition to the said county court for an order of sale of the real property belonging thereto; that a citation to the heirs to show cause why

such sale should not be made was duly issued and served by publication; that at the time specified in said citation for showing cause as therein required, Maria Agnes Meyer, Casper Henry Meyer, John Frederick Meyer, Bernard G. A. Meyer, John Casper Henry Meyer, Anna Sophia Meyer, and Maria Engle Meyer, claiming to be the brothers and sisters of, and that they were next of kin to, the intestate, appeared in the said proceedings, and filed a long list of objections to the granting of the said petition, including a number of charges against the conduct of the administrator in administering upon the estate. This apparently unlooked-for and unexpected event seems to have aroused so much antagonism that it quite distracted the course of proceedings upon the petition. The county court evidently forgot its duty to proceed, inquire, and find whether it was necessary that the real property, or any portion thereof, should be sold, and that the finding involved only an ascertainment whether the proceeds of the sale of personal property had been exhausted, and the legitimate charges, expenses, and claims had not all been satisfied, and that such finding could be made irrespective of the question as to who the heirs of Henry Meyer were, or whether he had heirs or not. All hands seemed to think that it was necessary, at this important juncture, to stop all inquiry which the statute requires to be made in such cases, and engage at once in ascertaining whether the seven persons named, late of Germany, were the right heirs to the estate, or mere pretenders. No immediate distribution of the estate was contemplated, nor was likely to be made soon, yet the parties representing it, and those claiming an interest in it, proceeded energetically to make up extensive and formal issues involving principally the question whether these Germans were or not of the same stock with the deceased, and to take the depositions of a great number of witnesses upon that point, occupying a period of four or five years in that vain pursuit. Such fact may have to be determined at the final winding up of the estate and termination of the proceedings connected therewith, but it is time enough, as has been said, to cross a stream when you get to it. The inquiry was entirely premature and unnecessary. When these parties appeared, claiming to be the heirs of the intestate, they should have been admitted to show any relevant and pertinent cause why a sale of the real property should not be made in accordance with the petition, without questioning their heirship. Such a course would not have enlarged the duties of the county court in the premises. It would have assisted the court in ascertaining the facts necessary for it to know, and which it was required to find, before granting the order applied for, whether any one appeared to show cause against it or not. Heirs do not admit the facts alleged in the petition, in such cases, by not appearing, and it is only to afford them an opportunity to point out objections to granting it, which the court might overlook, that they are notified to appear. This court will not undertake to determine from the evidence whether or not the parties alluded to are the heirs of Henry Meyer. Nor was it necessary for the circuit or county courts to make any such determination. The only question for this court to decide is whether or not the county court should have found that it was necessary to order a sale of the real property of the deceased, or any part of it. If the proceeds of the sale of the personal property had become exhausted, and there were still funeral charges, expenses of administration, or claims against the estate, which had not been satisfied, it was certainly the duty of the county court to make the order to sell the real property, or a sufficient part thereof, to liquidate any balance of such charges, expenses, or claims. Sections 1110, 1113, 1117, Code 1874, provide to that effect, and the county court had no right to go outside of their provisions. It was contended at the hearing that the administrator had procrastinated the business of settling the estate to such an extent that the county court was justified in denying the application for the order of sale of the real property upon that ground. That may be the rule in some of the other states, but it is not the rule under our procedure. There is

no limitation in this state as to the time when a claim against the estate of a deceased person may be presented, nor as to when such an application is required to be made. The county court has jurisdiction over the proceedings of administrators, and authority to direct and control their conduct and settle their accounts, (subsection 3, § 869, Code 1874,) and the court is always open for the transaction of such business, (section 877, Id.) If any delay, therefore, has occurred in the administration of this estate, the administrator is not alone chargeable with it. Parties interested in the estate could very easily have had his movements expedited, and the court could have done so of its own motion. Another question contended for on the hearing was that the administrator's personal claim against the estate, amounting to \$3,000 and interest, included in the schedule annexed to his petition, had never been legally allowed, and was barred by the statute of limitations at the time the petition was filed. It appears that the administrator, on the 1st day of July, 1876, presented the claim to the then county judge of Linn county for allowance, and that such judge duly allowed it as a claim against the said estate; but counsel for the respondents insist that as the administrator had not at that time filed his undertaking as administrator of the partnership estate, he was not, under the statute, authorized to act as such, and that the county judge referred to had no authority to allow it. But I do not think it follows that because the administrator was not allowed to act as such, that he could not have his claim against the estate allowed. He was, nevertheless, the legal administrator of the partnership estate; became such by virtue of his being administrator of the individual estate; and while he may not have had the right to enter upon the discharge of the duties of his trust until he gave the required security, yet that would not prevent him from presenting his own claim to the county judge for allowance, nor deprive that officer of his authority to allow it. The question, to my mind, is clearly untenable. I am satisfied from an examination of the petition, schedule accompanying it, and the evidence relating thereto, that the county court should have granted the order to sell at least a part of the real property in order to discharge the residue of the claims against the estate; as to what part thereof should be required to be sold for that purpose, the county court can judge much more intelligently than this court is able to. And, probably, as the estate is partnership property, and must eventually be sold or partitioned between the partners, it would be better to order it all sold.

The judgments of the circuit and county courts will be reversed, and the case remanded for further proceedings in accordance with this opinion.

STRAHAN, J., was an attorney in this case in the court below, and took no part in its hearing in supreme court.

(38 Kan. 368)

**JEWELL et al. v. SIMPSON.**

(*Supreme Court of Kansas. March 10, 1888.*)

**1. CHATTEL MORTGAGES—RECORDING AFTER LEVY OF EXECUTION.**

Where a chattel mortgage is not deposited in the office of the register of deeds, as prescribed by the statute, until after a judgment creditor of the mortgagor levies upon the property described therein, and the mortgagee has no possession of the property mortgaged, the chattel mortgage is void as against the creditor obtaining a lien by his execution and levy. Section 9, art. 2, c. 68, Comp. Laws 1885; *Ramsey v. Glenn*, 33 Kan. 271, 6 Pac. Rep. 265.

**2. SAME—BY MORTGAGOR HAVING NO INTEREST IN THE PROPERTY.**

A chattel mortgage signed and executed by a firm having no title or interest in the property therein described does not convey or transfer the legal or equitable title of the property to the alleged mortgagee.

**3. SAME—REFORMATION—PARTIES.**

In an action to recover damages for alleged conversion of personal property which the plaintiffs claim by virtue of a chattel mortgage, such mortgage cannot be reformed, when the persons sought to be made liable on the instrument when reformed are not parties to the action.

Error to superior court, Shawnee county; W. C. WEBB, Judge.

Application for rehearing. For former opinion, see 16 Pac. Rep. 450.

*Jetmore & Son*, for plaintiff in error. *Rossington, Smith & Dallas* and *P. L. Soper*, for defendant in error.

PER CURIAM. Counsel for plaintiffs in error have forcibly presented a motion for rehearing in this case. We reiterate what was stated in our former opinion, and are satisfied that the law is correctly declared therein. But further in this action the chattel mortgage, under which plaintiffs in error claim possession, cannot be reformed, as George and Harry Davis are not parties in the court below. We cannot say that "Davis and Sons" are bound by a chattel mortgage which they did not sign, even if executed by mistake, unless they are parties to the record, with opportunity to contest.

JOHNSTON, J., having been of counsel, took no part in the decision.

(38 Kan. 668)

#### BLACKMAN v. WEBB.

(*Supreme Court of Kansas. March 10, 1888.*)

##### ATTORNEY AND CLIENT—RETAINING FEE.

Whenever an attorney and counselor at law is employed generally to prosecute or defend in an action, he may, after the action has been terminated, recover from his client a retaining fee, although the contract of employment did not expressly or specifically mention a retaining fee.

(*Syllabus by the Court.*)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

*Waters & Chase*, for plaintiff in error. *Webb & Spencer*, for defendant in error.

VALENTINE, J. This was an action brought by Leland J. Webb against L. Blackman to recover for a retainer as an attorney and counselor at law. The case was tried before the court and a jury, and the jury found in favor of the plaintiff and against the defendant, finding the value of the retainer to be \$100, and also that the plaintiff had performed services for the defendant, in pursuance of such retainer, to the value of \$25, and the court rendered judgment in favor of the plaintiff and against the defendant for \$100, for the retainer only, and nothing for the services; and to reverse this judgment, the defendant, as plaintiff in error, brings the case to this court. The only question presented to this court is whether an attorney at law is entitled to recover a retaining fee where he sues only for the retaining fee and not for services, and where no express or specific contract has been made for a retaining fee, but only a general contract for the services of the attorney in defending in one action already commenced, and in prosecuting in another action in contemplation. The word "retainer," when used in the place where we are now using it, is defined as follows: "The act of a client by which he engages an attorney or counselor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant. The retaining fee." Bouv. Law Dict. "Retainer." "The act of employing or engaging an advocate, barrister, attorney, counselor, solicitor, or proctor, to appear and prosecute or defend. The word is also used for the notice served by an attorney, etc., on the opposite party or attorney, that he has been retained, in which use it is by elision for notice of retainer; and for the fee paid to a lawyer upon his undertaking a cause, in which use it is by elision for a retaining fee." Abb. Law Dict. "Retainer." It will be seen that the word "retainer" as used in cases of this kind means: *First*, the act of the client in employing his attorney or counsel; *second*, the notice of the retainer served upon the opposite party or his attorney; *third*, the retaining fee. We think the action may be

maintained, and the case of *Perry v. Lord*, 111 Mass. 504, is sufficient authority therefor. A retainer may be inferred from the circumstances of the case, (1 Amer. & Eng. Cyclop. Law, 953; Weeks, Attys. 340, and cases there cited;) and the right to a retainer fee follows every retainer. When an attorney is engaged to prosecute or defend in an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. He is retained by his client for that entire action; and whether his client may ever call upon him to perform services or not, he cannot perform services in that action for the adverse party, nor can he receive any fee or compensation from the adverse party. All his skill and ability for that case is at the command of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney; and whether the attorney is ever called upon to perform any services or not, in that case he may, when the case is terminated, recover for whatever the evidence shows the retainer was worth. Whether he may in any case recover a retaining fee and also an additional amount for his services we are not now called upon to determine. And neither are we called upon to determine whether he could in any case recover as a retaining fee more than his entire services would be worth if he should devote his services to the entire case, and through all its stages, from the beginning to the end. All that we are now required to determine is whether he can recover a retaining fee at all, in a case where no such fee was expressly and specifically contracted for, but only a general contract of employment was made. We hold that he can recover. The judgment of the court below will be affirmed.

All the justices concurring.

(39 Kan. 37)

BROWN *et al.* v. CITY OF ATCHISON.

(Supreme Court of Kansas. March 10, 1888.)

1. MUNICIPAL CORPORATIONS—INDEBTEDNESS—REFUNDING—ADDITIONAL BONDS—VALIDITY.

Where a city of the second class refunds a portion of its outstanding bonded indebtedness at 60 cents on the dollar, under a statute (chapter 89, Laws 1877) which permits the city to refund such indebtedness at only that rate; and at the same time, and as a part of the same transaction, the city enters into a contract with the holders of the original bonded indebtedness to issue still other and additional bonds on the same bonded indebtedness, and to deposit such additional bonds with a third party, to be afterwards delivered to the holders of the original bonded indebtedness, and to become valid and binding instruments upon certain contingencies; and such additional bonds are so issued and deposited: *held*, that both the contract and the additional bonds are void.

2. SAME.

And, for reasons given in the opinion, *held*, that such contract and additional bonds are also void under other statutes.

3. SAME—ULTRA VIRES CONTRACT—EQUITABLE RELIEF.

Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it, or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed, in whole or in part, by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render, and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract, and placing the other party *in statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit.

4. SAME—DOCTRINE APPLIED TO INVALID BONDS.

And *held*, under the circumstances of this case, that, although the contract and the additional bonds in this case are void, the city must account to the holders of

the original bonded indebtedness for all benefits received by it for which it has rendered no equivalent; and this, as nearly in accordance with the contract as the law and equity will permit.

(*Syllabus by the Court.*)

Error to district court, Shawnee county; DAVID MARTIN, Judge.

This was an action brought in the district court of Atchison county on March 26, 1883, by the city of Atchison against William Hetherington and Webster W. Hetherington, partners as Wm. Hetherington & Co., to have certain bonds of the city of Atchison, 20 in number, and each for \$500, amounting in the aggregate to \$10,000, canceled and declared null and void for illegality in their execution, and for want of consideration. On December 12, 1883, the defendants answered, setting forth the circumstances under which the bonds were placed in their hands; that they had no interest in the bonds except as trustees; that J. P. Brown and Frank Bier, partners as Brown & Bier, were the real owners of the bonds; and that there could not be a complete determination of the questions involved in the controversy without Brown & Bier being made parties, and asking that they should be so made parties. Also Brown & Bier appeared, and asked to be made parties defendant, which was granted; and on January 8, 1884, they filed their answer and cross-petition, setting forth, in substance, among other things, the following: On August 23, 1879, Brown & Bier owned bonds of the city of Atchison amounting to \$49,943.95, which, by way of compromise, they permitted to be refunded by the city of Atchison at the rate of 60 cents on the dollar. At the same time, and as a part of the same transaction, they, with the city of Atchison, entered into a certain contract, in pursuance of which the bonds in controversy were issued, and placed in the hands of Wm. Hetherington & Co. as trustees; and it is alleged that the city of Atchison has violated such contract in various particulars, whereby it has become liable to Brown & Bier; and therefore they pray that judgment may be rendered against the city of Atchison—*First*, that its petition against Wm. Hetherington & Co. be dismissed; *second*, that the city of Atchison be decreed to specifically perform the aforesaid contract, and to issue further bonds to Brown & Bier to the amount of \$19,977.58, with 7 per cent. interest from July 1, 1879, or that judgment be rendered in favor of Brown & Bier, and against the city of Atchison for that amount; *third*, or, if such judgment cannot be rendered, then that judgment be rendered in favor of Brown & Bier, and against the city of Atchison, for the sum of \$70,000, or that the city return to Brown & Bier the original bonds and coupons delivered by them to the city in the same condition in which they were when delivered, and for other relief. Full replies were filed by the plaintiff to the answers of the defendants. The case was afterwards tried before the court without a jury; and the court made special findings and conclusions of fact and law, and on May 29, 1886, rendered judgment in favor of the plaintiff, and against the defendants, that the bonds in controversy be delivered up, and canceled, and held for naught, and that Brown & Bier be forever enjoined from setting up or claiming any right or interest therein or thereto; and, to reverse this judgment, Brown & Bier, as plaintiffs in error, bring the case to this court, making the city of Atchison the defendant in error. The contract between the city of Atchison and Brown & Bier, as shown by the pleadings and the findings of the court, reads as follows:

"Whereas, the partnership firm of Brown & Bier now hold general funding bonds, and judgments on coupons from the general funding bonds of the city of Atchison, Kansas, amounting in the aggregate to the sum of \$49,943.95; and whereas, the city of Atchison is indebted to divers and sundry other parties who now hold the bonds of the said city of Atchison; and whereas, the said city of Atchison has offered to compromise the said bonds and judgments now held and owned by the said Brown & Bier upon a basis of 50 cents and 10 per cent. commission on the dollar of said amount of \$49,943.95, by issuing to



said Brown & Bier refunding bonds of the said city of Atchison, due in 20 years from July 1, A. D., 1878, with interest at 7 per cent. per annum, payable semi-annually; and whereas, the said Brown & Bier have accepted the said proposition of the said city of Atchison to compromise the said amount of bonds and judgments by them held and owned at 60 cents on the dollar, as aforesaid, in refunding bonds of the city of Atchison, upon the following terms and conditions, to-wit: *First.* The said city of Atchison is to deliver to said Brown & Bier refunding bonds of the city of Atchison in an amount equal to sixty per cent., as aforesaid, of the said sum of \$49,943.95, the receipt of which said refunding bonds is hereby acknowledged. *Second.* If the said city of Atchison shall, at any time within five years from this date, compromise any of its bonded indebtedness now outstanding, by issuing refunding bonds of said city in any amount in excess of sixty cents, as aforesaid, on the dollar on any bond compromised, or shall levy or cause to be levied a tax to pay any amount due in excess of 60 per cent. thereof, then and in that event the said city of Atchison is to issue and deliver to Brown & Bier refunding bonds of the city of Atchison in an amount equal to what such per cent. in excess of sixty per cent. on any bonds so compromised would amount to on the sum of \$49,943.95, and interest on such excess at 7 per cent. from July 1, 1879: Now, therefore, for the purpose of fulfilling the terms and conditions of this agreement obligatory upon the said city of Atchison, the said city of Atchison has caused to be issued and properly executed ten thousand dollars of the refunding bonds of said city, a schedule of which is hereto attached as part hereof; and, by agreement of the parties hereto, the said city of Atchison has deposited said ten thousand dollars of refunding bonds of said city, so executed and issued as aforesaid, with Wm. Hetherington & Co., of the city of Atchison, in escrow, there to remain for and during the period of five years from date thereof, unless sooner delivered to said Brown & Bier under the terms of this agreement; that is to say, that if the said city of Atchison shall, at any time before the expiration of five years from date hereof, compromise any of its outstanding bonded indebtedness at any sum in excess of sixty cents, as aforesaid, on the dollar, or shall, at any time within such period, levy or cause to be levied a tax to pay any bonds, coupons, or judgments against the city on any of its outstanding bonds or coupons in excess of sixty per cent., as aforesaid, of the amount due thereon, then and in that event the said Wm. Hetherington & Co. are authorized to deliver to the said Brown & Bier, out of the said bonds so deposited with them under this agreement, such an amount thereof of the face value equal to what such per cent. in excess of sixty per cent. would amount to on the sum of \$49,943.95, and interest on such excess at 7 per cent. from July 1, 1879. And it is further agreed that the condition upon which said Hetherington & Co. shall deliver said bonds to Brown & Bier, under this contract, shall be the official records of said city of Atchison, if said city shall keep a record of each compromise of said bonds. Should the city of Atchison levy tax to pay interest on bonds, judgments, and coupons, then the record of such levy shall be the evidence. Said Hetherington & Co. shall give written notice to the mayor of said city at least ten days before any bonds shall be delivered under this agreement. This contract shall not remain in force beyond the expiration of five years from date hereof, at which time all such bonds deposited with said Wm. Hetherington & Co., under this agreement, not used under the terms hereof, shall be surrendered to said city for cancellation. It is further mutually agreed between the parties hereto that said Brown & Bier and the said city of Atchison shall act in good faith towards the other as to the subject-matter hereof; and the said Brown & Bier agree that they will not in any way interfere with the said city of Atchison in its attempt to compromise its outstanding indebtedness, and further agree that they will faithfully labor to bring about and effect a compromise of the indebtedness of said city at a sum not to exceed sixty cents, as aforesaid, on

the dollar, at the earliest practical period, and should they fail to do so they forfeit all right under this contract, and said bonds shall be returned to said city of Atchison upon demand therefor; but the said Brown & Bier do not obligate themselves to effect any settlement of said indebtedness.

"In witness whereof the said city of Atchison, by its mayor, hereto fully authorized by bond committee, has caused these presents to be executed, and caused the same to be attested by the corporal [corporate] seal of said city, and said Brown & Bier have hereunto affixed their signatures, this 23d day of August, 1879.

[Seal.]

"THE CITY OF ATCHISON, KANSAS,

"Per JOHN C. TOMLINSON, Mayor.

"BROWN & BIER."

Each of the bonds deposited with Wm. Hetherington & Co., except as to number, and each of the refunding bonds, except as to number and amount, as is shown by the pleadings and the findings of the court, reads as follows:

"[Number]	UNITED STATES OF AMERICA.	[Dollars]
"114.	[State Seal.]	\$500.

"*State of Kansas, County of Atchison, City of Atchison. Refunding Bond.*

"Know all men by these presents that the city of Atchison, (a city of the second class,) in the county of Atchison and state of Kansas, for value received, hereby promises to pay to the bearer on July 1, 1898, at the office of the treasurer of said city, the sum of five hundred dollars, with interest thereon from date until paid at the rate of 7 per cent. per annum, payable semi-annually on January 1st and July 1st of each year, at the office of the treasurer of said city, on presentation of the proper coupons hereto attached, and at the times therein mentioned, respectively. This is one of a series of bonds of like tenor and date, of the denominations of \$50, \$100, \$500, and \$1,000, respectively, amounting in the aggregate to three hundred and thirty-three thousand dollars, (\$333,000,) issued for the purpose of refunding the entire bonded indebtedness of said city of Atchison, under and by virtue of the laws of the state of Kansas, and the provisions of an act of the legislature entitled 'An act to enable cities of the second and third classes to refund their indebtedness,' approved March 3, 1877, being chapter 89 of the Acts of the Legislature of Kansas for 1877; the mayor and council of said city of Atchison having duly determined at what per cent. said indebtedness should be refunded, and said issue of bonds being made in every respect in conformity with law.

"Executed and issued at said city of Atchison, in Atchison county, Kansas, by order of the mayor and council of said city, and signed by the mayor and clerk, and attested with the seal of said city, this 1st day of July, A. D. 1878.

[Seal of the City of Atchison.]

[Signed] "JOHN C. TOMLINSON, Mayor of the City of Atchison.

[Signed] "THOS. J. WHITE, Clerk of the City of Atchison."

Coupons, substantially the same in form, for the semi-annual interest payable on said bonds, were attached to each of the bonds, to those deposited with Wm. Hetherington & Co. as well as to those delivered to Brown & Bier.

*Waggener, Martin & Orr*, for plaintiff in error. *Wm. R. Smith*, for defendant in error.

VALENTINE, J., (*after stating the facts as above.*) On August 23, 1879, Brown & Bier owned bonds of the city of Atchison, which was then a city of the second class, amounting in the aggregate, principal and interest, to the sum of \$49,943.95, which, by an agreement with the city, were refunded at the rate of 60 cents on the dollar; Brown & Bier receiving in new or refunding bonds \$29,950, and in money \$16.37. Also, as a part of the same transaction, other new or refunding bonds to the amount of \$10,000 were issued by the city of Atchison, and deposited with Wm. Hetherington & Co. as trustees, to be held by them in escrow for a time not exceeding five years, subject

upon certain conditions and contingencies set forth in a written contract made between the parties at the same time, and as a part of the same transaction, to be finally delivered, in whole or in part, to Brown & Bier, or to be returned, in whole or in part, to the city of Atchison; such delivery or return to depend entirely upon the conditions and contingencies set forth in said contract. All these new or refunding bonds, the ones deposited with Wm. Hetherington & Co. as well as the others, as is shown upon their face, and as is also shown by the findings of the court below, were issued under chapter 89, Laws 1877. That chapter, so far as it is necessary to quote it, reads as follows:

"Section 1. Every city of the second and third class is hereby authorized to take up and refund all its matured and maturing bonds issued on account of any subscription to the capital stock of any railroad company, or for any other purpose, including all accrued interest thereon, and judgments rendered on any such bonds, and interest.

"Sec. 2. The bonds issued under this act shall be at the rate of not exceeding sixty cents for each dollar of said indebtedness, and shall bear seven per cent. interest per annum, payable semi-annually on the first day of January and July of each year, with proper coupons attached for such interest; be signed by the mayor and clerk, and attested with the seal of the city. \* \* \* Said bonds shall be due and payable twenty years after date thereof."

The first question presented in this case is whether the aforesaid written contract is valid or not. Is it valid under the act under which the new bonds were issued? In our opinion it is not. Under that act, a city is not authorized to issue refunding bonds at a rate greater than 60 cents on the dollar. Under that act, it would seem that all refunding bonds issued in excess of 60 cents on the dollar, and all contracts therefor, with or without reference to any conditions or contingencies, would be void. It would therefore seem that all that part of the aforesaid contract providing that bonds might be issued or delivered in excess of 60 cents on the dollar is void, and the bonds themselves so issued are also void; and, further, the natural tendency of the aforesaid contract would be to prevent the city from compromising or refunding any of its remaining bonded indebtedness at a rate exceeding 60 cents on the dollar, notwithstanding the fact that chapter 50, Laws 1879, which was then in force, provides that any city may compromise and refund any of its indebtedness at an amount greater or less than 60 cents on the dollar, and at an amount up to the actual amount of the indebtedness. If this contract is valid, then its tendency would be to virtually repeal the foregoing statute, so far as the city of Atchison is concerned. See, also, section 36 of the second-class city act, as amended by section 1 of chapter 67 of the Laws of 1873. Also the tendency of the contract would be to prevent the city of Atchison from levying a tax to pay any amount due on its outstanding bonded indebtedness in excess of 60 per cent. thereof. This is also in contravention of law, and against public policy; for every holder of every one of the city's bonds had the unimpeachable right to require that the city should levy an amount of tax sufficient to pay the entire amount of his bond, and no bondholder was required by any law to compromise with reference to his bond or bonds, or to take anything less for his bond or bonds than the full face value thereof, with all the interest thereon. It was always purely discretionary with every bondholder as to whether he would accept any proffered compromise or not, or any proffered privilege of refunding his bond or bonds or not, or whether he would require payment thereof according to the very terms thereof; and it will be presumed that the bondholders would always consult their own best interests in all transactions of this kind.

But it is claimed that if the contract and bonds would be void under chapter 89, Laws 1877, still that they are valid under chapter 50, Laws 1879. To this it may be answered that they were not made or issued under that act, but were made and issued under the act of 1877, but in violation of some of the provis-

ions of both acts. There are many differences existing between the two acts. The act of 1877 provides for refunding bonds by issuing others in their place at a rate not to exceed 60 cents on the dollar, due in 20 years, and drawing interest at the rate of 7 per cent. per annum. The act of 1879 provides for compromising and refunding any kind of indebtedness by issuing refunding bonds at any rate not exceeding the actual amount of the indebtedness, due at any time agreed upon, not exceeding 30 years, and drawing interest at any rate not to exceed 6 per cent. per annum; and the refunding bonds must contain a recital that they were issued under the act of 1879, and when they are issued the transaction is closed; and, if they are issued at a rate not exceeding 65 per cent. of the indebtedness, the city, in that case, shall never increase its indebtedness beyond the amount of the refunding bonds until they are paid or liquidated, and any indebtedness created over and above the "amount of the refunding bonds shall be absolutely null and void." It will be seen that there are many advantages and many disadvantages in refunding under one act or under the other, and a great room for choice. Brown & Bier, however, chose to refund under the act of 1877, and in doing so they failed in several particulars to comply with the provisions of the act of 1879. They took refunding bonds drawing interest at the rate of 7 per cent. per annum, when the act of 1879 says the interest shall not exceed 6 per cent. per annum. The act of 1879 provides that the bonds "shall contain a recital that they are issued under this act;" the bonds in the present case contain a recital that they were issued under the act of 1877. The act of 1879 contemplates that when the bonds are issued the transaction shall be closed, and that the city shall not further increase its indebtedness where the original indebtedness was refunded at 65 per cent. or less; but the transaction in this case was upon the theory that the transaction was not closed when the bonds were issued, and that the city should still further increase its indebtedness by delivering, upon certain contingencies, \$10,000 more in bonds to the original holders of the indebtedness. Under section 5 of this act of 1879, any such increase is void.

But it is urged by the plaintiffs in error that, even if the contract and the bonds in controversy would be void under the aforesaid statutes of 1877 and 1879, still that they are valid under section 36 of the act relating to cities of the second class, as amended in 1873, (Laws 1873, c. 67, § 1.) We think this is also a mistake. That section provides, among other things, as follows: "The [city] council may appropriate money, and provide for the payment of the debts and expenses of the city, and, when necessary, may provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created," etc. The city council of Atchison, however, never took any action under this section. They never even attempted to "provide for issuing bonds" under this section. But they expressly provided by an ordinance passed April 17, 1878, for refunding bonds under chapter 89, Laws 1877, and under no other act; and the entire transaction in the present case was had under that ordinance, and under the act of 1877, and under no other act or ordinance relating to the funding or refunding of indebtedness. We think the aforesaid contract, and the \$10,000 in bonds issued thereunder, and deposited with Wm. Hetherington & Co., are void under section 36 of the second-class city act, as well as under the other acts of the legislature.

But it is further claimed that even if the said contract is void under the statutes, and even if the bonds for \$10,000 issued under it, and deposited with Wm. Hetherington & Co., are void, still that in this action, and upon general principles of law and equity, Brown & Bier are not utterly destitute of all right to relief. It is claimed that under the circumstances of this case, and upon general principles of law and equity, Brown & Bier are entitled to full and complete relief under their contract. It is urged that as this is an action in the nature of a suit in equity; as the entire transaction between Brown & Bier and the officers of the city of Atchison was in good faith, and found to

be in good faith by the court below; as Brown & Bier parted with and delivered to the city of Atchison good and valid bonds of the city, amounting in the aggregate, principal and interest, to \$49,943.95, and received in return therefor, in bonds and money, only \$29,966.37, thereby delivering to the city of Atchison \$19,977.58 more than they received in return from the city, and all this upon the honest belief and the faith thereof that the aforesaid contract was valid, and would be scrupulously kept and fulfilled by the city, and that they (Brown & Bier) would be treated as favorably as the most favored person or persons who might afterwards return to the city city bonds for refunding; as the contract has been wholly fulfilled and executed on the part of Brown & Bier; as there is nothing unjust or immoral in the contract; and as the city has received from Brown & Bier \$19,977.58 in good and valid bonds, for which it has paid no equivalent,—the city is now bound to fulfill its contract, or, at least, before it can obtain equitable relief by having the bonds in controversy delivered up to it to be canceled and held for naught, it must do full and complete equity in the premises as towards Brown & Bier. It is claimed that, before the city of Atchison can have the bonds in controversy set aside or canceled, it must either place Brown & Bier in the same situation and condition occupied and sustained by them before the aforesaid transaction was had at all, by returning to them their original bonds in the same condition in which they were when Brown & Bier delivered them to the city, or that the city must otherwise do equity by placing Brown & Bier in as favorable a situation as they expected to be placed in by virtue of the provisions and conditions of the aforesaid contract. After the aforesaid contract was made, and within less than five years thereafter, the city of Atchison compromised and refunded about \$150,000 of its bonded indebtedness which had existed and was outstanding prior to the time when said contract was executed, by issuing new and refunding bonds for the full face value of the old bonds which it refunded; the new bonds to be due and payable in 30 years, and to draw interest, payable semi-annually, at the rate of 4 per cent per annum. These new bonds, and the issuing thereof, were legal and valid at the time of the issuing thereof, and such bonds might have been legally issued at any time from the time when the aforesaid contract was executed up to the time when they were in fact issued; and that kind of bonds,—that is, 4 per cent. refunding bonds, running 30 years,—for the full amount of the old indebtedness, might legally have been issued to Brown & Bier at the time when said contract was executed, instead of the 7 per cent. refunding bonds, running 20 years, for 60 per cent of the old indebtedness, which were actually issued to them. Now, it would seem that in equity, and within the scope and spirit of the aforesaid contract, Brown & Bier ought to be placed in as favorable a situation or condition as those whose bonds were afterwards legally refunded at their full face value, by the issuance of other bonds running 30 years, and drawing interest at the rate of 4 per cent. per annum; and this should be the judgment of the court, if the rules of law and equity in cases of this kind will permit. No authorities precisely in point can be found, but many authorities lend support to the above views.

In the case of *Hitchcock v. City of Galveston*, 96 U. S. 341, 350, 351, the following language is used: "In the view which we shall take of the present case, it is perhaps not necessary to inquire whether those cases justify the court's conclusion; for, if it were conceded that the city had no lawful authority to issue the bonds described in the ordinance, and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plaintiffs have no rights under it. They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that, under it, they have proceeded to furnish

materials and do work, as well as to assume liabilities; that the city has received, and now enjoys, the benefit of what they have done and furnished; that for these things the city promised to pay; and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful. \* \* \* Having received benefit at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

In the case of *City of Parkersburg v. Brown*, 106 U. S. 487, 503, 1 Sup. Ct. Rep. 442, the following language is used: "But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property, and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

In the case of *Chapman v. County of Douglas*, 107 U. S. 348, 355, 2 Sup. Ct. Rep. 62, where the county of Douglas, Neb., entered into an unauthorized contract for the purchase of a poor-farm, and, when the purchaser or his assigns attempted to enforce the collection of the notes executed in payment for the farm, the county resisted payment, on the ground that the contract was unauthorized; but the supreme court of the United States held the county liable, and in the opinion of the court used the following language: "The agreement, as we have assumed, so far as it relates to the time and mode of payment, is void; but the contract for the sale itself has been executed on the part of the vendor by the delivery of the deed, and his title at law has actually passed to the county. As the agreement between the parties has failed by reason of the legal disability of the county to perform its part according to its conditions, the right of the vendor to rescind the contract, and to a restitution of his title, would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown."

In the case of *Railroad Co. v. Howard*, 7 Wall. 392, 413, the supreme court of the United States uses the following language: "Corporations, as much as individuals, are bound to good faith and fair dealing; and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements, and then turn round and disavow their acts, and defeat the just expectations which their own conduct has superinduced."

In the case of *Township of Pine Grove v. Talcott*, 19 Wall. 666, 678, and in the case of *Bank v. Mathews*, 98 U. S. 621, 629, the supreme court of the United States approvingly refers to the following language used by Mr. Sedgwick in his work on Statutory and Constitutional Law: "It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception that, although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and

unjust to permit the defendant to repudiate a contract the fruits of which he retains. And the principle of this exception has been extended to other cases. So, a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description." Sedg. St. & Const. Law, (2d Ed.) 73.

In the case of *Argenti v. City of San Francisco*, 16 Cal. 256, 282, 283, the following language is used: "If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it; not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or, if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law, which always intends justice, implies one; and her liability thus arising is said to be a liability upon an implied contract; and it is no answer to a claim resting upon a contract of this nature, to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of \$50,000 prescribed by the charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance, and the restraining clauses of the charter. It would be indeed a reproach to the law if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness."

In the case of *Pimental v. City of San Francisco*, 21 Cal. 352, 361, 362, the following language is used: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution; and we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice."

In the case of *Paul v. City of Kenosha*, 22 Wis. 256, 262, where the plaintiff had purchased certain bonds of the city which were void for want of power to issue them, it was held that he was entitled to recover the amount paid; and the following among other language was used by the court: "The city has had that amount of money and legal scrip for its city bonds, which turn out to be of no value whatever. It seems to fall under the general rule of law that where a party sells an obligation which turns out to be valueless, and not of such a character as he represents it to be, he is liable to the vendee as upon a failure of consideration. The city bonds, it appears, were void when the agents of the city sold them to the plaintiff. Is it just and equitable that the city retain the money which it has received for its own worthless bonds?"

In the case of *Arms Co. v. Barlow*, 63 N. Y. 63, 70, it is held as follows. "The plea of *ultra vires*, as a general rule, will not prevail, whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong. \* \* \* It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief, or an action in some other form will prevail. The same rule

holds *e converso*. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation."

In the case of *Railroad Co. v. Dow*, 19 Fed. Rep. 388, 393, the court says: "The decided weight of modern authority favors the conclusion that neither party to a transaction *ultra vires* will be permitted to allege its invalidity while retaining its fruits."

In the case of *Hays v. Coal Co.*, 29 Ohio St. 330, 340, the following language is used: "The rule seems well established that where a contract has been executed and fully performed, on the part either of the corporation or of the other contracting party, neither will be permitted to insist that the contract, and such performance by one party, were not within the corporate power of the company."

Also see the case of *Hydraulic Co. v. Railroad Co.*, Id. 341.

In the case of *Thompson v. Lambert*, 44 Iowa, 239, 248, the court says: "As we understand the rule, *ultra vires* prevails in full force only where the contracts of corporations of this character remain *wholly* executory. \* \* \* This rule prevails even as to public or municipal corporations in analogous cases."

Mr. Morawetz, in his work on Private Corporations, states the rule as follows: "After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract, to recover compensation for a breach of the contract by the other party." 2 Mor. Corp. heading to section 689. "The general rule is that if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case." 2 Mor. Corp. § 721.

Mr. Kerr, in his work on Fraud & Mistake, (398,) uses the following language: "If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired."

See, also, 2 Dill. Mun. Corp. (3d Ed.) §§ 938, 959, *et seq.* See, also, the following cases: *Maduska v. Thomas*, 6 Kan. 153; *Bradley v. Ballard*, 55 Ill. 413; *Parish v. Wheeler*, 22 N. Y. 494; *Packet Co. v. Shaw*, 37 Wis. 655, 661; *Morville v. Society*, 123 Mass. 129, 137; *Clark v. Saline Co.*, 9 Neb. 516, 523, 4 N. W. Rep. 246; *Town of Searcy v. Yarnell*, 14 Amer. & Eng. Corp. Cas. 523, 1 S. W. Rep. 319; *State Board, etc., v. Railway Co.*, 47 Ind. 407. Other authorities of a similar character might be cited, but we think the foregoing are sufficient.

From the authorities we think the following principle may be deduced: Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it, or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed, in whole or in part, by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent



rendered in return, and these benefits are such as one party may lawfully render, and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract, and placing the other party *in statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit. It must be remembered that in this case the city had the power to refund its outstanding bonded indebtedness in three ways: (1) By issuing, as it did to Brown & Bier, new 7 per cent. bonds, running 20 years, for an amount not exceeding 60 per cent. of the old bonded indebtedness; (2) by issuing new bonds, drawing interest not to exceed 6 per cent. per annum, running not to exceed 30 years, and for an amount not exceeding the face value of the old bonded indebtedness; (3) by issuing new bonds, drawing interest not to exceed 10 per cent. per annum, running not less than 10 nor more than 20 years, and for the full face value of the old indebtedness. Hence it will be seen that the city had the power to refund bonds on better terms than those terms on which it refunded Brown & Bier's bonds; and hence, in this sense, the contract entered into between the city and Brown & Bier was not illegal, nor against public policy. Under section 36 of the second-class city act, Brown & Bier might lawfully have had their bonds refunded at their full face value, and drawing interest at the rate of 10 per cent. per annum, if the city had chosen to so refund them. But the city did not so choose. It, through its council, never even gave its officers authority to so refund them, or to so refund any other bonds. Now, while the aforesaid contract, and the bonds issued under it, and deposited with Wm. Hetherington & Co., are void, yet, as the city has received a benefit under such contract, and a benefit which it could legally receive, and a benefit which it would not have received except for such contract, and a benefit for which it has rendered no equivalent, we think it should be required to account to Brown & Bier for the same; and probably the only relief which Brown & Bier now obtain, under the circumstances of this case, is a judgment for the difference in value between the refunding bonds which were actually issued to and received by them, and an amount of 4 per cent. bonds, running 30 years, equal to the full face value of the bonds which they surrendered to the city to be refunded; and in such a case the bonds deposited with Wm. Hetherington & Co. should be returned to the city to be canceled.

The judgment of the court below will be reversed, and cause remanded for a new trial.

JOHNSTON, J., concurring. HORTON, C. J., taking no part in the decision.

(38 Kan. 730)

KAUFMAN v. SPRINGER.

(Supreme Court of Kansas. March 10, 1888.)

1. APPEAL—REVIEW OF EVIDENCE.

Where a jury, upon conflicting evidence, returns a verdict, and the court renders judgment thereon, such judgment will not be disturbed in this court.

2. EVIDENCE—HEARSAY.

K. gave S. a verbal order on H., claiming that he was indebted to him. H., on demand of S., for the amount of the order, told him he was not owing K. *Held*, such denial of indebtedness was not hearsay, but original, evidence.

(Syllabus by Holt, C.)

Commissioners' decision. Error to district court, Wabaunsee county; R. B. SPILMAN, Judge.

*Doolittle & Stringham*, for plaintiff in error. *J. F. Peffer*, for defendant in error.

HOLT, C. Defendant in error brought an action before a justice of the peace in Wabaunsee county for \$9.60, for building chimneys and doing other mason work. The defendant, in his set-off, averred that he had loaned plaintiff \$20, and that the balance thereof, after paying the \$9.60, was still due him. Upon appeal a trial was had in the district court to a jury, at the October term, 1886, and a verdict was rendered for plaintiff for \$9.60, and judgment therefor. The defendant brings the case here for review. The errors complained of are: *First*. In admitting testimony in favor of the plaintiff. *Second*. That the judgment is not supported by evidence. There was a conflict of evidence about the \$20, plaintiff stating it was a part payment for his laying down a sidewalk for defendant, and defendant claiming that it was loaned by him to plaintiff. From the testimony introduced, the defendant's version of the testimony is certainly reasonable, but the jury found for the plaintiff. The court sustained the verdict and rendered a judgment thereon. It is supported by the evidence of plaintiff himself, and corroborated by other witnesses. Under the well-established rule of this court, such a judgment, after receiving the approval of the trial court, will not be disturbed. It is unnecessary to cite authorities. The other objection arises upon the introduction of testimony. In their settlement for the sidewalk, plaintiff claims that defendant told him that one Hibbard was indebted to him, in the sum of \$19.50, for rent, and that Hibbard would pay plaintiff that amount for defendant. The plaintiff testified that when he spoke to Hibbard about the matter Hibbard told him that he was not legally indebted to Kaufman, and if he took that claim for part payment it would be at his peril, as he did not intend to pay it. Afterwards Hibbard himself testified to the same statements, and in his testimony in court said that he did not intend to pay the amount,—"it was not justifiable by law." We perceive no error in the admission of this evidence. The defendant referred the plaintiff to Hibbard for payment of this claim, and certainly the fact that Hibbard refused to pay was competent evidence, even though offered by the plaintiff himself. He heard him refuse the payment of it, and Hibbard himself, afterwards, at the trial, testified to the same statement, and added that he adhered to his former determination in the matter. These are all the exceptions we care to notice, and would recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 720)

FIELDS v. RUSSELL, Sheriff.

(*Supreme Court of Kansas. March 10, 1888.*)

1. TAXATION—BOARD OF EQUALIZATION—MAY ALTER ASSESSMENT BY ITS OWN MOTION.  
Where the board of county commissioners meet as a board of equalization, under the provisions of article 11, c. 107, Comp. Laws 1885, such board has the right to raise or lower the assessment of any township by its own motion, and without a hearing or evidence upon individual assessments.
2. SAME—PERSONAL PROPERTY IN POSSESSION OF MORTGAGOR.  
Where personal property is in the possession of the mortgagor on the 1st day of March, it is subject to assessment and taxation as the property of such mortgagor, and such mortgagor is not entitled to credit on his assessment for the amount due by him on such mortgage.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Wabaunsee county; R. B. SPILMAN, Judge.

This was an action brought by the plaintiff in error to enjoin the defendant, as sheriff of Wabaunsee county, Kan., from the collection of a personal tax-warrant issued by the treasurer of said county for the personal tax assessed and levied upon the personal property of said plaintiff. The record discloses the following facts: That the plaintiff was a resident of Wabaunsee

county, and was on March 1, 1885, duly assessed by the trustee of Alma township, in said county, and that among other property, plaintiff owned 157 head of neat cattle, which were by said assessor assessed at \$3,840; that afterwards, on the first Monday in June, 1885, the board of county commissioners of said county met as a board of equalization; that said board, without hearing any evidence, but upon its own motion, raised the assessment of all the personal property of Alma township 10 per cent., thereby increasing the assessed valuation of plaintiff's personal property 10 per cent.; that said board also increased the assessment in other townships in said county, reduced others, while others remained as returned by the said assessors; that there was levied upon such assessment and valuation, for state tax, 4 mills; county, 10 mills; poor fund, 2 mills; interest on railroad bonds,  $3\frac{1}{4}$  mills; school-district, 16 mills; county-road tax, 3 mills; township tax, 6 mills; making a total of  $38\frac{1}{4}$  mills. It is also shown that the neat cattle so assessed were purchased by plaintiff in October, 1884, and as part of the purchase thereof plaintiff executed a chattel mortgage to one Byran, of Osage county; that said mortgage was for the sum of \$4,000; that said mortgage was on the 1st day of March in full force; that afterwards plaintiff made application to the board of county commissioners to have said assessment changed and corrected, and to give plaintiff credit thereon for the sum of \$4,000, the amount of plaintiff's indebtedness on said cattle, which the board refused to grant. Trial by the court, and judgment for the defendant, and the temporary injunction dissolved. Plaintiff now brings the case here for review.

A. H. Case and George G. Cornell, for plaintiff in error. W. A. Doolittle, for defendant in error.

CLOGSTON, C., (*after stating the facts as above.*) The facts are substantially admitted, and upon these facts the plaintiff contends that the board of equalization had no authority or right to raise the assessment of Alma township; *second*, that plaintiff was entitled to a credit on his assessment the amount of the incumbrance on the neat cattle; *third*, that the poor-fund tax of two mills, and also the three mills county-road tax levied on the said assessment are both illegal. Section 74, c. 107, of the tax law, provides for a board of equalization, and prescribes its duties, which are that they shall meet on the first Monday in June and "proceed to fairly and impartially equalize the valuation of personal property." There is no provision in said article for the introduction of evidence to the board, or for any hearing. The duty is upon the county commissioners, as a board, to equalize these taxes. It is true, the board might proceed—and it would be very proper for it to do so—to hear evidence so as to arrive at an impartial assessment; but the board is not obliged to do so. Counties are divided into commissioner districts, and the board is supposed to know the value of property in the county, and when the commissioners meet as a board, and find that some townships have been assessed at a higher rate than others, it is the duty of the board, under this law, to equalize these assessments. Of course, when it comes to individual assessments, on the complaint of an individual, the board might also do this without proof, or might do it after hearing and proof. The second complaint urged presents a more difficult problem for solution. The tax law is based upon what is supposed to be an equitable adjustment, so that in the end property may bear its just proportion of taxes. While this is the object, yet there must of necessity be many cases where injustice is done. Property ought not to bear a double assessment. It ought to appear only once in the same year on the tax-rolls, in any form. Where property, as in this case, is held by a mortgagor in possession, both the property so incumbered and the indebtedness appear upon the tax-roll, and this is one of the cases where the tax law seems to be unjust; but as long as property is assessed, and taxes collected thereon, there must be some general rules for the government of such proceedings.

If only the equity of the party holding the property should be taxed, it would lead to endless trouble, expense, and litigation. The property may be traced and all put upon the tax-roll; but when it comes to the indebtedness thereon it would be almost impossible to reach and ascertain its amount and extent. If it is sought to include liens and indebtedness on property, then it must include those that are not of record as well as those that are. The plaintiff was the owner of this property. He was in possession of it, and while he had created a lien thereon, which, for the purpose of a lien transferred the legal title to the mortgagee, yet this property, under our rules of taxation, was subject to taxation. While as we said, it seems to work a hardship, yet we think the assessment valid. Counsel say in their brief that the poor tax was illegal. Yet no reason is assigned why this tax is illegal, and no authorities cited. Section 35, c. 79, Comp. Laws 1885, gives the county commissioners ample authority to make this levy, and as our attention has not been called to anything in conflict with this section, we must hold that tax valid. The same may also be said of the road tax. Section 21, c. 89, of the road law, provides that the county commissioners may annually levy a road tax, not exceeding three mills on the dollar. Counsel suggest no reason why this tax is void. Both of these taxes must be upheld, and for the foregoing reasons we recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(29 Kan. 14)

FORBES v. CALDWELL *et al.*

(*Supreme Court of Kansas. March 10, 1888.*)

1. APPEAL—REVIEW—MATTER NOT INCLUDED IN CASE MADE.

This court cannot determine that the trial court committed error in refusing to allow the record of a deed to go in evidence to the jury, when the made case presented here contains no copy or description of the record or deed.

2. LIMITATION OF ACTIONS—ADVERSE POSSESSION—INTERRUPTION.

The running of the statutes of limitation by the adverse possession of real estate is not interrupted in favor of a plaintiff in an action of ejectment by a judgment of forcible entry and detainer in his favor, and against the defendants, in such an action, when no possession is taken, or attempted to be taken, in pursuance of such a judgment.

(*Syllabus by Stimpson, C.*)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

The land in controversy was allotted to Louise Pa-ya, a member of the tribe of Pottawatomie Indians, under the supplemental treaty with that tribe, made by the government on the 29th day of March, 1866. A patent was issued to her on the 21st day of August, A. D. 1868. Louise Pa-ya conveyed the land to Josette Young on the 26th of July, 1866. Josette Young conveyed it to William C. Plummer, October 26, 1866. William C. Plummer conveyed it to Sarah Wright, September 22, 1879. Sarah Wright executed a bond for a deed to the land, to one Tilden, September 22, 1879. Tilden subsequently assigned this bond for a deed to James Caldwell, who, with his wife, and Sarah Wright, are the defendants in this action. The plaintiff in error claims title by virtue of a conveyance made to him, by Louise Pa-ya, or Shearer, she having married a man by the name of Shearer; said conveyance having been executed on the 8th day of May, 1880. Also a deed from F. W. Taylor to him of date 23d June, 1880, for the same land. Also a deed for the land from Peter Washka-nah-be, unmarried, and Se-bus-sun, unmarried, both heirs at law of Je Mahan, deceased, and William E. Thompson, of date May 24, 1880. The first two were claimed to be the sons of Louise Pa-ya, or Shearer, and Thompson claimed some interest in the land not disclosed in the evidence. The deed from Taylor to plaintiff in error was based on a previous conveyance from

Louise Pa-ya to Taylor, and this latter conveyance was ruled out by the trial court, and is not preserved in the record. The record contains evidence showing an occupation and improvement of the land by Plummer, Sarah Wright, Tilden, and Caldwell, for more than 15 years before this suit was instituted. This was an action of ejectment commenced in the Shawnee district court, on the 29th day of November, 1884. Answer filed, and trial to a jury at the September term, 1885. There was a general verdict for the defendants. Motion for a new trial filed and overruled.

*A. H. Case*, for plaintiff in error. *Overmyer & Safford*, for defendant in error.

SIMPSON, C., (*after stating the facts as above*.): The pivotal question in this case is whether the cause of action of the plaintiff in error is barred by the operation of the statute of limitations. That requires actions for the recovery of real property to be brought within 15 years after the cause of action has accrued; this being such an action as is contemplated by the fourth subdivision of section 16 of the Code of Civil Procedure. There are some preliminary rulings of the trial court that counsel for the plaintiff in error deem important enough to assign as errors, that deserve a passing notice. The first of these complaints is the exclusion of the record of the quitclaim deed from Louise Pa-ya, Mary McDowell, and Pe-an-ish, to Theodore F. W. Taylor, dated June 12, 1875; filed for record June 14, 1875. It was admitted that the original deed was not in the possession or under the control of the party offering the record of it. The record of the deed was objected to as being incompetent, irrelevant, and immaterial, and because there was no evidence of the execution of it by Louise Pa-ya. The record was excluded, and an exception noted. It is said that this was a material error. It may have been so, but how are we to determine? The record does not contain a copy of the deed. Neither is there any reason given for the ruling of the court. The deed may not have described the land in controversy. It may not have been acknowledged, or not properly acknowledged, or it may have disclosed other defects, so that any or all of these reasons, or other reasons, may have controlled the trial court. When the deed is not contained in the record, we cannot say whether its exclusion from the jury is error or not. We are bound to presume in this state of the record that it was not error. The second complaint is that the court below instructed the jury that they could arbitrarily reject, without cause or reason, the testimony of any witness. A cursory examination of the instructions given by the court will very easily determine that a small word is left out of the instructions, through inadvertence in making up the record. The first instruction is in these words: "You are authorized by law to arbitrarily reject, without cause or reason, the testimony of any witness, but it is your duty to carefully consider and so far as possible harmonize all the testimony in the case, upon a basis of truth. But if you are unable to do this, then you are authorized, and it is your duty to reject such of it as you think not entitled to credit." It is hardly necessary to call attention to the words preceding and those following the sentence in which the court says, "You are authorized by law to arbitrarily reject without cause or reason the testimony of any witness," to show that the court did really say, "You are *not* authorized by law to arbitrarily reject the testimony of any witness." The insertion of the word "not" at the proper place makes the whole of the first instruction consistent, harmonious, and legal, while, by dropping it, the instruction is rendered inconsistent and illogical. We must assume that in an instruction that is universally given in a case tried to a jury that no such glaring error would occur except through the carelessness of some one in making up the record. Especially is this so when it is apparent from the face of the instruction, and from the connecting words, that a mistake has been made in transcribing it. The next complaint is respecting the fifth instruction given by

the court, and that is as to the character of the adverse possession, sufficient to constitute the bar of the statute. The court said "that if the defendants continuously occupied the land in controversy, for fifteen years preceding the time of the commencement of the action, [29th day of November, 1884,] and after the 21st day of August, 1868, [the date of the patent to Pa-ya,] under their several deeds of conveyance, and that such occupation of said lands by the defendants, and those under whom the defendants claimed to hold, was open, notorious, adverse, and continuous, then this action is barred, and the plaintiff cannot recover in this action." It is said that this is not a correct statement of the law of adverse possession. That the rule is that the possession must be hostile in its inception, and so continue, without interruption, for the period of 15 years; that it must be an actual, visible, and exclusive possession, acquired and retained under a claim of title, inconsistent with that of the owner. This language must be construed in the light of the facts, as presented by the evidence in the case, because it is applied to them. The facts are that in this case there was a hostile possession, adverse to that claimed by the plaintiff in error, and inconsistent with it. For a year, at least, each party resorted to every expedient to keep possession so that if the instruction embodied a fair statement of the law the facts justified the court in giving it to the jury. What is adverse possession? It is occupancy without the permission, and not in subserviency to the rights of the true owner. The instruction given used the words "open, notorious, adverse, and continuous," and hence this seems to be more a criticism as to the phraseology of the instruction than a substantial complaint. We think the instruction complained of was a fair statement of the law, and that it was called for by the evidence.

To thoroughly understand the complaint about the sixth instruction given by the court a short statement of fact is necessary. The claim to title of the defendants in error originated in a deed from Louise Pa-ya to Josette Young, dated July 26, 1866. Josette Young conveyed to William C. Plummer, October 20, 1866; William C. Plummer conveyed to Sarah Wright, September 22, 1879; Sarah Wright executed bond for deed to one Tilden, January 18, 1883; Tilden subsequently assigned this bond for a deed to James Caldwell, who, with his wife and Sarah H. Wright, are defendants in this action. During the time that Mrs. Wright claimed to be the owner she rented the land in controversy to one J. A. Workman, who moved onto it, and cultivated a part of it. He stayed on the land from some time in February, 1880, until the 17th day of December, 1881. In February, 1881, under an arrangement with the plaintiff in error, he loaded most of his household goods in a wagon, left the house and premises, went a distance of two or three hundred yards from the house, stayed all night in the woods, and moved back the next morning into the house, and took possession of the land as the tenant of the plaintiff in error. Some short time before this maneuver one Wallace, as agent of Mrs. Wright, had given Workman notice to quit the land. These are the facts upon which counsel for the plaintiff in error base their contention that the instruction is erroneous. Their theory is that as Mrs. Wright had terminated the tenancy of Workman, by the notice to quit, hence Workman had a right to vacate the premises, and become the tenant of Forbes, who was the true owner. Forbes had the right to take peaceable possession of the land, and lease to Workman, or anybody else, and such a possession would oust Wright and interrupt the running of the statute. The fallacy of such reasoning is easily seen when it is recollected that this court has repeatedly held that the tenant is never allowed to dispute his landlord's title, after having accepted possession under him. *Brenner v. Bigelow*, 8 Kan. 496; *Pettigrew v. Mills*, 36 Kan. 745, 14 Pac. Rep. 170; *Smith v. Cooper*, 38 Kan. —, 16 Pac. Rep. 958. "It is a general rule, founded on reasons of public policy, that a tenant shall never be permitted to controvert his landlord's title, or set up against him a title acquired by himself during his tenancy, which is hostile in its character to that

which he acknowledged when he accepted the demise." 2 Tayl. Landl. & Ten. § 605. "An adverse claimant, who gets into possession of land by tampering with the tenant, cannot resist the landlord's claim when the tenant himself could not. The tenant must also regard the interest of the landlord with respect to his right of possession, and give due notice of any attempt to dispossess him. And the attornment of a tenant to a stranger is absolutely void, and will not in anywise affect the possession of his landlord." 1 Tayl. Landl. & Ten. § 180; section 14, c. 55, p. 519, Comp. Laws (Dassler) 1885. It follows that Forbes did not get such possession by the removal and subsequent re-entry of Workman, as would dispossess Mrs. Wright, and that in law there was no change of possession, and the running of the statute was not interrupted. The instruction was right. The only remaining question worthy of notice is as to the effect of the two judgments in forcible entry and detainer on the statute of limitations. One was in favor of the plaintiff in error; the other was against Mrs. Wright, one of the grantees of the defendants in error. The one was that Forbes had a right to the possession at the time this suit was instituted; the other was that Mrs. Wright had not the right to the possession at the time her suit was commenced. The court charged the jury in the third instruction that the plaintiff in error held the title in fee to the land in controversy by reason of his conveyance from Louise Pa-ya, and is entitled to a verdict, unless barred before the commencement of this action by the running of the statute. This is to say that the plaintiff in error had a right to the possession at anytime, from and after the execution of his deed, before the expiration of 15 years from and after the date of the patent. These actions in forcible entry and detainer were both tried and decided before the expiration of the 15 years. The plaintiff in error had undoubtedly the right of possession to this land, from the date of his deed from Louise Pa-ya on the 8th day of May, 1880, but he neither enforced his right to possession, under his judgment in the action for forcible entry and detainer, or brought his action of ejectment in time. There is evidence enough contained in the record to support the necessary finding of the jury included in the general verdict that there had been a continuous, adverse possession, hostile to the title of the plaintiff in error, for more than 15 years before the commencement of the action. One of the grounds of the motion for a new trial was that on the trial the plaintiff in error was surprised to learn of the non-residence of Mrs. Wright, and this same fact was also urged, as a reason for a new trial, on the ground of newly-discovered evidence. Numerous affidavits on both sides were produced on the hearing of the motion for a new trial, and were so conflicting in many of their statements that we have made no attempt to reconcile them. The trial court took the matter under advisement, and after some months overruled the motion.

We are inclined to think that the weight of the evidence on the motion was with the defendants in error. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(11 Colo. 156)

LIMBERG v. HIGENBOTHAM *et al.*

(*Supreme Court of Colorado. March 9, 1888.*)

1. EJECTMENT—ACTION FOR MESNE PROFITS—PLEADING.

In an action for mesne profits plaintiff declared on the common count for money had and received. Defendants answered, denying the allegations made in the complaint, and averring that they were informed that the action was for mesne profits of certain real estate, and setting up a defense thereto. *Held*, that the defect in plaintiff's complaint in not setting out the facts constituting his cause of action was supplied by defendants' answer.

2. SAME—EVIDENCE—AMOUNT OF RENTS—IMPROVEMENTS.

In an action for mesne profits it is error to exclude evidence to show the amount of rents received by defendants upon the ground that such rents include the use of improvements erected by defendants.

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**3. SAME—ACTION BY PURCHASER FOR MESNE PROFITS AGAINST TRESPASSER.**

Under Code Colo. § 8, requiring actions to be brought in the name of the real party in interest, an action may be maintained by a purchaser against trespassers for mesne profits accruing, pending ejectment by his grantor, after his purchase, and before delivery of seizin.

**4. SAME—NOMINAL DAMAGES IN EJECTMENT NO BAR.**

The recovery of nominal damages in an action of ejectment is no bar to an action for mesne profits.

Error to district court, Lake county.

The object of this action was to recover from the defendants, Higenbotham & Barnes, mesne profits received by them from tenants who occupied a portion of lots 1 and 2 of the Leadville Improvement Company's addition to the city of Leadville, pending action by said company for possession. The defendants to that action originally were De Lay, Cottrell, Mallan & Franklin. The suit was afterwards dismissed as to Cottrell, and prosecuted to final judgment against the other defendants. The plaintiff in that action, the Leadville Improvement Company, sold and conveyed the property mentioned to Charles T. Limberg, the plaintiff in the present action, on February 20, 1879, and, in order to deliver possession to the purchaser, brought suit in the court below against the parties then in possession, on April 26th following. These defendants, Higenbotham and Barnes, were not parties to the suit, they having entered into possession under the defendants therein, or some of them, pending the suit. They are charged in the present action with having collected and received from tenants in possession a large amount of rents and profits. Judgment was rendered in the ejectment suit in the court below, April 12, 1882, and final judgment, upon appeal in this court, December 4, 1883. A writ of possession was issued and executed, by putting the plaintiff in that suit into possession of the premises, on December 5, 1883, and the present action for mesne profits was brought on the day last mentioned.

*C. H. Wentzel and F. W. Owens*, for plaintiff in error. *Rogers & McCord and E. M. Hurlbut*, for defendants in error.

BECK, C. J., (*after stating the facts as above.*) The controlling question in the present case arises upon the pleadings. If they can be held sufficient to constitute a triable issue, and to sustain an action for the recovery of mesne profits of land, the court erred in excluding the evidence offered by the plaintiff on the trial tending to prove the amount of damages sustained, and likewise in nonsuiting the plaintiff. The Code of Procedure requires the complaint to contain a statement of the facts which constitute the cause of action. This the complaint in the present case failed to do. That it was insufficient, therefore, in itself admits of no discussion. It was simply the "common count for money had and received by the defendants to and for the use of the plaintiffs," the only facts stated being the amount alleged to have been so received, viz., \$22,225, and that the defendants received said sum at the county of Lake between the 1st day of January, 1879, and the 4th day of December, 1883. The complaint did not inform the defendants, from whom they were charged with receiving this money, on what account it had been received, or how the plaintiff became entitled to any money received by them within the dates mentioned in the complaint. But instead of taking advantage of the defect by demurrer, or motion to have the complaint made more specific, as they might have done, the defendants answered it, denying the allegations made therein, and adding the following averments: "That they have been informed that said action was intended to be an action against these defendants for mesne profits for certain real estate, and defendants allege that they have a full and complete defense to any such action. \* \* \* And defendants further allege that any interest in or title to said premises which plaintiff has, was acquired by him since the first day of December, A. D. 1883." It was further alleged in the answer that any cause of action which the plaintiff



could have maintained against the defendants had been adjudicated and determined before the commencement of this suit as between the parties thereto and their predecessors in interest. The answer also contains the following allegations: "And these defendants further allege that there is a non-joinder of parties defendant in this action; and further allege that there is misjoinder of parties to this action." To this answer the plaintiff replied, denying the misjoinder and non-joinder of parties; denying that the matters in controversy were *res adjudicata*, and that the property referred to was acquired by the plaintiff since December 1, 1883; and alleging that the title to the property had been in the plaintiff since the time mentioned in the complaint.

The complaint and answer were certainly very informal. They violate all rules of pleading, and, considered separately, neither could be sustained against the objections that might have been interposed. Both signally fail to observe the primary rule of Code pleading, viz., that the facts constituting the cause of action must be set forth. But, as far as the parties were able to do so, all objections were waived. While the plaintiff failed on his part to inform the defendants under what circumstances they became indebted to him, or how he became entitled to any money received by them within the period mentioned in his complaint, the defendants appear to have supplied the defect in and by their answer. By it they say substantially: "We know the nature of your claim, and the account on which it is founded. Your claim is for mesne profits received by us from the rents of certain lands claimed by you; but we have a complete defense to your action. Your title to the land was not acquired within the dates mentioned in your complaint, within which you charge us with having received rents, and if you had a right of action against us on account of such rents or otherwise, it was fully adjudicated before the commencement of this action, both as to the parties to this suit, and as to their predecessors in interest. And, further, you cannot maintain this action in any event, for you have not joined the necessary parties as defendants, and some of the parties joined are not parties in interest; wherefore we pray judgment." It will be observed the answer concedes the cause of action, but, while it assumes to set up several defenses thereto, does not set out the facts constituting any one of them, save as to the negative allegation that the plaintiff did not acquire his title until after the expiration of the period within which the defendants are charged with the receipt of rents. How the plaintiff's claim had been adjudicated, or when, or in what action, or what court, is not stated, and as to the non-joinder of defendants and misjoinder of parties, not a single fact indicating who should have been joined and who omitted is stated. The plaintiff, in turn, by his replication, accepts the issues as tendered by the defendants in their answer, merely denying the allegations of new matter, and averring "that the title to said property has been in the plaintiff since the time referred to and mentioned in the complaint herein."

Informal, therefore, as the pleadings are, we are of opinion that, taken together, they present a triable issue, viz., whether the defendants, within the dates mentioned in the complaint, are chargeable with the receipts of mesne profits of land then owned by the plaintiff. It has been frequently held that substantial issues may be presented by the answer, and that a complaint so defective as to fail to state a cause of action may be supplemented by the statement of material facts in the answer, and the defect be thus cured. Pom. Rem. § 579; Bliss, Code Pl. § 437. "When the defendant chooses to understand the plaintiff's count to contain all the facts essential to his liability, and in his plea sets out as an answer those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have

omitted to notice in the outset of the controversy." *Slack v. Lyon*, 9 Pick. 62. Upon the trial of this action the court, upon the objection of counsel for defendants, excluded all evidence tending to show the amount of rents received by the defendants, upon the ground that they included the use of improvements erected by the defendants. This was clearly error. If the defendants were entitled to any set-off or defense by reason of improvements placed upon the land by them, it was not available on this trial, for the reason that no such defense was interposed in their answer, or otherwise. Code, §§ 64, 260; Tyler, Ej. 844. It was error, in any event, to exclude evidence upon such ground, since it was a matter of defense, what proportion of the rents accrued from the improvements. It follows, as a necessary sequence, that it was error to render the judgment of nonsuit. The grounds assigned by defendants in their motion for nonsuit are still relied upon as sufficient to sustain the action of the court. They are: "*First*. That the proof introduced did not sustain the allegations of the complaint." This was not the plaintiff's fault, since proper evidence offered by him in support of the issue joined was excluded by the court, on the motion of the defendants. "*Second*. Because, in the action for mesne profits, no one but the plaintiff in the original ejectment suit is entitled to bring such action, and that this plaintiff is bound by the record." This and other objections, for want of proper parties, are all groundless. The Code (section 3) requires all actions to be prosecuted in the name of the real party in interest; and while it may be proper for a vendor of land to bring suit against the disseisor, in order that he may be able to deliver possession to the purchaser, yet, after the recovery on such action, it is entirely proper for the purchaser to sue in his own name for the rents and profits which accrued pending the former action. He is the real party in interest. Tyler, Ej. 839, 840; Sedg. & W. Tr. Title Land, §§ 656. The authorities are equally clear that the action for mesne profits is not confined to the same parties defendants who were defendants in the ejectment suit; but when the action is successful it may be brought and maintained against the landlord of the party who was in possession; against any one who was in receipt of rents and profits; a third person to whom possession was given by the defendant pending suit, or against any trespasser. One going into possession under the defendant in ejectment is held to be a privy, and bound by the record. *Doe v. Whitcomb*, 8 Bing. 46; *Jackson v. Stone*, 13 Johns. 447; *Chirac v. Reinicker*, 11 Wheat. 280; Sedg. & W. Tr. Title Land, § 658. "*Third*. Because the evidence shows that the matter is *res adjudicata*." This proposition is evidently based upon the fact disclosed by the record in the ejectment suit, introduced upon the trial of this cause, that the plaintiff recovered one cent damages in that action. That was the recovery of nominal damages merely, and the rule is that such a recovery of in ejectment does not bar an action for mesne profits. Id. § 662. The Code authorizes an action for mesne profits upon a recovery in ejectment. Section 274.

For the errors mentioned, the judgment must be reversed, and the cause remanded for new trial, with leave to the parties to amend their pleadings.

(11 Colo. 124)

MURRAY v. DENVER & R. G. R. Co.

(*Supreme Court of Colorado*. March 9, 1888.)

NEGLIGENCE—EVIDENCE—NONSUIT.

In an action for injuries alleged to have been caused by defendant's negligence, where the plaintiff's evidence shows that he, as an employe of defendant, was working in a narrow cut upon its railroad; that a car, becoming detached from a train of defendant, ran through the cut, and that plaintiff was injured either by jumping against the walls of the cut, or by stones thrown from the car, but does not show the cause of the accident, nor any facts raising a presumption of negligence, a nonsuit is properly granted.

Error to district court, Arapahoe county.

This action was brought in the district court by the plaintiff Murray, against the Denver & Rio Grande Railroad Company, to recover damages for injuries received while in the employ of the defendant on its road as a laborer. Judgment of nonsuit was entered against the plaintiff, who brings the cause to the supreme court by writ of error. It appears, from the evidence, that the plaintiff, with other laborers, was engaged in repairing the road of the defendant in a narrow and curving cut with steep banks; that a car, loaded with stone, in some way became detached from a construction train of the defendant, distant one-half a mile, more or less, from the cut; that it ran down the track and through the cut at great speed, coming into collision with a push car near the plaintiff, and jumped the track. Plaintiff was injured more or less seriously, either by jumping against the walls of the cut, or by certain stones thrown from the car in passing; it does not clearly appear which. The plaintiff was nonsuited on the ground that the evidence failed to show negligence upon the part of the defendant.

*Brown & Putnam*, for plaintiff in error. *Edw. O. Wolcott*, for defendant in error.

ELBERT, J., (*after stating the facts as above.*) The plaintiff, at the time of the injury complained of, was an employe of the defendant company. The evidence showed the accident, and the injury to the plaintiff, but left the cause of the accident entirely unexplained. This was not sufficient to raise a presumption of negligence upon the part of the company. In actions of this character the presumption is that the employer has discharged his duty to the employe. It was for the plaintiff to overcome this presumption by showing negligence upon the part of the company. *Wood, Mast. & Serv.* §§ 368-382, and cases cited; *Railroad Co. v. Salmon*, 11 Kan. 83. This the plaintiff failed to do; the evidence does not fix liability upon any one. The cause of the accident is uncertain. It may have been the result of a defect, either latent or patent, in the machinery or appliances used, and the defendant company may or may not have had notice of the defect. It may have resulted from the neglect of an incompetent fellow-servant, of whose incompetency the company had full knowledge, or no knowledge whatever. Or it may have resulted from some other cause possible in the field of conjecture. Upon this point the jury would have been left to speculation, had the cause been submitted to them. There was a defect of proof which precluded the application by the court of any known rule of recovery. The plaintiff failed to "prove a sufficient case for the jury," and this is a statutory ground of nonsuit. Code Civil Proc. p. 48. The judgment of the court below is affirmed.

(11 Colo. 134)

PEOPLE *ex rel.* v. AUSTIN, Treasurer.

(*Supreme Court of Colorado.* March 9, 1888.)

COUNTIES—COUNTY WARRANTS—PRIORITY OF PAYMENT—POWER OF TREASURER.

Gen. St. Colo. § 687, provides that county warrants or orders not taken up at the date of presentation shall be entitled to preference, as to payment, according to the order of time in which they may be presented to the county treasurer. *Held*, that the county treasurer could not divert money, raised for the purpose of funding these warrants, to pay warrants subsequently issued by the county commissioners, under the provisions of Sess. Laws 1887, p. 241, which provides that, where there is no money to meet current expenses, the board may draw warrants against taxes which have been levied, to the extent of 80 per cent., to meet current expenses.

*Mandamus* to the county treasurer of Conejos county.

Original agreed case. Prior to the adoption of section 2, p. 241, Sess. Laws 1887, the valid floating indebtedness of Conejos county, represented by outstanding warrants duly registered according to law, had reached the constitutional limit. In October of that year the board of county commissioners attempted, at least partially, to act under the provisions of the statute men-

tioned. They set apart or assigned, by resolution, 80 per cent. of the incoming revenue for the current fiscal year to a fund for the payment of current county expenses. They did not, however, fund the floating indebtedness, or otherwise provide for its payment, the remaining 20 per cent. being wholly inadequate for the purpose. They also prescribed the form of warrant to be drawn on such fund, which should, under the statute and decision of the supreme court, operate as an assignment thereof, *pro tanto*, in advance. In pursuance of this action of the board, numerous warrants were issued, assigning portions of the incoming revenue, and were received in payment for necessary services or materials furnished the county from time to time. Relator in this case is the holder and owner of one of these warrants, which he has presented to respondent, the county treasurer, for payment. Respondent declines to pay the warrant on the ground that it is his duty to first take up other warrants that have been presented, which were duly registered prior to the one in controversy, and which constitute part of the floating debt existing before the year 1887. The following is the material portion of section 2 above mentioned: " \* \* \* Whenever there are no moneys in the county treasury of a county to the credit of the proper fund to meet and defray the necessary expenses of the county, it shall be lawful for the board of county commissioners of such county to provide that county warrants and orders of such county may be drawn and issued against, and in anticipation of, the collection of taxes already levied for the payment of such expenses, to the extent of eighty per centum of the total amount of the taxes levied: provided, that warrants and orders so drawn and issued, under the provisions of this section, shall show upon their face that they are payable solely from the fund upon which the same is drawn, and the taxes levied to form the same when collected, and not otherwise. County warrants and orders may be in such form as the county commissioners may provide, and may be made payable to the order of payee, or to the bearer. The person or persons to whom such last-named warrants and orders shall be allowed and delivered shall be held to have accepted the same in full payment and satisfaction of the claim to pay which the same was issued; and the obligation of said warrants is hereby limited as stated; and said warrants shall be paid only by, through, and from the fund drawn upon; and the collected and uncollected taxes levied, appropriated, collected, or paid into the county treasury to create, constitute, and form said fund, and the taxes provided by law therefor, shall be covered into said fund until all warrants drawn shall be fully paid, satisfied, and discharged, both principal and interest. Said limited and last-named warrants and orders shall not operate as a debt of said county, and shall not be held to add to or increase the debt or indebtedness of said county: provided, that the provisions of this law shall in nowise affect the lawful warrants and orders of any county which were issued prior to the passage of this law, and are outstanding and unpaid; but such warrants, unless redeemed under the funding statute, shall first be paid, both principal and interest, in the order of their registry."

*Alvin Marsh*, Atty. Gen., for petitioners. *Eugene Eugley*, for respondent.

**HELM, J.**, (*after stating the facts as above.*) While the matters here involved are presented in the form of an agreed case, the proceeding is in the nature of *mandamus* to compel respondent, the county treasurer, to pay a certain county warrant owned by relator. But a single question is submitted for adjudication. This question may be concisely stated as follows: Can a county in this state which has reached the constitutional limit of indebtedness assign its incoming revenue, by orders drawn thereon, to the payment of the necessary current expenses, so as to postpone, in favor of the new orders thus issued, the discharge of its prior valid indebtedness represented by outstanding registered warrants? Section 637, Gen. St., under which most, if not all,

of the warrants constituting the floating debt of Conejos county were issued, entered into and forms a part of the contract represented thereby. *People v. Hall*, 8 Colo. 485, 9 Pac. Rep. 84. This statute provides that such orders or warrants, when not taken up at the date of presentation, "shall be entitled to a preference, as to payment, according to the order of time in which they may be presented to the county treasurer." Therefore the county is bound by contract to give these orders precedence in payment over all orders subsequently issued. The county commissioners can take no step, either with or without legislative sanction, that shall impair the obligation of these contracts. *People v. Hall, supra*. Yet their action, according to relator's view, has precisely this effect. As construed by him, it postpones outstanding warrants to those assigning the incoming revenue for 1887 in payment of current expenses. We do not appreciate the pertinency or justice of counsel's assault upon section 2, p. 241, Sess. Laws 1887. This section is obnoxious to none of the constitutional objections urged. The trouble, if any trouble there be, is not with the statute, but with the action of the county commissioners. If that body sought to dedicate, absolutely, 80 per cent. of the current incoming revenue to the payment of current expenses, regardless of outstanding warrants, they were attempting to violate a plain requirement of the statute. The last proviso of the section expressly declares that prior outstanding valid warrants must be redeemed under the funding statute, or they shall be first paid, in the order of registry, from the incoming revenue. It qualifies the preceding provisions, and undoubtedly controls the resolution of the commissioners. With this limitation, the action of the county authorities, so far as presented to us, seems regular. The foregoing subject has already been considered by this court. In discussing the constitutional limitations regarding county indebtedness, we have said: "Counties may provide, under the funding statute, for the payment of all outstanding orders constituting a legal indebtedness. Such an indebtedness therefore, when thus disposed of, does not interfere with the use of the current general revenue to defray the current expenses. And counties, in all cases, have the power to so adjust their affairs that valid warrants may issue in payment of such expenses as they accrue. \* \* \*"  
*People v. May*, 9 Colo. 404, 10 Pac. Rep. 641; 12 Pac. Rep. 838; 15 Pac. Rep. 36. This language is as easily understood as is that of the statute. And it is difficult to perceive how the meaning of either the decision or statute could be mistaken. The warrant of relator is not entitled to payment till the prior valid warrants issued under section 637, Gen. St., are paid, or redeemed in the manner provided by the funding act.

(10 Colo. 582)

WHEELER v. NORTHERN COLO. IRRIGATING CO.

(*Supreme Court of Colorado. January 4, 1888.*)

1. IRRIGATION—RIGHTS OF CONSUMERS—EXCESSIVE CHARGES FOR WATER.

Under Const. Colo. art. 16, §§ 5-8, declaring unappropriated water of natural streams "public" property, subject to appropriation for the "use of the people" free of charge, the distributor of water to consumers for hire, not being the proprietor of water unappropriated by it, a demand of \$10 per acre, in advance, for "the right to receive and use water" from its canal is in violation of the constitutional right to the use of unappropriated water free of charge.

2. SAME—MANDAMUS.

Where a carrier of water, for hire, to consumers for irrigating and other purposes, demands \$10 per acre, in advance, in addition to the yearly rental fixed by it for the use of water from its canal, the demand being unreasonable and illegal under Const. Colo. art. 16, §§ 5-8, and the statute in force giving no relief to the consumer, *mandamus* will lie to enforce the constitutional right to the use of unappropriated water on payment of a reasonable compensation for transportation.

Appeal from district court, Arapahoe county.

*Mandamus* proceeding. Appellant, Byron A. Wheeler, as relator, instituted *mandamus* proceedings in the court below to compel the respondent

company to furnish him water for irrigation. Respondent demurred to the alternative writ. The demurrer was sustained, and judgment entered in its favor. From this judgment the present appeal was taken. The following constitutional and statutory provisions are considered, or referred to in the opinion:

CONSTITUTION, ART. XVI.

"Sec. 5. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

"Sec. 6. The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but, when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

"Sec. 7. All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes, for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

"Sec. 8. The general assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

GENERAL STATUTES.

"Sec. 311. Any company constructing a ditch under the provisions of this act shall furnish water to the class of persons using the water in the way named in the certificate, in the way the water is designated to be used, whether miners, mill-men, farmers, or for domestic use, whenever they shall have water in their ditch unsold, and shall at all times give the preference to use of the water in said ditch to the class named in the certificate; the rates at which water shall be furnished to be fixed by the county commissioners as soon as such ditch shall be completed and prepared to furnish water."

"Sec. 1740. Any person or persons, acting jointly or severally, who shall have purchased and used water for irrigation of lands occupied by him, her, or them, from any ditch or reservoir, and shall not have ceased to do so for the purpose or with intent to procure water from some other source of supply, shall have the right to continue to purchase water to the same amount for his, her, or their lands on paying or tendering the price thereof fixed by the county commissioners as above provided, or, if no price shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water, or did sell water during the then last preceding year. This section shall not apply to the case of those who may have taken water as stockholders or shareholders after they shall have sold or forfeited their shares of stock, unless they shall have retained a right to procure such water by contract, agreement, or understanding, and use between themselves and the owners of such ditch, and not then to the injury of other purchasers of water from or shareholders in [the] same ditch."

*W. F. Stone, L. C. Rockwell, C. W. Wright, and I. E. Barnum, for appellant. T. D. W. Yonley, Hugh Butler, and A. B. McKinley, for appellee.*

HELM, J., (*after stating the facts as above.*) The alternative writ of *mandamus* performs the office of the complaint in an ordinary civil action. It

must state a cause of action, and failing to do so, will not support a judgment. Its legal sufficiency may, by the return or answer, provided for in the Civil Code, be challenged as upon demurrer, and tested under the rules of pleading applicable to the ordinary complaint, when assailed by demurrer. The alternative writ before us is somewhat informal, and undoubtedly contains unnecessary matter; but, so far as mere form is concerned, we shall hold it sufficient without discussion, and proceed to consider the alleged substantial legal objections that are fairly presented by respondent's demurrer.

The subject of water-rights has always been justly regarded as one of the most important dealt with in the legislation and jurisprudence of Colorado. Hitherto attention has been mainly directed to the adjustment of priorities and differences between individual consumers; but hereafter, owing to the rapid settlement of the eastern part of the state, the *status* of the carrier, and its relations with the consumer, will command the most earnest and thoughtful consideration. For convenience, I shall, throughout this opinion, use the terms "carrier" and "consumer," meaning the canal company and tiller of the soil, respectively. The agriculturists in the territory mentioned are, with few exceptions, unable to convey water from the natural streams to their land. The annual rainfall is increasing; yet at present, without irrigation, but a small fraction of the producing capacity of the soil can be utilized, and, unaided, these consumers will for years to come be practically helpless. To the successful cultivation of that region, the carrier and consumer are therefore equally indispensable. Hence a wise legislative policy, and an intelligent judicial construction, require a careful consideration of the privileges, powers, and duties of the carrier, as well as the rights and obligations of the consumer. The courts should protect the consumer in the full enjoyment of his constitutional and statutory rights; but they should also jealously guard the rights of the carrier, and so deal with it (the constitution and statutes permitting) as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water.

The pleadings in the case at bar show that respondent is a carrier and distributor of water for irrigation and other purposes. That its canal, two years ago, was upward of 60 miles in length, and capable of supplying water to irrigate a large area of land. That relator is one of the land-owners and consumers under the canal, and can obtain water from no other source; also that respondent has, undisposed of, a sufficient quantity to supply his wants. That he tendered the sum of \$1.50 per acre, the annual rental fixed by respondent, and demanded the use of water for the current season, but declined to pay the further sum of \$10 per acre also demanded, and to sign a certain contract presented to him for execution. That respondent refused, and still refuses, to grant relator's request, except upon compliance with these conditions. The remaining essential facts will sufficiently appear in connection with the specific questions of law presented, as they are in their proper order discussed.

Does the record show a clear legal right of relator, from the enjoyment of which he is unlawfully precluded by respondent? Our constitution dedicates all unappropriated water in the natural streams of the state "to the use of the people," the ownership thereof being vested in "the public." The same instrument guaranties in the strongest terms the right of diversion and appropriation for beneficial uses. With certain qualifications, it recognizes and protects a prior right of user, acquired through priority of appropriation. We shall presently see that, after appropriation, the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator. But, to constitute a legal appropriation, the water diverted must be applied within a reasonable time to some beneficial use; that is to say, the diversion ripens into a

valid appropriation only when the water is utilized by the consumer, though the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch. The constitution unquestionably contemplates and sanctions the business of transporting water, for hire, from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes, and decisions) necessarily give the carrier of water an exceptional *status*; a *status* differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary now, however, to enumerate these rights in detail; for the present, it suffices to say that they are dependent for their birth and continued existence upon the use made by the consumer. But, giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a "proprietor" of the water diverted. A cursory reading of the statutes might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water. And the constitutional phrase, "to be charged for the use of water," relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such use. But, construing all the provisions of that instrument bearing upon the subject *in part materia*, the correctness of both of these inferences must be denied. The constitutional convention was legislating with reference to the necessities and practical wants of the people; and this body, in its wisdom, ordained that the ownership of water should remain in the public, with a perpetual right to its use, free of charge, in the people. By section 8, art. 16, of the constitution, from which the foregoing phrase is taken, the convention recognized the carrier's right to compensation for transporting water, and provided for a judicial, or *quasi* judicial, tribunal to fix an equitable maximum charge, where the parties fail to agree. It requires no citation of authority to show that the words "purchase" and "sale," together with other words of like import, used in this connection by the legislature, must receive a corresponding interpretation. Under the constitution, as I understand it, the carrier is at least a *quasi* public servant or agent. It is not in the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others; being engaged in the business of transporting, for hire, water owned by the public, to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits or emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties, and subjected to a reasonable control. Were the constitution and statutes absolutely silent as to the amount of the charge for transportation, and the time and manner of its collection, there would be strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise. It has in most instances, from the nature of things, a monopoly of the business along the line of its canal. Its vocation, together with the use of its property, are closely allied to the public interest. Its conduct in connection therewith materially affects the community at large. It is, I think, charged with what the decisions term a "public duty or trust." In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges; and an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and extortionate demands would lay the foundation for judicial interference. *Munn v. People*, 94 U. S. 113, and cases cited; *Price v. Land Co.*, 56 Cal. 431; *Railroad Co. v. People*, 56 Ill. 365; *Vincent v. Railroad*



Co., 49 Ill. 33. But the constitution is not silent in the particulars mentioned. It evinces, beyond question, a purpose to subject this as other branches of the business to a certain degree of public control. As we have seen, it provides for a tribunal to which the maximum amount of water-rates may be referred, in case of dispute between the carrier and consumer. And I think that, by fair implication, it forbids the carrier's enforcement of unreasonable and oppressive demands in relation to the time and manner of collecting these rates. Any other view would accuse the convention of but partially doing its work; for the fixing of maximum rates would be protection grossly inadequate, if either of the parties might dictate absolutely the time and conditions of payment. The primary objects were to encourage and protect the beneficial use of water; and while recognizing the carrier's right to reasonable compensation for its carriage, collectible in a reasonable manner, the constitution also unequivocally asserts the consumer's right to its use upon payment of such compensation. Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject.

The contract which respondent required relator to sign and agree to comply with, as a condition precedent to the granting of his request, contains the following among other conditions: That he buy in advance "the right to receive and use water" from its canal, paying therefor the sum of \$10 per acre; also that he further pay "annually, in advance, on or before the 1st day in May of each year, \* \* \* such reasonable rental per annum, not less than one dollar and a half nor more than four dollars per acre, as may be established from year to year" by respondent. If we hold respondent to the literal terms used in this contract, we must declare the \$10 exaction illegal. Respondent cannot collect of relator the sum of \$10, or any other sum, for the privilege of exercising his constitutional right to use water. But counsel contend, in argument, that the foregoing expressions, quoted from respondent's contract, are not intended to require the payment of \$10 per acre for a right to use water. They say this \$10 is merely a portion of the annual "rental" exacted of consumers in advance for the remaining years of respondent's corporate existence; that instead of requiring, say, \$2.50 per acre for each irrigating season in turn, respondent has seen fit to divide this sum into two parts, collecting \$1.50 annually, and the residue of \$1 each for the remaining 10 years of its corporate life, as one entire sum in advance. This construction of the contract may, under all the circumstances, seem plausible, though I doubt if the courts could accept it; but, if accepted, the difficulty under which respondent labors would not be obviated. If the carrier may collect a part of its annual transportation charge in advance for the remaining years of its corporate life, it may collect all. Suppose the company just organized. Under counsel's view, the consumer may, there being no legislation on the subject, be compelled to pay the cost of delivering water to him for the entire 20 years of its existence, before he can exercise his constitutional right during a single season. But there is nothing in the law obliging him to cultivate his land for any particular period. He may not want the water for 20 years, or it may be utterly impossible for him to advance so large a sum at once. In fact, a majority of those who till the soil are too poor to comply with such a demand. To say that they must do so, or have no water, is to deprive them of their right to its use, just as effectually as though the right itself had no existence. It is true, these people would not themselves be able to bring water from the natural streams to their farms, and without the carrier they might be compelled to abandon their attempts at agriculture. This consideration, however, only reinforces the position that a reasonable control was intended. The carrier must be regarded as an intermediate agency, existing for the purpose of aiding consumers in the exercise of their constitutional

right, as well as a private enterprise, prosecuted for the benefit of its owners. Yet, if such exactions as the one we are now considering are legal, the carrier might, at its option, in the absence of legislation, effectuate or defeat the exercise of this right; and we would have a constitutional provision conferring an affirmative right, subject for its efficacy, in a given section, to the greed or caprice of a single individual or corporation. Besides the extraordinary power mentioned, the carrier would also, under counsel's view, be able to consummate a most unreasonable and unjust discrimination. B. could have water, because he can pay for its carriage 20 years in advance; C. could not have water, because he is unable to pay in advance for its carriage beyond a season or two. But, say counsel, C.'s only remedy, and the only remedy of relator and other consumers dissatisfied with the carrier's terms, is by application to the county commissioners. I reply, *first*, that, so far as the present case is concerned, this suggestion embodies but little consolation. Relator's land is situate in Arapahoe county. The statute as it stood when the proceedings described in the alternative writ took place did not permit the commissioners of that county to act with reference to respondent's canal; while, under the constitution, the commissioners of no other county could exercise the necessary jurisdiction. It was utterly impossible, therefore, for relator to secure relief in the manner pointed out, and, if the courts could not take cognizance of the alleged grievance, he was wholly bereft of means of redress. I reply, *second*, that the commissioners may be empowered to fix the maximum amount of the rate; that is, they may be authorized to announce a limit beyond which the carrier cannot go. In my judgment, under the constitution, they cannot be vested with authority to establish the exact rate to be charged, or to specify either the time or conditions of payment. The time and conditions of payment are proper subjects for legislation. The legislature, doubtless, has authority to say that the rate, whether the carrier adopt the maximum fixed by the commissioners, or establish one below such limit, shall be collected annually in advance for each irrigating season; or it can make any other reasonable regulations in these respects. But the legislature itself cannot establish the unreasonable rule we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them, the right secured them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition. This conclusion is not based merely upon the ground of private inconvenience or hardship; it rests, as will be observed, upon the higher and stronger ground of conflict with the beneficent purpose of our fundamental law. A further consideration worthy of mention in passing, bearing, at least, upon the unreasonableness of the view urged upon us, is the position of the consumer who pays the charges for 20 years in advance. What assurance has he that the carrier can or will keep its engagement during that period? Its business is attended with considerable hazard, and requires large and continuing expenditures of money. The consumer may find himself without water, and dependent for the recovery of his large advancement upon the doubtful experiment of suit against an insolvent company.

To say that the courts may not interfere, under the circumstances above narrated, is to say that the clear intent of the constitution in relation to a constitutional right may be disregarded with impunity, simply because no express inhibitory constitutional or statutory provision on the subject can be found; also, that, for a like reason, one charged with an important public duty may condition its performance upon unreasonable and oppressive demands. I do not usurp the province of the legislature by declaring what would be reasonable requirements as to the time and manner of collecting water-rates. My position is that, for the reasons given, respondent's demand of \$10 per acre, as an advance payment of part of the transportation charge

for the remaining years of its corporate life, is illegal, as well as unreasonable and oppressive. Respondent's enterprise is of great public importance and benefit. The original construction of its canal cost large sums of money, and its running expenses are necessarily heavy. For a considerable period the capital invested must have been unproductive. These and other circumstances may be proper subjects for consideration by the commissioners, when called upon to establish a maximum rate; and, whenever they become appropriate matters for judicial cognizance, the attention deserved will be received from the courts. But no expenditure, however vast, and no inconvenience, however great, can justify or legalize the exaction, the consumer objecting, of the demand under consideration, as an absolute condition precedent to use for the current irrigating season. I must not be understood as intimating that this demand is illegal *per se*; and if the consumer, prior to 1887, saw fit to waive his right, by voluntarily submitting thereto, both the legislature and courts may be alike powerless to relieve him from the legitimate results of his contract. When properly understood, the statutes, in so far as they relate to the principal subjects examined, harmonize with the conclusions above stated. Counsel's proposition that only those consumers who have previously used water are permitted to demand it, on payment of the rate established by the carrier, is not sound. The section upon which they rely (1740, Gen. St.) is simply an assurance of the right to continue, under specified circumstances, a use already exercised. It does not operate to repeal section 311 of the General Statutes. This section expressly commands ditch companies, having water in their canals not taken, to furnish the same to the class of persons using it in the manner named by the articles of incorporation, upon payment of the established rate. The declaration therein that this rate shall be fixed by the county commissioners must be taken with the constitutional condition attached, viz., "where application is made to them by either party interested." But when the company has a fixed rate of its own, with which the consumer is satisfied, no necessity exists for the making of such application. If counsel's position were correct, the land-owner who has never had the use of water would, so far as the statutes are concerned, be wholly at the mercy of the carrier; for section 1740 does not give him the right to water, even when the maximum rate has been fixed by the commissioners.

In view of the foregoing conclusions, I need not dwell upon the legality of respondent's demand that relator, as a condition precedent to the use of water for the season 1886, enter into the written contract before us. This contract contains a number of conditions that appear unreasonable, and, as I construe the constitution and statutes, are of doubtful legality. But it is sufficient to recall the fact that the unlawful demand of \$10 per acre for the right to use water is a conspicuous provision therein. Relator could no more be required to execute a contract containing this condition than he could be compelled to comply with the demand, in the absence of contract. It is not necessary to consider what would have been the result had respondent charged \$11.50 per acre for the irrigating season of 1886, instead of demanding \$1.50 for that season, and \$10 per acre as part payment for future years. Neither is it necessary to speculate as to what respondent would have charged for the season mentioned, had the law been understood by its officers according to the construction above given.

In view of the pleadings, and especially of the language employed in respondent's contract, I think that relator, upon the showing made, was entitled to the use of water from respondent's canal for the irrigating season specified in the alternative writ. This conclusion is emphasized by the defective condition of the commissioner statute prior to 1887, which left relator helpless, so far as action by that body was concerned. I also think that *mandamus* lay for the enforcement of his rights in the premises. The demurrer

should have been overruled, and the judgment must therefore be reversed, appellant recovering his costs. But courts do not order the performance of impossible acts. This proceeding was instituted for the purpose of compelling respondent to supply relator with water during the irrigating season of 1886. Since then respondent may have changed its annual charge or rate; besides, the only tender or demand appearing in the record were for that season. To order compliance with relator's request for 1886 would be absurd; to order a delivery of the water for 1888 would be unwarranted. To permit an amendment of the alternative writ so as to cover the approaching irrigating season would be to allow the substitution in this proceeding of a new and wholly different course of action, and to violate an established rule of pleading. The judgment is reversed, and the cause remanded.

BECK, C. J. I concur in the foregoing opinion of Mr. Justice HELM as to most of the propositions therein contained. In my judgment, the district court had jurisdiction of this cause when it was before it, not upon the principal ground urged by the counsel for appellant,—that there was no disagreement between the parties as to the price of compensation demanded by the respondent for furnishing the water requested,—but on the ground that the terms and demands exacted were unreasonable and illegal. The record before us does not warrant the proposition of counsel that, of the two sums of money demanded by the respondent, only the \$1.50 per acre was for compensation for transporting and furnishing the water, and that the \$10 per acre was wholly for royalty, gift, or bonus. Possibly, a large portion of the latter sum may have been a demand of this character, and consequently without consideration in law or fact. The alternative writ states, but not wholly *in hæc verba*, the stipulations upon this point, of the contracts required to be signed by the consumers of water. The statement is: "Said contracts, after reciting that in consideration of the stipulations therein contained, and the payments as therein specified, the said company, party of the first part, agrees to sell to the consumer of water, the party of the second part, 'the right to receive and use water from the canal of the first party' for irrigating the land described, for the sum of money named, and also 'upon the further payment annually in advance, on or before the first day of May in each year from the date hereof, such a reasonable rental per annum, not less than one dollar and a half per acre, and not more than four dollars per acre, as may be established from year to year by the first party.' " Appellant's counsel, in discussing the question of jurisdiction, construe the phrase above quoted from the contract, "the right to receive and use water from the canal of the first party," as an attempt on the part of the respondent company to sell a right which is by the constitution dedicated to the people, and vested in the public, and which is therefore not a subject of sale. The language may admit of criticism, but it is only slightly variant from the language employed in the constitution respecting the duty of the general assembly to provide by law that the board of county commissioners, in their respective counties, shall have power "to establish reasonable maximum rates to be charged for the use of water" furnished by individuals or corporations; and it is not as objectionable as the phraseology of the statutes, which includes such expressions as "selling water," "furnishing water for sale," "purchasing water," and the like. Without any greater liberality of construction than that given the statutes, this contract might be construed to mean, by "the payment as therein specified" for "the right to receive and use water from the canal of the first party," the consideration charged by the respondent company for conveying water through its canal, and furnishing it for the use of consumers. Now, the appellant was unwilling to make all the payments therein specified. He tendered a portion thereof, and refused to pay the balance. Did not this action on his part fairly give rise to a disagreement or dispute between the parties

as to the price to be charged for water from the ditch? It is my opinion that the nature of the disagreement came clearly within the purview of both the constitution and the statute. But for the defect, therefore, in the statute, (which deprived the appellant of any relief under it,) it would have been obligatory upon him, before applying to the district court for relief against the unjust charges and terms imposed by the ditch company, to have made application to the county commissioners of Arapahoe county to establish the maximum rate which the respondent might charge. Thereafter he might or might not have had a cause of action against the company, depending upon the course subsequently pursued by it. There being no gross wrong without a remedy, however, and the statute then in force affording the appellant no right to apply to said county commissioners to fix a rate, he was justified in applying to the court for relief in the first instance. Respecting the measure of relief which might have been granted, the writ being now *fructus officio* as to its principal object, I express no opinion. The respondent, however, could not legally require payment of the \$10 per acre, or other sum, for a series of years in advance, whether it be regarded as compensation or otherwise. Any sum charged for royalty or as a bonus would be unconstitutional. Except in so far as these views may not harmonize with the foregoing opinion, I concur therein.

ELBERT, J., not sitting.

(11 Colo. 68)

CHEVER v. HORNER *et al.*

(*Supreme Court of Colorado.* January 28, 1888.)

1. PUBLIC LANDS—TOWN-SITES—CONVEYANCE BY PROBATE JUDGE—PRESUMPTIONS.

Where a deed, executed by a probate judge under act Colo. March 11, 1864 regulating the entry and conveyance of town-sites as provided in acts Cong. May 23, 1844, and May 28, 1864, authorizing the entry of town-sites in trust for the benefit of occupants, recites that entry and conveyance was made under authority of law, and that the grantee was entitled to the land, and the improvements thereon, such recitals are sufficient to raise a presumption that the preliminary requisites of law have been complied with, and the deed is not open to attack for defects or omissions in the initiatory proceedings, in an action of ejectment brought by one holding a subsequent deed from the probate judge.

2. EJECTMENT—JUDGMENT—FORM OF.

Where the finding and judgment, in an action of ejectment, in effect, are that plaintiff had neither title nor right of possession, an irregularity as to the form of the judgment is without prejudice to the plaintiff.

Appeal from Arapahoe county court.

Charles G. Chever, appellant, brought an action at law against the defendants, Henry E. Rogers and John W. Horner, for possession of lot 10, block 176, in the East division of the city of Denver, claiming ownership in fee-simple. The complaint alleged that Rogers wrongfully withheld possession from the plaintiff, and that Horner claimed title adversely to him. The defendants filed separate answers, Rogers saying he could not obtain information sufficient to form a belief whether the plaintiff was seized of any estate or interest in the lot; and Horner averring ownership in fee-simple in himself, that Rogers was his tenant, and traversing the rights claimed by the plaintiff. The replication denied the rights and title claimed by Horner. The property in controversy constitutes a portion of the original town-site of the city of Denver, entered by James Hall, probate judge of Arapahoe county, May 6, 1865. The entry was made under and by virtue of the acts of congress of May 23, 1844, and May 28, 1864, (5 U. S. St. at Large, 657, 13 U. S. St. at Large, 94,) "in trust for the several use and benefit of the rightful occupants and *bona fide* owners of the improvements." Upon the trial in the district court the plaintiff proved that he had filed upon the lot in question, in the office of the probate judge, on the seventh day of August, 1865. He also introduced in evidence a deed for said lot, dated May 8, 1875, from William

C. Kingsley, probate judge of Arapahoe county, to himself. Defendant Horner introduced in evidence, to establish his title to the lot in controversy, a deed from Probate Judge Downing to John Hughes, bearing date October 24, 1867. This was followed by a deed from John Hughes to the defendant of an undivided half of said lot, dated November 26, 1870, and a decree of the district court of Arapahoe county, in partition proceedings, made and entered at the April term of 1877, vesting the other undivided half thereof in said defendant. On rebuttal the plaintiff offered to prove that Hughes, grantee of Probate Judge Downing, never filed upon the lot as required by the territorial act of 1864; that at the time of the execution of Judge Downing's deed to him there were two filings upon the lot, one by the plaintiff, and the other by one John M. Veasey; also that Hughes was not a beneficiary under the trust created by the acts of congress; that he was not an occupant, or entitled to possession of the lot in controversy, and had no improvements thereon. Plaintiff also offered to prove that on the 23d day of May, 1873, he was in possession of the lot, and that on the 30th day of the same month the defendant Horner broke through the fence, moved a frame house upon the lot, and took possession thereof. These offers of proof were all rejected by the court, exceptions being reserved by the plaintiff. The act of congress of May 23, 1844, authorizing the entry of town-sites in trust for the use and benefit of the occupants, required the trust to be executed in respect to the disposal of lots, and the proceeds of sales thereof, according to such regulations as might be prescribed by the legislative authority of the state or territory in which the town-site was situated; and it also provided "that any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect." The congressional act of May 28, 1864, entitled, "An act for the relief of the citizens of Denver, in the territory of Colorado," extending the provisions of the former act to specific subdivisions of land, provided "that in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of 23d of May, 1844, and the rules and regulations of the commissioner of the general land-office." The territorial legislature, by an act approved March 11, 1864, prescribed rules and regulations for the execution of the trust arising under the former act, and by operation of law they were equally applicable to entries made under the latter act.

*J. Q. Charles and H. C. Dillon, for appellant. J. W. Horner and Lucius P. Marsh, for appellees.*

BECK, C. J., (*after stating the facts as above.*) In construing the foregoing statutes, this court has held that the execution and delivery of a deed to a portion of the Denver town-site, by a probate judge, acting under and by virtue of these statutes, was analogous to the granting of a patent by the land department of the government, and that the same presumptions in favor of the regularity of such deed exists as in the case of a patent issued by the government. It has long been a settled doctrine that a government patent cannot be impeached collaterally, nor the regularity of the proceedings anterior to its issue called in question in an action at law, where the land department of the government had jurisdiction to dispose of the land. The adjudications of the supreme court of the United States upon this point are reviewed in *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. Rep. 225, a case substantially similar to that here presented, and which we think conclusive of most of the questions raised by the assignment of errors in this case. It was there held that the conclusive presumptions attaching to a patent were applicable to the deed of a probate judge, assuming to act under and by virtue of the United States and territorial town-site statutes. One of the positions assumed by appellant's counsel is that the present case should be distinguished from the *Anderson Case*, because its essential facts are different, and for the

reason that the questions of law involved did not arise in the former case. We reply that the controlling legal proposition is the same in both cases, viz., can the prior deed executed by the probate judge be collaterally impeached by proof that certain preliminary requisites of the law have not been complied with? In the former case this question was determined in the negative. Why should it be determined differently in the present case? The principle reasons assigned are that the deed sought to be impeached in the former case, that from Probate Judge Downing to Foy, (through which, by mesne conveyances, defendant Caroline E. Downing deraigned title,) was based upon a filing made in accordance with the territorial act of March 11, 1864, while no such proof was made in support of the Hughes deed in the present case; and plaintiff offered to show that no filing had been made by Hughes. While the fact that Foy had made such filing was disclosed by the record in the former case, it was not a controlling fact in the decision. The doctrine announced was that the deed upon its face purported to have been issued in pursuance of the law, and was therefore only assailable in a direct proceeding to set it aside. Another proposition insisted upon is that it was admissible to attack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is: "That the action of Downing in issuing the deed in question to Hughes was a fraud upon the rights of the plaintiff in this case, will hardly be questioned." Whether this charge be true or not, the proposition that upon this ground the validity of the deed was examinable, in an action of this character, is in conflict with the leading cases on the subject. The doctrine is established by numerous decisions of the supreme court of the United States that, should the officers of the land department, in issuing a patent, err in respect to their duty, or as to questions of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if, upon any state of facts, the patent might have lawfully issued; and that against collateral attack it will be presumed the necessary facts existed. Parties aggrieved by such error or fraud must resort to a direct proceeding to set aside the patent. *Smelting Co. v. Kemp*, 104 U. S. 636; *Johnson v. Towsley*, 13 Wall. 72-83; *Moffatt v. U. S.*, 112 U. S. 24, 5 Sup. Ct. Rep. 10. It is held in *Field v. Seabury*, 19 How. 323-333, that when a patent has issued without any provisions incorporated for inquiring into its fairness as between grantor and grantee or between third parties, a third party cannot raise, in ejectment, the question of fraud as between the grantor and grantee, and thus look beyond the patent. This case declares that a patent cannot be collaterally avoided at law for fraud, and that the court had never declared it could be done. A third proposition is that the case comes within the two exceptions to the rule of conclusive presumptions mentioned in the *Anderson Case*; the first being, when there is a contest between two patentees for the same land, that a patent takes effect from the date of the original proceedings to obtain title, and in such case they are referred to for the purpose of ascertaining which of the contestants took the first steps; the other instance being under a statute declaring a patent void, where no entry as an initiatory proceeding had been made. These exceptions require explanation. In a contest between two patentees, concerning the same tract of land, where the patents were issued by the land department of the government under the general land laws thereof, and the land in dispute was subject to entry and sale, the exception only applies to cases arising under certain state statutes which authorize such an inquiry into the prior equities in an action at law. It is not a general exception. The exception also applies if the earlier patent issued without jurisdiction, as if the land was not then the property of the United States, or was not open to entry and sale. Another exception and the one upon which the most of the cases cited by the appellant are based, relates to patents issued by

the government for lands in California, under the treaty of 1846 with Mexico, and the congressional act of 1851, passed in aid thereof. This exception will be explained hereafter. As to the second class of exceptions, also arising under special statutes, the rule announced in the above-mentioned case was, if the patent is silent on the subject it is competent to show the initiatory steps were not taken at all. The rule contended for under this third proposition is that the filing upon a lot by a claimant, made in the office of the probate judge, in pursuance of the territorial act of March 11, 1864, was the equivalent of an entry of land in a government or state land-office; that, as between conflicting claimants for the same lot, the party making the earlier filing, although holding the junior deed, is entitled to recover by virtue of the doctrine of relation, as "where two patents have been issued by the United States for the same property, and the junior conveyance, by relation, has been held to convey the superior and better title." When two patents for the same tract of land are issued by the government, while the first patent conveys the legal title, the second may convey the equitable and better title. But the courts of the United States do not hold that the equitable title shall prevail in an action at law, save in the excepted cases mentioned. It was so held in *Ross v. Barland*, 1 Pet. 655, but the reason assigned by the court was that the cause originated in the state of Mississippi, where, according to the peculiar mode of proceeding in actions of ejectment, the courts "look beyond the grant, and examine the progressive stages of the title from its incipient state \* \* \* until its final consummation by grant; and if found regular, and according to law, in these progressive stages, the grant is held to relate back to the inception of the right, and to have dignity accordingly." In such a case the correctness of the practice, as established by the courts of the state, could not be examined on writ of error to the supreme court of the United States, as stated in the syllabus of the case. The court, however, said: "Upon common-law principles, the legal title should prevail, in the action of ejectment, upon the same grounds that the legal right prevails in other actions in courts of law." This case is therefore not in point, since the practice mentioned does not prevail in this state. The case of *Sherman v. Butch*, 93 U. S. 209, was a contest at law between two patentees who claimed the same tract of land, the plaintiff by a patent from the United States, and the defendant by a patent issued by the state of California. The plaintiff held the junior grant, and it was held proper for him to introduce evidence of his prior entry, not for the purpose of impeaching or contradicting the state patent, but for the purpose of showing that when the state of California made her conveyance she had no title to the land. This case, therefore, fell within another exception. The same character of testimony was held admissible, for the same purpose, in *Polk's Lessee v. Wendal*, 9 Cranch. 87, a case strongly relied upon by the appellant in the present action. The plaintiff's title rested upon a patent issued by the state of North Carolina, regular in all respects. The defendant relied upon an earlier patent issued by the same state, purporting to convey the same lands. The lands in controversy comprised a portion of a tract of territory which had been ceded by the state of North Carolina to the government of the United States many years prior to the issuing of either patent. At the time of the cession the right was reserved by the state to perfect incipient titles. It did not appear on the face of the defendant's patent that an incipient title had accrued prior to the cession, and the state authorities had not jurisdiction to make a grant upon rights claimed to have accrued afterwards. On this point the court say: "After the cession the state of North Carolina had no power to sell an acre of land within the ceded territory. No right could be acquired under the laws of that state." Page 284.

The patent in the above case purported to have been made by virtue of certain warrants founded on entries. The plaintiff offered to prove that these



entries were never made, and that the warrants were forgeries. This evidence was excluded at the trial by the district court of the United States, but held to have been admissible by the supreme court, on the principal announced in both this and the previous case, that the object of the testimony was to show that the state had no title to the thing granted, and consequently acted without jurisdiction. If, as the court says, these warrants had no existence at the time of the cession, and no entries had been made, the grantee had no incipient rights. The patent being silent on this point, and there being a state statute requiring an entry to be made, and declaring void all patents issued in violation of its provisions, the case comes clearly within both classes of exceptions referred to in the *Anderson Case*. These are the only classes of cases found by us where unconditional patents have been held open to examination at law. The doctrine of relation, so earnestly insisted upon by counsel for appellant, as applicable to the case before us, has frequently been applied in equity, and has likewise been applied under peculiar systems of procedure, as in the Mississippi case. There are other instances, however, than those above given, wherein it has been held proper in contests between patentees for the same land in legal actions, to show "that a junior patent was founded upon an earlier entry than the older patent, and therefore passes the title." Most of the cases cited on part of the appellant have been of this character. These cases have arisen, as above stated, under treaty stipulations with Mexico, by virtue of which the territory embraced within the state of California was ceded to the United States, and under the act of congress of March 3, 1851, passed to ascertain and settle the private land claims in that state. By the treaty of cession the property rights of the inhabitants were to be protected to the same extent as under the former government. The act of congress specified the manner and terms on which these treaty obligations would be discharged. All claims to land were to be presented, within two years from the date of the act, to a board of land commissioners for investigation, or to be treated as abandoned. The claims were to be supported by evidence furnished by the claimants, and government officers were to appear and contest on behalf of the United States. Appeals were authorized from the land board to the district court of the United States, and thence to the supreme court. Upon confirmation of a claim by this special tribunal, or on appeal, the land was to be surveyed and located, and upon approval of the survey by government officers a patent issued from the United States to the claimant. As to the effect of the patent when issued it was held to operate as a relinquishment to the patentee of all interest of the United States in the land granted thereby, and to be an official declaration that the claim was valid under the laws of Mexico, and entitled to recognition under the treaty stipulations. As to claims to these lands made by other parties after the cession of the territory to the United States, the patents are held conclusive, and to take effect by relation at the time proceedings were instituted before the board of land commissioners by the parties whose rights were acquired under the Mexican government. They are held to convey to the patentee the legal title, and to be conclusive in actions of ejectment as against all persons asserting imperfect or equitable titles, or interests acquired after the cession of the territory. This class of patents, however, reserve the rights of "third persons," in accordance with the provision of the act of March 3, 1851, that the final decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the rights of third persons. The third persons intended were held to be those whose rights were acquired under the former government.

We are of opinion that the adjudications of the state and federal courts, upon patents issued by the United States for lands in California claimed under Mexican and Spanish grants, do not furnish a correct rule for the interpretation of a deed to a parcel of land in the Denver town-site, executed by probate judge,

under and by virtue of the acts of congress and of the territorial legislature relating to that subject. The statement in the *Anderson Case* that a deed executed by the probate judge is analogous, in effect, to a patent granted by the government, had reference to patents for lands of the United States issued by the land department under the public land laws of the government. The adjudications upon patents issued upon Mexican grants were necessarily variant from those made in cases arising under the public land laws. The laws, the principles involved, and the systems of procedure in the two cases are essentially different. In one case the patents, when regularly issued, are conclusive in actions at law of the rights of all persons. In the other, although the proceedings may be entirely regular, yet there is a reservation to those who may be able to show superior rights. For these reasons the latter class of cases cannot control the construction of conveyances of the character under consideration. The decisions in the former class, in so far as they relate to the effect and conclusive character of patents made under systems of procedure similar to our own, or in accordance with common-law principles, are recognized authority in the construction of these deeds. Under the acts of congress above mentioned, and the provisions of the act of the territorial legislature in aid thereof, the probate judge, holding the title to the town site in trust for the beneficiaries, was authorized to convey the lots and parcels of land therein to those entitled to the same. This was a general jurisdiction over the subject-matter, analogous to the jurisdiction of the land department of the government over the issuing of patents to lands subject to entry under the land laws of the United States. Being invested with title and jurisdiction, Probate Judge Downing conveyed the lot in controversy to John Hughes, from whom appellee Horner deraigned title more than seven years prior to the conveyance by his successor, Judge Kingsley, to the appellant Chever. If, then, the deed from Judge Downing to Hughes is regular upon its face, and purports to have been executed in pursuance of the authority vested in the grantor, it is not open to attack in this collateral proceeding for defects or omissions in the initiatory proceedings. Referring to the copy of the deed set out in the transcript, the deed itself is shown to contain the recitals of the entry of the town-site by Probate Judge James Hall; that for more effectually carrying out the trust secured by the act of congress he conveyed by deed to his successor in office, Omer O. Kent, "all portions and lots of land not heretofore conveyed by him in accordance with said trust;" that said Omer O. Kent conveyed by deed to his successor in office, Jacob Downing, to effectuate the same purposes, "all portions and lots of land not heretofore conveyed by him in accordance with said trust." It also contains these further recitals: "And, whereas, the said party of the second part is justly entitled to the lots and parcels of ground hereinafter described as the rightful occupant thereof, and the *bona fide* owner of the improvements thereon, under the provisions of said act of congress; now, therefore, in consideration of the premises, and the sum of one dollar, by the party of the second part, in hand paid to the said party of the first part, under and by virtue of the act of congress aforesaid, and the laws of the territory of Colorado, the said party of the first part doth hereby grant and convey unto the said party of the second part," etc. It is seen from these recitals that the deed is neither void upon its face nor silent as to the authority of the officer to execute it. They are sufficient, under the principles announced, and the authorities cited in support thereof, to raise the presumption, in an action of this character, that the necessary initiatory steps were taken in conformity with the law. Respecting the error assigned as to the form of the judgment, the irregularity complained of is in no manner prejudicial to the appellant.

The effect of the finding and judgment is that in so far as this action is concerned he had neither title nor right of possession. The judgment is affirmed.

(11 Colo. 198)

AUSTIN *et al.* v. BUSH.

(*Supreme Court of Colorado. March 16, 1888.*)

**CERTIORARI—WHEN LIES—DILIGENCE OF PETITIONER.**

Where defendants in an action of replevin do not appear, relying upon the assurance of the constable, to whom they give up the property, that they need do nothing further, and that he will have the suit dismissed, there is not such diligence as entitles them to *certiorari* to the county court, under Gen. St. Colo. 1883, § 1905, relating to *certiorari*.

Commissioners' decision. Error to Arapahoe county court.

Action of replevin in justice court by James S. Bush, plaintiff, against S. Austin, C. H. Reynolds, and W. H. Bush, defendants. Judgment was entered for plaintiff. Upon an order quashing a writ of *certiorari* to the county court, defendants sued out this writ of error.

C. H. Toll, for plaintiffs in error. Bentley & Vaile, for defendant in error.

DE FRANCE, C. On the 5th of January, 1883, the defendant in error obtained judgment against the plaintiffs in error, in a justice of the peace court, in the county of Arapahoe. On the 17th of March, 1883, the plaintiffs in error filed a petition in the county court of said county, asking that the action in which said judgment was rendered be removed to said county court by writ of *certiorari*, which was done. The defendant in error afterwards filed a motion to quash the writ of *certiorari*, and to dismiss the proceedings had and taken in pursuance thereof, on the grounds—*First*, that the petition for said writ does not show that the judgment before the justice of the peace was not the result of negligence of the party praying for such writ; *second*, that the petition does not show that said judgment was unjust; *third*, that the petition does not show that it was not in the power of the defendants to take an appeal in the ordinary way. This motion was sustained by the court, and a final judgment entered, dismissing the proceedings upon such writ, and awarding a *procedendo* to such justice's court. The case is brought here by a writ of error to the county court, and the only question to be decided is, whether the petition for the writ of *certiorari* was sufficient to warrant the issuance thereof.

The action was one of replevin to recover the possession of sleigh-bells alleged to be of the value of \$18. The only facts stated in the petition for the writ of *certiorari*, to show that the judgment was not the result of negligence on the part of the petitioners, are as follows: That, when the constable came to them to serve the writ of replevin, they delivered the sleigh-bells to such constable, stating to him that they did not wish to defend the suit, and that they would pay the costs; that the constable thereupon promised them that he would deliver the sleigh-bells to the plaintiff, have the action dismissed, and that he would come to them for the costs as soon as he could ascertain their amount; that they inquired of said constable whether it was necessary for them to appear before the justice in said action, or to do anything further therein, and that he informed them it was not; that they relied upon the promise of such officer, and supposed the suit had been dismissed, and knew not to the contrary until the 8th day of March following. No additional reasons or facts are stated to show it was not in their power to take an appeal in the ordinary way. The judgment rendered by the justice was to the effect that the plaintiff retain the property, and have and recover the sum of \$50 damages for the detention thereof. It seems incredible that damages to that extent could accrue simply on account of detaining property alleged in the affidavit for replevin to be worth only \$18. How a justice or court, acting under the obligations of a solemn oath, could render such an unconscionable judgment, is beyond our conception. But, notwithstanding this hardship and injustice, we are compelled to follow the uniform, and, as we think, proper, construc-

tion given to the section of the statute which authorizes the writ of *certiorari* in such cases. This statute is designed for exceptional cases, and gives this additional remedy, by *certiorari*, to those, and those only, who fairly come within its provisions. The law, in general, requires at least ordinary diligence of those who claim its protection, and especially of parties litigant. But it is said that before a party is entitled to the benefit of the writ of *certiorari*, under the section of law in question, he must "use something more than ordinary diligence to perfect his appeal" in the ordinary way, (*Lord v. Burke*, 4 Gilman, 367;) and the same degree of care, we imagine, should be exercised to prevent the judgment in the first instance. The facts stated in their petition show a want of even ordinary diligence on the part of plaintiffs in error, both before and after the judgment complained of was rendered against them. To rely upon the mere promise of the constable is not sufficient. And the failure of the officer, under the promise made, to notify them within a reasonable time of the amount of the costs in the case, should at least have induced an inquiry into the matter upon their part; and, even without such failure on the part of the officer, they should have made proper inquiry, in apt time, as to what disposition had been made of the suit. *Tilton v. Association*, 6 Colo. 288, and cases there cited.

The court below committed no error in dismissing the writ of *certiorari* and awarding a *procedendo*. The judgment should be affirmed.

RISE and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

(11 Colo. 180)

#### HAMILL v. ASHLEY.

(*Supreme Court of Colorado. March 16, 1888.*)

##### 1. PLEADING—AMENDMENT—POWER OF THE COURT TO DIRECT.

Where an action is brought by two persons as partners, and it is shown that they are not partners, and that one of them alone is the real party in interest, the court may, under Code Civil Proc. Colo. §§ 78, 81, relating to amendment of pleadings, deny a nonsuit, and allow the complaint to be amended by striking out the name of the other party.

##### 2. PRINCIPAL AND AGENT—ACTION AGAINST PRINCIPAL—EVIDENCE.

Defendant wrote to plaintiff, "It will be all right for you to do whatever surveying my man requires." In an action to recover for services rendered in pursuance of this letter, evidence of any instructions from defendant to his agent, not communicated to plaintiff, is not admissible.

Commissioners' decision. Appeal from superior court of Denver.

This was an action to recover for certain services rendered in surveying certain lands. The action was commenced against the said William A. Hamill by the said John K. Ashley and one Peter O'Brien, as partners. It was tried to the court. At the close of the evidence for plaintiffs there, a motion for nonsuit was made by appellant, for the reason that, from the evidence, it appeared that the said plaintiffs were not partners, and that said Ashley was the real party interested in the action; whereupon the court granted an amendment of the complaint by striking out the name of O'Brien, and then denied the motion for nonsuit. Appellant excepted, and proceeded with his evidence in support of his defense. The controversy was then over the amount that Ashley was entitled to recover in the action, it being contended by appellant that he was not liable for the full amount claimed, for the reasons that the charges for the services were unreasonable, and that his agent had tran-

scended his authority in the premises. Before dealing with appellant's agent, or undertaking to perform the services, appellee, Ashley, received from appellant a letter concerning the said agent and services, as follows:

"GEORGETOWN, COLO., May 27, 1882.

"*Ashley, Esq., County Surveyor, Tabor Block, Denver:* My man, F. W. Cline, writes me here he has seen you in reference to surveying some 440 acres of land near Argo. It will be all right to do whatever surveying Cline requires, in addition to running out the lines of the several tracts that go to make up the 440 acres. The land is as follows: W.  $\frac{1}{2}$  of S. W.  $\frac{1}{2}$  of section 2, township 3 S., range 68 W.; S. W.  $\frac{1}{2}$  of N. W.  $\frac{1}{2}$  of section 2, township 3 S., range 68 W.; N. E.  $\frac{1}{2}$  of S. E.  $\frac{1}{2}$  of section 3, township 3 S., range 68 W.; S. E.  $\frac{1}{2}$  of N. E.  $\frac{1}{2}$  of section 3, township 3 S., range 68 W. This is the old Page place. Also S. E.  $\frac{1}{2}$  of S. E.  $\frac{1}{2}$  of section 3, township 3 S., range 68 W.; the E.  $\frac{1}{2}$  of N. E.  $\frac{1}{2}$  of section 10, township 3 S., range 68 W.; the N. W.  $\frac{1}{2}$  of N. W.  $\frac{1}{2}$  of section 11, township 3 S., range 68 W.; and the W.  $\frac{1}{2}$  of S. E.  $\frac{1}{2}$  of section 10, township 3 S., range 68 W. This last eighty acres I bought from W. A. Smith, and Mr. Smith informs me that there is a stone placed in the ground that is in the exact position of the original post planted when the government survey was made. My man, Cline, can point it out to you. If convenient, would like you to commence surveying on Tuesday next, the 30th inst.

"Yours, truly,

W. A. HAMILL."

And prior thereto appellant had instructed his agent, Cline, as follows:

"GEORGETOWN, COLO., May 1, 1882.

"*Mr. Fred W. Cline, Hamill's Farm, near Argo—DEAR SIR:* \* \* \* 'Surveyor.' You might ask Mr. Wolcott, or one of his clerks, the name and address of the county surveyor, then go and see him and have him say what he will charge per day; and if it is a reasonable charge, let him run out my lines on the entire 440 acres, establishing corners that cannot be destroyed, and also level over the land, and ascertain the best places to get ditches. I cannot get away from here for some days.

"Yours, truly,

W. A. HAMILL."

The court held that the appellee was not bound by any instructions to the agent, Cline, not communicated to him, and accordingly excluded all evidence of that character, including the said letter to Cline. It is argued for appellant here that, in each of these orders and rulings, the court erred.

*Morrison & Fillius*, for appellant. *W. B. Mills*, for appellee.

STALLCUP, C., (after stating the facts as above.) Section 78 of our Code of Civil Procedure provides that the court may in furtherance of justice, amend any pleading by adding or striking out the name of any party, or by correcting a mistake in any other respect. Section 81 provides that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and that no judgment shall be affected or reversed by reason thereof. The order for the said amendment, and the denial of the said motion for nonsuit, were warranted by these provisions.

The said letter to appellee was a sufficient warrant for him to deal with the agent, Cline, in the surveying of these lands, as one vested with full authority therein; and any private instructions limiting such authority, not communicated to appellee, were properly excluded. *Story*, Ag. § 127; *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. Rep. 234. The fact that the services rendered by appellee were in his capacity of county surveyor in no way diminished his rights in this action.

This action was for a recovery of the reasonable value of the services rendered in surveying the lands described. There was some conflict in the evidence, but there was evidence to sustain the findings of the court of the value of the services, and that the services were rendered in compliance with the re-

quest made, and directions given by the agent, Cline. The judgment should be affirmed.

RISING and DE FRANCE, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the superior court is affirmed.

(11 Colo. 201)

MUSSETTER v. TIMMERMAN.

(*Supreme Court of Colorado*. March 16, 1888.)

1. PARTNERSHIP—ACTIONS BETWEEN PARTNERS—PARTNERSHIP DEBTS—EVIDENCE.

In an action against a former partner to recover one-half the amount of a firm debt paid by plaintiff, after the dissolution of the firm, duplicate bills of the goods so paid, and of the prices of such goods, are admissible in evidence, plaintiff having testified that such bills contained a correct statement of the goods and the prices at which they were bought.

2. SAME—ASSUMPTION OF DEBTS BY NEW PARTNER—SCHEDULE—ESTOPPEL.

Plaintiff sold out his interest in a partnership, the incoming partner agreeing to pay certain debts of the firm. A schedule of such debts was made by plaintiff which was intended and supposed by plaintiff and his copartner to include all the debts of the firm, but by mistake certain debts were left out, and these plaintiff afterwards paid. In an action against his former partner to recover one-half the amount thus paid, *held*, that plaintiff was not estopped by the fact that he made the schedule and told defendant that it contained all the firm debts.

Commissioners' decision. Appeal from superior court of Denver.

This was an action by George W. Timmerman against his former partner, Lathrop Mussetter, to recover half the amount of certain firm debts paid by plaintiff after the dissolution of the firm. Judgment was rendered for plaintiff, and defendant appeals.

*J. H. Dennison*, for appellant. *Harmon & Cover*, for appellee.

DE FRANCE, C. The plaintiff, Timmerman, who is the appellee in this court, was engaged in the drug business in the city of Denver, and in June, 1882, the defendant, Mussetter, became an equal partner with him in said business. This partnership continued until some time in January, 1883, when the plaintiff sold out his interest therein to a person by the name of Cox. As a part of the purchase price for such interest, Cox agreed, in writing, with the plaintiff to pay certain debts of the old firm, and a schedule of said debts was attached to and formed a part of said agreement. There seems to have been an understanding between plaintiff and defendant at the time that such schedule was to and did include all the debts of said partnership. A mistake was made, however, in this respect, and debts amounting to \$285.66 were left out of said schedule. These debts the plaintiff afterwards paid, and then brought this suit to recover one-half the amount thereof. It is alleged that the debts so paid by the plaintiff were contracted by the firm on account of the purchase of certain goods. The defendant denied that such goods had been purchased or received by the firm, and alleged that plaintiff had agreed to pay all debts, if any, not mentioned in said schedule. The plaintiff replied, denying that he had agreed to do so. At the trial, which was to the court, the plaintiff and defendant each testified in his own behalf. In giving in his testimony, the plaintiff referred to certain bills of parcels, claimed to be duplicates, stating that such bills contained a statement of the goods so purchased, and the prices agreed to be paid therefor, and that he had paid for the goods, and at the prices therein named. These bills were offered and admitted in evidence, over the defendant's objections, and the ruling of the court in admitting the same is assigned as error. We think this objection is not well taken. The bills were admissible as part of the plaintiff's testimony. Whether they were the original bills or duplicates could make no difference,

provided they contained a correct list of the goods bought, and a true statement of the prices at which they were purchased. The plaintiff's testimony tended to show that they did. The principle of estoppel contended for does not arise in this case. Upon the issue made that the plaintiff was to pay all debts not mentioned in the schedule, the court found against the defendant. The defendant was not a party to the agreement between Cox and the plaintiff. The plaintiff prepared the schedule of debts which Cox assumed to pay. It does not appear that he either willfully or knowingly left any debts out of such list. Nor does it appear that his assertion to defendant, if he made such, that the schedule included all the debts of the firm, was willful, or made with intent to deceive the defendant, or to induce him to act thereon. Neither does it appear that defendant was prevented an inspection of such schedule, or that any concealment or deception was practiced or resorted to in its preparation. 1 Herm. Estop. § 329. It is apparent, then, that the mistake and the consequent loss to both the plaintiff and himself are due in part to his own negligence. But the defendant, in his testimony, says that the new firm of Cox & Mussetter was to pay all the debts of the old firm. That being true, it is difficult to see how the defendant is injured. On the presumption that he was an equal partner with Cox in the new firm, he would have had one-half of these debts to pay, according to his own testimony, if they had been included in the schedule. The plaintiff, therefore, is the only person who suffers by the mistake, and Cox reaps the benefit.

The judgment in this case should be affirmed.

STALLCUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment of the superior court is affirmed.

(11 Colo. 191)

JEFFRIES v. HARRINGTON, County Judge, et al.

(Supreme Court of Colorado. March 16, 1888.)

1. APPEAL—FROM INFERIOR COURT—APPELLATE JURISDICTION OF COUNTY COURT.  
Const. Colo. art. 6, §§ 2, 11, providing that the district and supreme courts of the state shall have appellate jurisdiction, does not by implication limit appellate jurisdiction to such courts; and appellate jurisdiction may be conferred on county courts under Const. art. 6, § 23, providing that no appeal shall lie to the district court from any judgment given by the county court upon an appeal from a justice of the peace.
2. OFFICE AND OFFICER—DEPUTIES—RIGHT OF WOMAN TO ACT.  
Const. Colo. art. 7, § 6, provides: "No person except a qualified elector shall be elected or appointed to any civil or military office in this state." Held, that the word "office," as used therein, does not include deputy-clerkships of county courts, and women may hold such deputy-clerkships.

Commissioners' decision. Error to district court, Arapahoe county.

Howard B. Jeffries sued out a writ of *certiorari* and prohibition to restrain the county court of Arapahoe county and Benjamin F. Harrington, county judge, from compelling said Jeffries, as justice of the peace, to send up to said county court certain papers and transcript. On the hearing, judgment was rendered against Jeffries, and he appeals.

J. C. Petman, for plaintiff in error. Steele & Malone and Sullivan & May, for defendant in error.

STALLCUP, C. This case is here upon writ of error to the final judgment of said district court, rendered upon a hearing in proceedings under chapter 31 of our Code of Civil Procedure, entitled "Of the Writ of *Certiorari* and Prohibition." The application for the writ had been made by said plaintiff in error upon allegations that a final judgment had been duly rendered by said plaintiff in error, as justice of the peace in and for said county, in an action

duly pending before him as such; that an appeal of said case to the said county court had been attempted by filing an appeal-bond in said county court; that no appeal thereby or at all had been effected, for the reason that the appeal-bond for such appeal which had been filed in said county court had been approved there by Miss Kate Mace, as deputy-clerk of said court, and that by reason of her sex she was disqualified and incapable of holding such position, and of discharging the duties thereof. The plaintiff in error had been ordered by the said county court to send up to said court the papers and transcript, as required by law in cases of appeal from justices of the peace to the county court; wherefore the writ was prayed to stay and annul the proceedings of said county court in the premises. Upon the record here, two questions are argued:

1. That the acts of our legislature conferring appellate jurisdiction upon the county courts of the state are void, for want of constitutional power in the legislature to confer such jurisdiction. It is conceded in the argument that we look to our constitution, not to ascertain the power of the legislature, but to ascertain the limitations upon such power; but it is urged that an implied limitation in this respect arises by the provisions of sections 2, 11, art. 6, Const., in that they specify that the district courts and the supreme court of the state shall have appellate jurisdiction, and that, by implication, appellate jurisdiction is limited thereto; but no such implication can arise therefrom, in view of the provisions of section 23, art. 6, Const., which are as follows: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians, conservators, and administrators, and settlement of their accounts, and such other civil and criminal jurisdiction as may be conferred by law: provided, such courts shall not have jurisdiction in any case where the debt, damage, or claim, or value of property involved shall exceed two thousand dollars, except in cases relating to the estates of deceased persons. \* \* \* No appeal shall lie to the district court from any judgment given upon an appeal from a justice of the peace."

2. May a woman lawfully hold the position of deputy-clerk of a county court, and discharge the duties thereof? By the act of January 13, 1877, it is provided that every clerk of a court of record, with the approval of the judge thereof, may appoint one or more persons to act as deputy or deputies, who may perform the duties of such office in the name of his or their principal, and that such deputy shall hold such office at the pleasure of his principal. This is all the legislation we have upon the subject, except the act of March 15, 1887, which does not materially change the same. There is nothing in these provisions rendering a woman incompetent to hold and discharge the duties of such position. By section 6 of article 7 of our constitution it is provided that "no person except a qualified elector shall be elected or appointed to any civil or military office in this state." A like constitutional provision has been construed by the supreme court of Ohio, and the word "office," as used therein, held not to include such deputy-clerkship. *Warwick v. State*, 25 Ohio St. 24. We do not think it was the intention of the framers of our constitution to declare such avenues of employment closed to women, and, until some clear expression to that effect has been made by constitutional or legislative provision, the courts should not declare against the employment of women in such positions. The judgment should be affirmed.

RISING and DE FRANCE, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.



(11 Colo. 194)

ALDEN v. KARRICK *et al.*

(Supreme Court of Colorado. March 16, 1888.)

## VENDOR AND VENDEE—REMEDIES OF VENDOR—BREACH OF CONTRACT OF SALE—PLEADING.

Plaintiff sold to K. an interest in certain mines. As part of the purchase price K. assumed and agreed to pay certain incumbrances against the property, and agreed that, after reimbursing himself for such payment from the proceeds of the property, he would pay plaintiff \$25,000 as fast as the same could be realized from the property. K. took possession of the property, and 15 days later sold it to H., without the knowledge or consent of plaintiff. In an action by plaintiff against K. and H. to recover the \$25,000, *held*, that a complaint which failed to allege that the sale by K. to H. was fraudulent or unreasonable, or that K. realized, or could have realized, either by a sale of the premises, or by working them, a surplus above the incumbrances assumed by him, did not state a cause of action. *Rising, C.*, dissenting.

Commissioners' decision. Error to district court, Pueblo county.

On August 15, 1888, the plaintiff in error, by his deed, conveyed to the defendant in error, Karrick, an interest in certain mining claims in Gunnison county. The deed contained the following provision: "Subject to all the incumbrances against said property, as evidenced by the trust deeds thereon, which indebtedness the party of the second part hereby assumes and agrees to pay. Also subject to the terms, conditions, and agreements contained in a certain contract this day entered into between the parties hereto." The said agreement referred to was in writing, and as follows: "This memorandum of agreement, made and entered into this 15th day of August, A. D. 1888, by and between B. F. Karrick, of the county of Pueblo, in the state of Colorado, party of the first part, and Hiram O. Alden, of the county and state aforesaid, party of the second part, witnesseth, that for and in consideration of the execution and delivery by the said second party to the said party of the first part, of a mining deed conveying to the said party of the first part all the right, title, and interest of the said Alden in and to an undivided seven-sixteenths (7-16) in and to the Silent Friend and Robinson and Ferry lodes, as more particularly described in said deed, and upon conditions in said deed set forth, the said party of the first part agrees and binds himself, his heirs, his executors, administrators, and assigns, firmly, by these presents, to pay the floating and mortgage indebtedness upon said mines and lodes, and that after the repayment to himself of the sum of money necessary to pay the floating and mortgage indebtedness, (that is to say, the portion of the same for which the said second party is liable,) upon said above-mentioned and described lodes and mining claims, he, the said party of the first part, will, out of the net proceeds of said mines or lodes, whether realized by working said claims and shipping ore therefrom or from a sale of the same, pay to the said party of the second part the sum of twenty-five thousand dollars (\$25,000) cash as soon as the said sum of money shall have been realized from said mining premises and lodes as aforesaid. And it is further agreed that the said first party shall, after having reimbursed himself for the outlay of money hereinbefore mentioned, pay the sum of twenty-five thousand dollars to the said party of the second part, in installments of five thousand dollars, as soon as such sum of money shall be realized from said mining premises, and said installments to be paid successively as often as the sum of five thousand dollars shall be realized from said premises as aforesaid, and until the total sum of twenty-five thousand dollars shall have been paid as aforesaid. And it is further agreed that until said sum of twenty-five thousand dollars shall have been paid, in full, as aforesaid, the said part of the second part shall, at all reasonable times of the day or night, either in person or by proxy, have free access to said mining premises and the underground workings of the same, with full power and authority to examine and inspect the same; and that he, the said second party, shall also, at all reasonable times, have full right to examine the books

of said mines, or any person or persons working and managing the same. And the said first party further agrees to work and mine said above-mentioned lodes in a good and workman-like fashion, and as economically as possible, with due regard to the proper development of said mining premises," Karrick then took possession of the premises, and about 15 days afterwards sold and delivered the same to James W. Hanna, without the knowledge or consent of the plaintiff in error. Upon December 31, 1883, the plaintiff in error commenced this action upon the assumption that a sale of the premises by Karrick made him liable for the payment of the \$25,000 named in the contract, without regard to the productive capacity of the mines, or to the amount realized by such sale, and the allegations of the complaint were accordingly framed, and in the complaint the terms of the said deed and contract were set forth. A demurrer thereto was sustained, whereupon final judgment was rendered against plaintiff. Exceptions were taken, and the case comes here on writ of error.

*Pitkin & Richmond and C. E. Gart, for plaintiff in error. J. M. Waldron and R. D. Thompson, for defendants in error.*

STALLCUP, C., (*after stating the facts as above.*) It is apparent, from the terms of the contract, that Karrick was vested with ownership in and dominion over the interest conveyed to him by Alden, and that he was accordingly to keep and work or sell the same, to the end to reimburse himself for the debts by him assumed and paid, and to realize such further sums as he might thereby; with the proviso that out of such further sums so realized the same should go to the liquidation of the said \$25,000. In the event of a sale, the working of the mines by him would necessarily cease, but until a sale he was required to work the mines to the payment of said sum, at least so long as productive and profitable to that end. The liability to pay any part of the \$25,000 was limited by the express provisions of the contract to the net surplus above the debts assumed, which Karrick might be able to realize, either by a sale of this interest in the mines, or by working the same. In order, therefore, to show a cause of action for a breach of this contract, it must appear from the complaint that such surplus was so realized, or that it could have been so realized. Thirty-eight thousand dollars was the amount of the debts assumed by Karrick. It will be seen that he was bound to pay this amount in any event, and that this seven-sixteenths interest in the mines conveyed to him constituted the only means for a return to him of this amount. A construction of the contract to the effect to deprive Karrick of this means of paying himself without paying the additional \$25,000, would leave him helpless and the loser of \$38,000, in case this interest in the mines was incapable of yielding the net surplus of \$25,000. The language of the contract will not permit of any such unreasonable construction. If this interest in the mines was incapable of yielding any part of such surplus, by sale or working the same, then appellant has not been injured, and has no cause of action. In the complaint there is no allegation or claim that the mines ever had returned to Karrick, by sale or otherwise, the amount assumed and paid out by him, or that the mines were at all capable of producing a net profit for any purpose, either by selling them or by working them. There being no allegation of facts in the complaint showing that the said sale was fraudulent, or that it was not reasonable, or that said interest was capable of producing a net yield greater than the amount of the debts assumed and paid by Karrick, or that by the said sale enough had been realized, or could have been realized, to produce a surplus over and above such debts, the complaint was properly adjudged insufficient to show a cause of action, and the demurrer thereto was therefore properly sustained. *Toombs v. Mining Co.*, 15 Nev. 444.

The judgment should be affirmed.

DE FRANCE, C., concurs. RISING, C., dissents.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment of the district court is affirmed.

(11 Colo. 204)

VALLETTE *et al.* v. SAN JUAN & N. Y. MINING & SMELTING CO.

(*Supreme Court of Colorado.* March 16, 1888.)

APPEAL—WHO MAY APPEAL—PARTY IN WHOSE FAVOR JUDGMENT IS RENDERED.

A party cannot appeal from a judgment rendered in his favor; his only mode of review being by writ of error.

Commissioners' decision. Appeal from district court, San Juan county.

This was an action for recovery of real estate, brought by Henry F. Vallette, Edmund B. Sears, and Edward W. Beattie against the San Juan & New York Mining & Smelting Company. The plaintiffs appeal from a judgment in their favor.

C. F. Wilson and H. F. Vallette, for appellants. Taylor & Ingersoll, for appellee.

DE FRANCE, C. The appellants were plaintiffs in the district court, and on the 12th day of September, 1884, recovered a judgment against the appellee, by which they were adjudged to be the owners, and entitled to the possession, of a parcel of mining ground, described in such judgment, and were awarded costs of suit. The appellants have endeavored to appeal from said judgment to this court, and a transcript of the proceedings of the court below has been filed with the clerk of this court. A party is not allowed an appeal to this court from a judgment rendered in his own favor. The only mode of review is by writ of error. *Hall v. Mining Co.*, 6 Colo. 81, and cases there cited. The case should be stricken from the docket of this court.

RISING and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion this cause is stricken from the docket.

(11 Colo. 164)

BUELL v. BURLINGAME.

(*Supreme Court of Colorado.* March 16, 1888.)

1. PLEADING—ANSWER—NOT RESPONSIVE TO COMPLAINT.

A complaint alleged that plaintiff and defendant together executed a certain note; that subsequently, for a valuable consideration, defendant agreed to pay the whole of said note; that defendant failed to pay, and plaintiff was forced and compelled to pay, said note. The answer denied that defendant agreed to pay said note to plaintiff; that plaintiff was forced or compelled to pay the same; or that the same was paid by plaintiff for the use and at the request of defendant. *Held*, that such answer raised no issue.

2. LIMITATION OF ACTIONS—WHEN CAUSE OF ACTION ACCRUES—PAYMENT.

Where plaintiff and defendant together executed a note, and afterwards defendant, for a valuable consideration, agreed to pay the whole of it, but failed so to do, and plaintiff paid it, *held*, that the statute of limitations commenced to run against plaintiff from the time he paid the note, and not from the time the note became due and payable.

3. PRINCIPAL AND SURETY—PAYMENT BY SURETY—BENEFIT OF PRINCIPAL—ESTOPPEL.

Defendant, when she made an assignment for the benefit of creditors, was indebted to plaintiff on three several notes, each drawing interest at 1 per cent. a month. She was also indebted on a note drawing 2 per cent. a month, executed by herself and plaintiff, the whole of which she had agreed to pay. The share due plaintiff from the assignee on his three notes was, by plaintiff's direction, applied on the note signed by himself and defendant, drawing 2 per cent. a month. *Held*, that this application was to defendant's advantage, and she could not object thereto.

**4. JUDGMENT—SETTING ASIDE DEFAULT—SUBSEQUENT JUDGMENT ON MERITS—EFFECT.**

Judgment by default was rendered against defendant, which afterwards, on her motion, was set aside, and she answered, and judgment was rendered against her on the trial. *Held* that, even if the proceedings which resulted in the order setting aside the default were invalid, the judgment rendered on trial would not on that account be set aside.

Commissioners' decision. Error to district court, Arapahoe county.

This action was commenced December 17, 1879. The defendant in error was plaintiff below, and the complaint set out four causes of action, the first three being upon promissory notes made by the defendant to the plaintiff, and the fourth cause of action is stated as follows: "(1) That on or about the 15th day of December, 1875, he paid for the use of the defendant the sum of \$1,963.50, the amount of principal and interest of a certain note dated 7th January, 1872, due ninety days after date, to the order of Nathaniel Young & Co., for fifteen hundred dollars, with interest at the rate of 2 per cent. per month until paid, and which said note was signed by Buell & Burlingame, and dated at Central City, Colorado; (2) that on or about the 3d day of August, 1872, the said defendant promised and agreed with this plaintiff to pay said note and the whole thereof for valuable consideration; (3) that said defendant, Anna M. Buell, and this plaintiff were makers of said note; (4) that the said defendant, Anna M. Buell, failed to pay said note, or any part thereof, except the sum of \$600, by the indorsements as agreed, and this plaintiff was, on said 15th day of December, 1875, forced and compelled to pay it to the said Nathaniel Young & Co., together with the interest thereon, amounting to the said sum of \$1,963.50." Defendant, answering the complaint, admits that she made and delivered to the plaintiff the three promissory notes referred to in the first three causes of action, but denies that each, or either of them, remain wholly due or unpaid; alleges that on the 4th day of August, 1873, she made an assignment for the benefit of her creditors, of which plaintiff was one, and charges, upon information and belief, that Thomas H. Potter, her assignee under said assignment, paid to plaintiff at least 30 per cent. of the amount of said notes, early in the month of February, 1874, which amount should be credited upon said notes. For answer to the fourth cause of action the plaintiff alleged that the several supposed causes of action in said fourth cause mentioned, did not, nor did any of them, or any part thereof, accrue to the plaintiff at any time within six years next before the commencement of this action; denied that she undertook or promised the plaintiff to pay him all or any or either of said sums of money in said cause specified, or any part thereof; denied that plaintiff, at any time, paid, for her use and at her request, the sum of \$1,963.50, or any other sum, to Nathaniel Young & Co., or to their order; denied that plaintiff was forced or compelled to pay said Young & Co., or to any one else, said sum of \$1,963.50, or any part thereof; denied that she agreed at any time to pay plaintiff the note mentioned in said fourth cause of action, or any part thereof. Plaintiff, replying to defendant's answer, alleged that it was not true, as alleged in said answer, that the fourth cause of action accrued more than six years prior to the commencement of the action. There is no contest as to the notes mentioned in the first three causes of action, except as to the claim of defendants that the amount which the plaintiff was entitled to receive from the proceeds of the assets assigned to Potter by defendant, on account of her indebtedness on said notes, should be credited thereon. The evidence shows that plaintiff and defendant, as partners under the firm name of Buell & Burlingame, made their promissory note to Nathaniel Young & Co. on the 7th day of June, 1872, payable 90 days after date, with interest at 2 per cent. per month until paid; that on or about the 3d day of August, 1872, said partnership was dissolved by the plaintiff selling his interest in the partnership property to the defendant, and that defendant, in consideration of such sale, agreed with the plaintiff to pay said note, and a certain note to Silas B. Hahn for \$1,000, made and

signed by the plaintiff and the defendant on the 14th day of March, 1872, payable 90 days after date; and defendant also agreed to pay all other indebtedness of said firm; that on August 4, 1873, the defendant made a voluntary assignment of all her property to Thomas H. Potter, as trustee, in trust for the benefit of all her creditors *pro rata*; that, at the time this assignment was made, the note made to Young & Co. for \$1,500, and the note made to Silas B. Hahn for \$1,000, had not been paid; that said trustee realized from the assets of the said trust-estate an amount sufficient to pay 30 per cent. of the assignor's indebtedness; that the amount of the proceeds of said assets that plaintiff was entitled to receive upon the three notes he held against the defendant was applied by the assignee, under the direction of the plaintiff, upon the said notes to Young & Co. and to Hahn; that the plaintiff about the 15th day of December, 1875, and prior thereto, paid to the holder of said note to Young & Co., and in full payment thereof, the sum of \$1,963.50. The case was tried to the court, and the court rendered judgment therein on the 1st day of May, 1880, in favor of the plaintiff and against the defendant, for the sum of \$5,777.75.

*L. C. Rockwell*, for plaintiff in error. *B. M. & C. J. Hughes*, for defendant in error.

*RISING, C., (after stating the facts as above.)* The first seven assignments of error relate to the sufficiency and relevancy of the evidence introduced by the plaintiff, upon the question of the payment by him of the note to Young & Co., and these assignments may all be considered together, as they are based upon the rulings of the court in admitting proof of such payment, and in refusing to strike out such proof, on motion. It being contended by the plaintiff in error that the testimony asked to be stricken out is immaterial, and not pertinent to the issues made, we will first ascertain what issues, relating to the fourth cause of action, are made by the pleadings. The material allegations of the complaint as to this cause of action are that on or about the 3d day of August, 1872, the defendant, for a valuable consideration, agreed with the plaintiff to pay a certain note made by the plaintiff and defendant to the order of Nathaniel Young & Co., on June 7, 1872, for \$1,500, due 90 days after date, with interest at 2 per cent. per month until paid; that the defendant failed to pay said note, or any part thereof, except the sum of \$600; that on or about the 15th day of December, 1875, he paid, for the use of the defendant, to the order of Nathaniel Young & Co., the sum of \$1,963.50 on account of the principal and interest due on said note. An examination of the answer will show that there is no issue raised upon any material fact alleged. The answer does not deny that defendant agreed to pay said note, but denies that she agreed to pay it to the plaintiff. This cannot be treated as a denial of the allegation. The answer does not deny that defendant failed to pay said note, but denies that plaintiff was forced or compelled to pay the same, as alleged in the complaint. We do not think the allegation in the complaint, that plaintiff was forced and compelled to pay said note, is a material allegation. The complaint stated a cause of action without this allegation. If, applying the law to the evidence, it appears that the plaintiff was authorized to make the payment when he did, that is all that is necessary to enable him to base his cause of action thereon. He was not required to wait until he was forced or compelled by legal proceedings to make such payment. The answer does not deny that plaintiff, on or about December 15, 1875, paid to the order of Nathaniel Young & Co. the sum of \$1,963.50 for the use of defendant, but denies that such sum was so paid for the use and at the request of defendant. This amounts to an admission of the payment as alleged, but denies that such payment was made at the request of the defendant. The question whether the fourth cause of action is barred by the statute of limitations may be treated under the eighth assignment of error. It is contended by counsel for plain-

tiff in error that the statute commenced to run from the time when the Young & Co. note became due and payable, and this contention is based upon the theory that, as the agreement between plaintiff and defendant as to the time when defendant was to pay the note is indefinite, it should be held that such payment was to be made upon the maturity of the note. We do not think the point made in the argument has any bearing upon the question in this case. The agreement between the plaintiff and defendant created new relations between them, and, as between them, the plaintiff became the surety of the defendant for the payment of the Young & Co. note. *Smith v. Sheldon*, 35 Mich. 42-48; *Colgrove v. Tallman*, 67 N. Y. 95. A cause of action, by a surety against a principal, does not accrue until payment made by the surety. Ang. Lim. § 131, and cases cited; Brandt, Sur. § 176, and cases cited. The evidence shows that the action was not barred by the statute. It is also urged that the judgment for \$5,777.75 is for too large an amount, in that there should have been credited upon the notes mentioned in the first three causes of action the sum of 30 per cent. of the amount due thereon, being the sum realized from the assets assigned to Potter by defendant. The evidence shows that the sum which defendant in error was entitled to receive from the estate assigned to Potter, by the plaintiff in error, on account of said three notes, was, under the direction of defendant in error, applied on the Hahn and Young & Co. notes, during the life of said notes, so that plaintiff in error had the full benefit of the amount so paid by her assignee; and not only so, but as to the amount of \$600 paid on the Young & Co. note such payment stopped interest on that amount at 2 per cent. per month, when, if it had been credited on the notes held by defendant in error, it would have stopped interest at 1 per cent. per month. The plaintiff in error has not sustained any damage by reason of such application of the proceeds of the assigned estate. There is no merit in the point made by counsel for plaintiff in error, that two judgments were rendered in this case upon the same causes of action. The record shows but one entry relating to the default of the defendant, and that is an entry of judgment by default on the 13th day of January, 1880. On the 17th day of January, 1880, a stipulation between the parties was filed, providing that the court might set aside the default theretofore entered in the case, and on the 19th day of January, 1880, on motion of the defendant, and in pursuance of said stipulation, it was ordered by the court "that the default heretofore entered herein against the said defendant be, and the same hereby is, vacated and set aside, and leave is granted the said defendant to answer the complaint herein forthwith." The defendant answered, and went to trial, and judgment was rendered against her upon such trial. We have no doubt but that the judgment by default was set aside by the proceedings had, but, if it were not so, we should not reverse this judgment, or interfere with it in any way, on account of such prior judgment, but leave the party to such relief as the facts would entitle her to in a direct proceeding to avoid either of said judgments. To permit the plaintiff in error to raise any question based upon the action of the court in setting aside the default entered, would, under the circumstances of this case, be wholly unwarranted.

The judgment should be affirmed.

DE FRANCE and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

(11 Colo. 176)

MORGENSON v. MIDDLESEX MINING & MILLING CO.

(Supreme Court of Colorado. March 16, 1888.)

1. MINES AND MINING—JUNIOR AND SENIOR LOCATIONS—CROSS-VEINS.

Under Rev. St. U. S. §§ 2322, 2336, defining the rights of junior and senior locators of cross-veins, where a junior mining location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found in his vein within the side lines of the senior location, except at the space of intersection of the two veins; and the junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. Following *Branagan v. Dulaney*, 8 Pac. Rep. 669; *Lee v. Stahl*, 11 Pac. Rep. 77.

2. SAME—EVIDENCE OF EXTENT OF CROSS-VEINS.

In an action to recover the value of certain ore, the defendant pleaded in defense that he had taken the ore from his own vein, the Silver Bell, which crossed the vein of the plaintiff known as the Butler vein, and the court refused to allow proof that the Silver Bell vein entirely crosses the Butler vein. *Held*, that the fact that there were two such veins as the Silver Bell and the Butler was necessarily involved in the proof of the fact alleged in the answer, and such proof was improperly refused.

3. EXCEPTIONS, BILL OF—SIGNING AND SEALING—SUFFICIENCY OF SEAL.

Under Sess. Laws Colo. 1879, p. 170, providing that a scroll affixed to any writing by way of seal constitutes a private seal having same effect and obligation, to all intents, as if said instrument were sealed, a bill of exceptions signed by a judge with the letters "L. s.," included in brackets, placed immediately after his name, is sealed in compliance with the law requiring bills of exceptions to be sealed.

Commissioners' decision. Appeal from district court, San Miguel county.

This was an action brought by the Middlesex Mining & Milling Company, appellee, against Frank Morgenson, appellant, to recover the value of certain ore.

*Montague & Fitch, L. F. Hollingsworth, and S. Slessinger*, for appellant.  
*Taylor & Ingersoll*, for appellee.

**RISING, C.** This action was brought by the appellee against the appellant to recover the value of certain ore which it alleged had been taken from the Butler lode mining claim by defendant, and that said claim was owned by, and was in the possession of, the plaintiff at the time said ore was so taken. The defendant placed his defense upon the alleged ownership of the Silver Bell lode mining claim by him, and that the Silver Bell lode or vein crosses the Butler lode or vein, and that the ore alleged to have been taken out by him was taken out of the Silver Bell lode or vein, and that no part thereof was taken from the Butler lode or vein, or from any of its dips, spurs, or angles, or from any vein parallel to said Butler vein. The Butler claim was located prior to the location of the Silver Bell claim. The foregoing statement of the pleadings is sufficient for a proper understanding of the questions raised by the errors assigned. The defendant was examined as a witness in his own behalf, and, as such witness, was asked the following question: "I will ask you whether this Silver Bell vein crosses the Butler,—whether it is a cross-vein crossing the Butler lode? This question was objected to by counsel for plaintiff, and the objection sustained by the court. And thereupon defendant, by his counsel, then offered to prove, by said witness, "that the Silver Bell vein, of the Silver Bell lode, entirely crosses the Butler claim and the Butler vein, and extends, and can be readily traced, across said Butler claim and vein, and at a distance far beyond that, continuously from the west end of the Silver Bell lode to a distance far beyond the Butler claim." This offer was denied by the court, and to this ruling the defendant excepted.

It is contended by appellee, in support of the ruling of the court, that the offer was not full enough in that it assumed the existence of a Butler lode or vein, and that the proof offered did not go to show the existence of two separate and distinct veins known as the "Silver Bell" vein and the "Butler" vein. We do not think this objection well taken. The offer was to prove a fact alleged in the answer, and the proof of such fact necessarily embraced

the showing of two separate veins. But, if this were not so, can appellee consistently say that the location certificates of the location of the Butler lode, introduced in evidence, are not sufficient proof of the existence of such lode upon which to base the offer made?

But it is evident, from the pleadings and the argument of counsel, that the main objection to the introduction of this proof was based upon its irrelevancy and immateriality, under the construction of sections 2322 and 2336 of the Revised Statutes of the United States which counsel for appellee claim should be given to said sections. It is also evident that the exclusion of this proof, and the refusal of the court to give an instruction asked by the defendant to the effect that the ore in a located vein which crosses another vein, upon which another and prior location has been made, belongs to the owner of the cross-vein, was based upon a construction of said sections which would exclude the owner of such junior location from any rights of ownership in the ore found in such cross-vein within the surface boundaries of the senior location. Since the trial of this case in the court below, this court has passed upon the main question presented by this appeal, holding, that when a junior mining location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. Rep. 669; *Lee v. Stahl*, 9 Colo. 208-210, 11 Pac. Rep. 77. Under this construction of sections 2322 and 2336, the court erred in its ruling refusing to permit the defendant to prove that the Silver Bell vein of the Silver Bell claim crossed the Butler claim and the Butler vein, and extended to a distance far beyond the Butler claim. The evidence was competent and material for the purpose of showing that the Silver Bell vein, from which defendant extracted the ore in controversy, was a cross-vein extending entirely across the Butler claim. The instruction asked by defendant, and refused by the court, does not state the law fully, in that it fails to except, from the ownership by the owner of the cross-vein of the ore found therein, the ore found in the space of intersection of the two veins. This point was not raised upon the argument by counsel for appellee, but the question was discussed upon the broad proposition that the senior locator is entitled to all the ore in such cross-veins.

It is contended by counsel for appellee that the bill of exceptions is not sealed, and that for this reason such bill cannot be considered by this court. The bill is signed by the district judge, and the letters "L. s.," inclosed in brackets, are placed immediately after the name of the judge. The law requiring a bill of exceptions to be sealed does not contemplate the adoption, by the judge signing such bill, of a seal other than or different from the private seal of such judge, and a bill of exceptions sealed by the judge with his private seal is sealed in compliance with the law. Under the provisions of an act of the legislature, approved January 25, 1879, which we have been unable to find in the General Statutes, but which has not been repealed, a scroll affixed to any writing, by way of seal, will constitute a private seal, having the same effect and obligation, to all intents, as if said instrument were sealed. *Sess. Laws 1879*, p. 170; *Widner v. Walsh*, 3 Colo. 418.

The objection to the bill of exceptions is not well taken. The judgment should be reversed and a new trial ordered.

DE FRANCE and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed, and the cause remanded for a new trial.



(11 Colo. 162)

**BROWN v. LANDON.**

(*Supreme Court of Colorado. March 16, 1888.*)

**1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.**

Where no exception is taken to the judgment of a county court, the appellate court cannot review such judgment upon the evidence.

**2. SAME—FROM INFERIOR COURTS—ADMISSIBILITY OF EVIDENCE.**

Where an action is commenced in a justice's court, and taken by appeal to the county court, it is not error in the county court to refuse to exclude certain evidence on the ground that such evidence had not been introduced in the justice's court.

Commissioners' decision. Appeal from Chaffee county court.

Action by Lizzie Landon against Jessie Brown and another. Judgment for plaintiff, and defendants appeal.

*J. S. Painter*, for appellant.

**RISING, C.** This case was commenced in justice's court, taken to the county court by appeal, and there tried to the court without a jury, and judgment rendered for the plaintiff, from which judgment defendants appealed to this court. No exception to the judgment was taken or reserved by appellants, and therefore this court cannot review the judgment upon the evidence. *Breen v. Richardson*, 6 Colo. 605; *Law v. Brinker*, Id. 555. Under the assignment of errors in this case, we can only consider such errors as are assigned upon the rulings of the court made during the trial, and to which rulings exceptions were reserved. There is but one exception shown by the record, and that is to the ruling of the court in overruling the defendants' objection to the admission in evidence of a bill of sale of the property in controversy made by Nellie Brooker to the plaintiff. The defendants based their objection upon two grounds: (1) That said bill of sale was not introduced in evidence in the justice's court, nor filed in said court; and (2) that it had been agreed by the parties that the case should be tried upon the agreed statement of facts reduced to writing, and read in the case. We do not think the objection is well founded. An examination of the agreed statement of facts fails to show an agreement to submit the case upon such statement of facts, and no such intention can be gathered from the language used. The judgment should be affirmed.

**DE FRANCE and STALLCUP, CC.**, concur.

**PER CURIAM.** For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

(11 Colo. 205)

**FOLSOM v. CRAGEN et al.**

(*Supreme Court of Colorado. March 16, 1888.*)

**1. MINES AND MINING—LIEN FOR WORK—OWNERSHIP.**

Where plaintiffs performed work on a mine after defendant's deed thereto, which she claimed was in reality a mortgage, was recorded, under a contract with her husband and another, who were not her agents, and the only evidence tending to connect her with the work was that in a conversation with plaintiffs she said her husband wanted the mine worked, and he would see that they were paid, plaintiffs were not entitled to a lien as against her, under Gen. St. Colo. 1888, §§ 2131, 2137, giving mechanics and miners a lien for work done on real estate under a contract with the owner of the premises.

**2. SAME—PRIOR MORTGAGE.**

And defendant's deed, if in fact a mortgage, being recorded before the plaintiffs' contract was made, or work commenced thereunder, would, under Gen. St. Colo. 1888, § 2149, take precedence of the mechanic's lien.

Commissioners' decision. Appeal from Clear Creek county court.

Action by Peter Cragen and Albert Bigelow against Emugene Folsom, De Witt C. Folsom, and Jacob M. Miller, to enforce a lien upon a mine for work and labor done thereon. Judgment for plaintiffs. Defendant Emugene Folsom appeals.

*C. C. Post* and *A. D. Bullis*, for appellant. *Morrison & Fillino*, for appellees.

DE FRANCE, C. The appellees, claiming a lien upon a mine by virtue of the law allowing liens to mechanics and others, and their compliance therewith, for work and labor done and performed by them upon such mine, under an alleged contract with the owners thereof, brought this action to enforce the said lien. The appellant, Emugene Folsom, her husband, De Witt C. Folsom, and one Jacob M. Miller were made defendants to the action. The contract to do such work and labor is alleged to have been made by appellees with the appellant and the said Miller, and was made about the 1st of July, 1884. The mine in which the work was done had been conveyed by the said De Witt C. Folsom to the appellant, by a deed absolute in form, which was recorded in October, 1883. De Witt C. Folsom and Miller made no defense, but the appellant answered, denying the contract, and alleging that the said deed of conveyance from her husband to her was a mortgage, given to secure the payment of a loan of \$2,000, and interest, made by her to her husband, and that the appellees had knowledge thereof at the time of making said contract. By their replication, the appellees denied such knowledge. The trial was to the court, and a decree was rendered, authorizing the sale of said mine to satisfy the claim of appellees, which was found and declared to be a lien upon said mine prior to the mortgage lien held by appellant. The evidence failed to show that the appellant was a party to the contract, or that she had authorized the work to be done. As appears from the testimony, the defendants Miller and D. C. Folsom were in possession of the mine, and made the contract on their own behalf with appellees. By the decree rendered, it is evident that the court regarded Miller as the only defendant liable under the contract; for it says that he owes the indebtedness, and provides for a personal judgment against him for any balance unsatisfied by a sale of the mine. After the work was partly done, the appellees had a conversation with the appellant at her residence, her husband being absent at Pueblo, and they each testify that the conversation related to the mine and the contract, and that she said her husband wanted the work to continue, and that she wanted it continued. The appellee Bigelow says: "Mrs. Folsom then asked us if we were going back to work. I told her we would if everything was all right. She said her husband would see that we were paid for our work, and that they had put too much money into the mine to lose it." This is the only evidence which tends to connect her with the subject-matter of the contract or work. The contract was to run an adit 50 feet at a price of \$6 per foot. When they had run 10 feet, they went to Miller, saying they could not make wages at that price; and Miller thereupon agreed to pay them at the rate of \$7 per foot for the remaining 40 feet. The appellees say that on this occasion Miller told them that appellant desired to see them; and that they then called to see her, and had the conversation testified to. In her testimony she denies having told Miller that she wanted to see appellees; says that she was not in possession of the mine; that her husband was not her agent; that she did not know the terms of the contract, or the price to be paid; that she had no recollection of the appellees telling her what the terms and price were, and that she did not think they did so; that she said to them that her husband was in Pueblo, and that she was satisfied he wanted the mine worked, and, if at home, would so request plaintiffs; and that she had no recollection of asking the plaintiffs to go back to work upon the mine, and did not think that she had done so. Cragen testified, in rebuttal, that appellant asked them

what price they were to receive for the work, and that he replied, seven dollars per foot. Appellant's husband testified that she was never at the mine; and that he told the appellees, when the contract was made, that he was the owner of the mine. The appellees admitted in their testimony that appellant was not present at the making of the contract, nor at the mine during the progress of the work; and that they had, just prior to the making of said contract, completed the work under another contract on said mine, for which Mr. Folsom, the husband, had paid them. And Cragen says in his testimony: "I always believed, up to the time we filed a lien upon the mine, that De Witt C. Folsom and J. M. Miller were the owners of the mine." The appellees did not file their statement claiming a lien until after the work was completed under said contract.

This is all the evidence which has any material bearing upon the question to be decided here. The only question for our decision is whether the court, after finding that the appellant was not a party to the contract, and was not personally liable thereon, erred in subjecting her rights and interest in the said mine to a sale to satisfy the claim of the appellees. That it did err in this, admits of no doubt. The deed from her husband to the appellant was upon record long before the contract was made which forms the basis of the lien claimed by the appellees. They then had constructive notice, at least, that the appellant was the absolute owner of the mine. Mr. Folsom, the husband, informed them, when the contract was made, that he himself was the owner of the mine. The appellees were then bound, if they sought to affect the interest of appellant, to inquire as to what her rights were. They failed to do so, but acted upon the belief, even after the conversation with appellant, that her husband and Miller were the owners of the mine. There was nothing said in that conversation as to the ownership of the mine, and, as testified to by Bigelow, the appellant said to appellees that her husband would see that they were paid for such work; thus showing that she did not intend to obligate or render herself liable to pay for the same, or to subject her interest in the mine to its payment. It cannot be said that appellant concealed from appellees the fact that she had an interest in the mine. She had informed the public of her rights by placing her deed upon record, and was under no obligation to inform the appellees, or any one else, that her rights were other than those purported by such deed; at least, without inquiry being made of her concerning the same. The testimony of the appellees that they had no knowledge of the appellant's rights cannot avail them. They were bound by the record notice. Unless the appellant was a party to the contract, or adopted the same, and thus made it her own contract, her rights cannot be affected thereby. The principal contract must be with the owner. Sections 2131, 2137, Gen. St. 1883; *Mellor v. Valentine*, 3 Colo. 255; Phil. Mech. Liens, § 225. The appellant's deed, even if a mortgage, was recorded before the contract was made, or the work commenced thereunder, and would take precedence of the mechanic's lien. Section 2149, Gen. St. 1883; *Tritch v. Norton*, 10 Colo. —, 15 Pac. Rep. 680.

A new trial should have been granted, and the judgment must be reversed.

RISING and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is reversed, and the cause remanded for a new trial.

(11 Colo. 220)

ARMSTRONG v. ABBOTT.

(*Supreme Court of Colorado*. April 8, 1888.)

CORPORATIONS—KNOWLEDGE OF OFFICERS—NOTICE TO CORPORATION.

A director of a land company who was also probate judge, at the grantor's request drew a deed, in the presence of the president and executive board of said com-

pany, conveying to a third person certain lots, and took the acknowledgment of the same. Afterwards, and before such deed was recorded, the company purchased the same lots from the same grantor. *Held*, that the company had no such knowledge of the identity of the lots purchased by it with those formerly conveyed as would charge it with notice of such former conveyance.

Commissioners' decision. Appeal from Larimer county court.

Ejectment by John C. Abbott against Andrew Armstrong. Judgment for plaintiff, and defendant appeals. The appellee was plaintiff below, and his action was one in the nature of ejectment, to recover lot 1, block 112, in the town of Fort Collins. From the evidence it appears that one Davis was owner of the lot on May 14, 1873; that upon that day he conveyed the lot, by deed, to the trustees of the Presbyterian Church, upon condition that they erect a stone church thereon within one year, and, upon failure so to do, the title to revert. This deed was not recorded until May 13, 1877. On September 13, 1879, the church trustees not having built the church, or otherwise improved the lot, conveyed it by quit-claim deed to the appellant Armstrong, who partially inclosed the lot soon after, and was so in possession when this action was commenced, September 6, 1882. On July 12, 1873, about two months after the conveyance to the church trustees, Davis conveyed the same lot to the Larimer County Land Improvement Company, a corporation, which deed was duly recorded July 22, 1873. The company afterwards conveyed the lot to Haynes, and Haynes to the appellee, Abbott. The conveyance from Davis to the church trustees was not of record when the company purchased the lot. The appellant claims that the facts were such as to charge the company with notice of the prior conveyance, at the time it made such purchase, and that the court's finding to the contrary was error. The facts shown upon this point are as follows: A. F. Howes, who was a director and member of the executive committee of the company, also probate judge, drew the deed which Davis made conveying this lot, and another adjoining, to the church trustees. And concerning the same he testified as follows: "I had no interest in the transaction; when I certified the acknowledgment to this deed, I was acting as scrivener and acknowledging officer only,—don't know that I charged my mind with it." R. A. Cameron and J. E. Remington, also directors and members of the executive committee of the company, were present at the time this deed was made, and, on the same day, the company conveyed to the church trustees the two adjoining lots. The evidence does not disclose who acted for the company in the purchase of the lot July 12, except that R. A. Cameron, in his testimony, stated that he was president of the land company, and that he had charge of the buying and selling of real estate, and that he got a large number of lots from Davis for the company.

*T. M. Robinson*, for appellant. *E. A. Ballard*, for appellee.

**STALLCUP, C.** It is conceded, in the argument, that, under our statute, the improvement company acquired title to the lot by the conveyance of July 12, 1873, as against the conveyance to the church trustees of May 14, 1873, provided the purchase by, and the conveyance to, the company, were without notice to the company of the prior conveyance. The improvement company, a corporation carrying on the business of buying and selling real estate, necessarily transacted its business through its agents. In the transaction of May 14, 1873, certain of its officers doubtless had knowledge of the fact that Davis conveyed two lots to the church trustees, and knew their location with reference to the two lots which were conveyed to the church trustees by the improvement company on the same day; but while actively engaged in buying and selling lots, and while making purchases of lots from said Davis, two months after the occurrence of the conveyances to the church trustees, this lot No. 1 was purchased from Davis, the record showing title in him. The question arises, was the mind of any one of the said directors or officers of the improvement company then charged with what had occurred two months pre-

vious, so as to affect the company with notice of the previous conveyance, to the church trustees, of this one lot? As there was nothing in the transaction of May 14th to require or cause the officers of the company to fix and carry the description and identity of this lot in their minds, it is not reasonable to presume that they did so, nor to declare that they should have done so. So there was nothing in the negotiations and purchases of lots two months thereafter to require the company's agents, in making said purchases, to look any further than to the records as to the title of Davis thereto. For notwithstanding a person may have knowledge, incidentally, of a conveyance of town lots, and even know their locality, yet it would be quite unreasonable to require that the number, description, and identity of such lots should be retained indelibly in the memory of such person, especially when they are lots in a newly laid-out town, uninclosed, unimproved, and of no great value. There was nothing in the transaction of May 14th of the character requiring the officers of the company to take note or memory thereof, as, in the conveyance of the lots by Davis to the church trustees, the company was in no way party thereto, nor affected thereby, neither was any one acting in the same for, nor on behalf of, the company. Nothing is shown of the lot purchase by the company from Davis, of July 12th, of a character calculated to bring home to, or charge upon, the company, or its agents, notice of the fact that this lot had been previously conveyed by Davis. So the case seems fairly within the rule that the principal is not bound by the unofficial knowledge communicated to the agent, unless such knowledge is present to the agent's mind at the time of effecting the purchase. This rule, as stated in the case of *The Distilled Spirits*, 11 Wall. 356, is certainly founded upon correct principles, and decisive of the question here presented. It follows that there is no reason for disturbing the findings of the court below, as the same were according to the evidence in the case and the law upon the subject. The judgment should be affirmed.

PER CURIAM. For the reasons assigned in the foregoing opinion of Commissioner STALLCUP the judgment of the county court is affirmed.

(11 Colo. 170)

WISDOM *et al.* v. PEOPLE.

(*Supreme Court of Colorado.* March 16, 1888.)

1. CRIMINAL LAW—ALIBI—EVIDENCE—SUFFICIENCY.

An instruction that, "to render proof of an *alibi* satisfactory, the evidence must cover the whole time of the transaction in question, so as to render it impossible that the defendant setting up such defense could have committed the act," is liable to mislead the jury, and is ground for new trial.<sup>1</sup>

2. SAME.

Defendant and two others testified that on the evening that the crime for which he was indicted was committed defendant was at a pawn-office, for the purpose of borrowing money. The pawnbroker, after testifying that defendant was at his office on the evening in question, was asked whether defendant borrowed any money from him. An objection by the prosecution to this question was sustained. *Held* no error, the fact of whether or not he borrowed money having no relevancy to the *alibi* attempted to be proved by defendant.

3. SAME—EVIDENCE OF ACCOMPLICE—DECLARATIONS.

On the trial of an indictment for burglary an accomplice, as a witness for the prosecution, after testifying that he told M. where the jewelry was that was taken, was asked if he went with M. to show him where the jewelry was. *Held* not objectionable on the ground "that the declarations of one of several persons engaged in a common unlawful purpose are not admissible against the others if made after the completion of the unlawful purpose."

<sup>1</sup>As to the evidence necessary to support an *alibi*, see *State v. Rivers*, (Iowa,) 27 N. W. Rep. 781, and note; *People v. Lee Sare Bo*, (Cal.) 14 Pac. Rep. 310; *People v. Lee Gam*, (Cal.) 11 Pac. Rep. 184; *State v. Johnson*, (Iowa,) 34 N. W. Rep. 177; *Burger v. State*, (Ala.) 3 South. Rep. 319; *State v. Maher*, (Iowa,) 37 N. W. Rep. 2

## 4. SAME—COMPETENCY OF ACCOMPLICE—INSTRUCTIONS.

An instruction that "an accomplice is a competent witness, and if the jury, weighing the probabilities of his evidence, think him worthy of belief, a conviction, supported by such testimony alone, is legal," is correct, the jury being further instructed that "evidence from an accomplice should be received with great caution."<sup>1</sup>

## 5. SAME—TESTIMONY OF ACCOMPLICE—ERROR WITHOUT PREJUDICE.

On cross-examination of an accomplice he stated that the first time he accused defendants of being implicated in the crime charged was after he was arrested, and in jail, and this statement was made to his attorney. Defendants then attempted to show that the accusation was induced by his attorney telling the accomplice that the district attorney would let him go if he would implicate and convict defendants, but the evidence was excluded on objection of the prosecution. *Held*, that if error was committed it was cured by the subsequent objection of defendants to the introduction of proof of the same matter.

Commissioners' decision. Error to criminal court of Lake county.

Indictment for burglary against three defendants, Robert Wisdom, Charles Patten, and Walter Beal. Wisdom and Patten were convicted, and they bring error.

*N. Rollins and Taylor, Ashton & Taylor*, for plaintiffs in error. *Attn Marsh*, Atty. Gen., for defendant in error.

RISING, C. Plaintiffs in error and one Walter Beal were jointly indicted for burglary. A severance was had as to Walter Beal and the plaintiffs in error were tried together and convicted. Twelve errors are assigned. The first and second relate to proceedings had before the commencement of the trial and are not relied on in the argument. The other errors will be considered in the order which counsel have argued them. On the trial Walter Beal was made a witness for the prosecution, and he testified that he told Joe Measures where the jewelry was that was taken. Thereupon he was asked if he went with Measures to show him where the jewelry was. This question was objected to, and the court permitted the witness to answer, and upon this ruling the third assignment is based. Joseph Measures was a witness for the prosecution, and, after testifying that Beal had acknowledged that he knew where the jewelry was, was asked what he did with Beal after such acknowledgment. This question was objected to, and the court permitted the witness to answer, and upon this ruling the sixth assignment is based. These assignments are argued together, and the objection to the questions asked is "that the declarations, confessions, or admissions of one of two or more persons who are shown to have been engaged in a common unlawful purpose are not admissible in evidence against the others, if made after the completion of the unlawful purpose." Neither of the questions asked called for an answer which could possibly come within the rule contended for by counsel, and the answers actually given were unobjectionable. Upon the cross-examination of Beal he stated that the first time he accused plaintiffs in error of being implicated in the robbery was after he was arrested and placed in jail, and that he made this first statement to Mr. Hall, who was his attorney. He was then asked what Mr. Hall said to him that caused him to implicate plaintiffs in error. This question was objected to on the ground that the statement was a privileged communication, and the objection was sustained by the court, and upon this ruling the fourth assignment is based. The fifth assignment is as follows: "The court erred in refusing to permit defendants below to show that Mr. Hall had stated to the witness Beal that he had made arrangements with the district attorney to let the witness go if he would implicate and convict

<sup>1</sup> Concerning the necessity of corroborating the testimony of an accomplice, in order to sustain a conviction, and the extent of such corroboration, see *People v. Elliott*, (N. Y.) 12 N. E. Rep. 602, and note; *People v. Kunz*, (Cal.) 14 Pac. Rep. 386; *Patterson v. Com.*, (Ky.) 5 S. W. Rep. 387; *People v. Clough*, (Cal.) 15 Pac. Rep. 5; *State v. Dana*, (Vt.) 10 Atl. Rep. 727; *Dodson v. State*, (Tex.) 6 S. W. Rep. 543. As to who is an accomplice within the rule, see *Smith v. State*, (Tex.) 5 S. W. Rep. 219, and note.

defendants below." This evidence was objected to on same ground as the objection to the last question. The fourth and fifth assignments were considered together by counsel in their argument.

We do not think the objection urged against the admission of the testimony is well taken; but the proof, if relevant at all, was relevant for the purpose of showing what inducements were at any time held out to the witness to get him to implicate others in the burglary with which he was connected, and if the exclusion of such proof at that time was error, the defendants by their subsequent action in objecting to the introduction of proof of the same matter are estopped from now urging such error. Upon the redirect examination of Beal, he was asked whether Hall held out any inducements to him to implicate the defendants. To this question the defendants objected, and the objection was sustained. The witness was then asked to state all that Hall said to him, and this question was objected to, and the objection sustained. The objection made to these questions by the defendants was that the matter was the same that the court had before ruled out. The defendant Robert Wisdom testified, in his own behalf, that on the evening of the 5th day of May he went, in company with John and Tom Robinson, to the pawn-office of Ben Davis for the purpose of borrowing money to get out of town; and John and Tom Robinson each testified that they went with Wisdom to the loan-office of Ben Davis on the evening of May 5th, and that Wisdom borrowed money there. Ben Davis testified that Wisdom, with two colored boys, was in his establishment on the evening of May 5th, in the neighborhood of 6 o'clock, and he was then asked whether Wisdom borrowed any money from him. This question was objected to by the district attorney, and the objection sustained, and upon this ruling the seventh assignment is based. Counsel for plaintiffs in error base their argument, in support of this assignment, upon the ground that the testimony offered was corroborative of facts testified to by defendant Wisdom and the Johnsons; but, if such facts were material and irrelevant, then it was not error to exclude further testimony of the same kind. The only material fact in the testimony of the Johnsons and the testimony of Davis related to the *alibi* attempted to be proved, and we fail to see how the excluded testimony of Davis had any bearing upon that question. The court gave the following instruction to the jury: "An accomplice is a competent witness, and if the jury, weighing the probabilities of his evidence, think him worthy of belief, a conviction supported by such testimony alone is legal." The ninth assignment is based upon the giving of this instruction. The defendants requested the court to instruct the jury as follows: "The testimony of an accomplice in a crime is not sufficient on which to find a verdict of guilty, unless such testimony is corroborated in a material respect by the testimony of witnesses not connected with the alleged offense." And defendants requested the court to further instruct the jury as follows: "A conviction cannot be had upon the uncorroborated testimony of an accomplice." The eleventh assignment is based upon the refusal of the court to give said instructions. Counsel have argued the ninth and eleventh assignments together. There is no rule of law requiring the trial judge to instruct the jury to acquit the accused in case his guilt is established only by the unsupported testimony of an accomplice. *Solander v. People*, 2 Colo. 48-67; *Ingalls v. State*, 48 Wis. 647; *People v. Haynes*, 55 Barb. 450; *Allen v. State*, 10 Ohio St. 289; *Earll v. People*, 73 Ill. 329. In *Earll v. People* an instruction was given identical in substance with the instruction in this case upon which the ninth assignment is based, and the instruction was sustained. In *State v. Stebbins*, 29 Conn. 463, 473, it is held, that a conviction may be had on the uncorroborated testimony of an accomplice, but that it is the duty of the court to caution the jury as to the weight to be given to such testimony. This is as far as the later cases go, and in the case at bar the court instructed the jury that "evidence from an accomplice should be received with great caution,"

and, in giving this instruction, the court performed its whole duty in regard to that matter. The court instructed the jury upon the law relating to an *alibi* as follows: "The jury are further instructed that in this case what is known in law as an '*alibi*'—that is, that the defendants were at another place at the time the crime charged in the indictment was committed—is in part relied on by the defendants. To render the proof of an *alibi* satisfactory, the evidence must cover the whole time of the transaction in question, so as to render it impossible that the defendants setting up such defense could have committed the act." The court committed no error in charging the jury that "to render the proof of an *alibi* satisfactory, the evidence must cover the whole time of the transaction in question," and whether the qualifying language following this part of the instruction states a correct legal proposition or not, depends upon its application to that part of the instruction last quoted. It seems to us that the words "so as to render it impossible that the defendants setting up such defense could have committed the act," relate exclusively to the completeness with which the whole time must be covered by the evidence; and if they do, then they state a correct legal proposition. *Brice-land v. Com.*, 74 Pa. St. 463, 469; *Ware v. State*, 67 Ga. 349; *Landis v. State*, 70 Ga. 651; *Miller v. People*, 39 Ill. 457, 464. But if the language so used relates to the sufficiency of the proof of the *alibi*, then the instruction is erroneous in that it requires a greater degree of proof than might be sufficient to create a reasonable doubt of the guilt of the accused, for while such testimony might not be sufficient to show that it was impossible for the defendants to have been present at the commission of the burglary, it still might have been sufficient to have raised a doubt in the minds of the jury as to whether they were present or not, and such doubt might have created a reasonable doubt as to their guilt. Defendants should not be deprived of the benefit of such doubt. *Kent v. People*, 8 Colo. 584, 9 Pac. Rep. 852; *Chappel v. State*, 7 Cold. 92, 94; *Walters v. State*, 39 Ohio St. 215, 217; *State v. Hardin*, 46 Iowa, 623, 628; *Pollard v. State*, 53 Miss. 410, 421; *State v. Waterman*, 1 Nev. 543; *Stuart v. People*, 42 Mich. 255, 260, 3 N. W. Rep. 863; *West v. State*, 48 Ind. 483, 487; *Adams v. State*, 42 Ind. 373. While we think the qualifying language relates to the *alibi*, and not to the amount of proof necessary to establish the defense, and that it is improbable that defendants have been injured by the instruction through a misconception of its meaning by the jury, still we cannot say that they could not have been so injured, and for this reason we think a new trial should be had. *Sullivan v. People*, 31 Mich. 1-4. As the twelfth assignment of error raises no questions that will be likely to arise upon a retrial of the case, we do not deem it necessary to pass upon the rulings therein assigned for error.

The judgment should be reversed.

DE FRANCE and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment of the criminal court is reversed, and cause remanded for a new trial.

(11 Colo. 388)

PEOPLE v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,456.)

(*Supreme Court of California*. March 23, 1883.)

1. PUBLIC LANDS—MEXICAN GRANTS—CONFIRMATION AND SURVEY—EFFECT OF PATENT.  
Where the survey of a Mexican grant has been confirmed by the general land-office, a patent issued in pursuance thereto, setting out such survey, cannot be collaterally impeached on the ground that the survey does not conform to the boundaries fixed in the decree of the United States circuit court confirming the grant. PATERSON, J., dissenting.
2. SAME—WHO ARE THIRD PARTIES—ACT CONG. MARCH 3, 1851.  
A party claiming title to certain California lands in opposition to a government survey and patent, such alleged title having been acquired since 1850, the time



when the rights of the government attached thereto, is not a third person, within the meaning of act Cong. March 3, 1851, providing that a patent shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Suit by the people of the state of California against the city and county of San Francisco, to quiet the title to certain lands claimed by plaintiff. Judgment for defendant, and plaintiff appeals.

*E. Marshall*, Atty. Gen., (*Phillip G. Galpin*, of counsel,) for appellant. *John Lord Love*, City and Co. Atty., and *Garbee, Thornton & Bishop*, for respondent.

MCKINSTRY, J. The appeal is from a judgment in favor of the defendant, based upon an order sustaining a demurrer to the complaint. The prayer of the plaintiff is that the title of the plaintiff to the premises in question be forever quieted against adverse claims of the defendant, etc., and for other and further relief. The complaint avers that the land in controversy is "swamp and overflowed," and also that it is "tide land," lying below the line of ordinary high tides. It cannot be both "swamp and overflowed" land, included in those ceded by the United States to the state by the act of congress extending the "Arkansas Act," and tide land, so called; but as the title relied upon by plaintiffs in argument is the title in the state, by virtue of her sovereignty, to all lands within her borders lying below the line of ordinary high tides, we shall disregard the averment with respect to the land being swamp and overflowed. This we are justified in doing, because every consideration in favor of the right of the state to the land as swamp and overflowed applies with redoubled force in favor of the state's claim to the land as tide lands.

It is alleged in the complaint that the defendant, as the successor in interest of the pueblo of San Francisco, "a Mexican citizen, claiming to have existed before said conquest," (July 7, 1846,) filed its petition before the board of land commissioners appointed under the act of March 3, 1851, "to ascertain and settle private land claims in the state of California," to procure a determination by them "of its rights to four leagues of land situated upon the peninsula where now stands the city of San Francisco;" that said tribunal, after due proof taken, duly made its decree in regard to the matters set forth in said petition; that said cause was subsequently appealed to the district court of the United States for the Northern district of California; that said cause was again transferred under a special act of congress, passed on the 1st day of July, A. D. 1864, and entitled "An act to expedite the settlement of titles to lands in the state of California," to the circuit court of the United States for the circuit of California; that said cause in said court was entitled "*The City of San Francisco vs. The United States*;" that such proceedings were thereafter had and taken in said cause that a decree final was ultimately rendered by said court, whereby, as between the government of the United States and the city of San Francisco, it was adjudicated and determined "that the claims of the petitioners, the city of San Francisco, to the land herein-after described, is valid, and that the same be confirmed. The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the 7th of July, 1846) on which the city of San Francisco is situated as will contain an area of four square leagues,—said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid; subject to the following deductions, namely: Such parcels of land as have been heretofore reserved or dedicated to public

uses by the United States; and also such parcels of land as have been, by grants from lawful authority, vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and, as to any residue, in trust for the use and benefit of the inhabitants of the city." And the complaint further alleges that the premises therein described, the title whereto the plaintiff asks to have quieted, "are without the boundaries of said pueblo, as given in said decree. The same were at the date of said conquest below high-water mark." The complaint further alleges that, "for the purpose of carrying said decree into execution," a survey was made and approved by the surveyor general of the United States for the district of California in the year 1867-68, of which notice was given as provided in the act of congress of July 1, 1864, and the same was duly advertised; that objections were made to the survey, and the commissioner of the general land-office approved the survey, but allowed an appeal to the secretary of the interior; that the secretary disapproved the survey, and ordered a new survey to be made; that a new survey and plat was made by the surveyor general for California, and transmitted to the commissioner of the general land-office, the same being certified by said surveyor general as having been made in strict accordance with the instructions of the commissioner, the said instructions having been given under direction of the secretary of the interior. And the complaint further avers: "Thereafter a patent in due form of law, based upon the said last-mentioned plat and survey, was issued under the great seal of the United States, and signed by the president thereof, which purported, by virtue of the authority of said decree, and in pursuance thereof, to grant and convey to the city of San Francisco the tract of land embraced and described in said last-mentioned plat and survey, and embracing four square leagues, and including said premises within the exterior boundaries thereof." It is also again directly alleged that the premises here in controversy are included in the plat and survey so as aforesaid made under the direction and supervision of the department of the interior; that the defendant claims some interest under the patent and otherwise in the premises adverse to plaintiff; and that the patent is a cloud on plaintiff's title. Then follows a description by metes and bounds of the tract of land (containing 150 acres more or less) of which the plaintiffs claim to be the owners.

It is contended on the part of appellants that as the surveyor general had no power to include in a survey any land, the claim to which was not confirmed by the decree of the circuit court, so neither the commissioner of the land-office nor the secretary of the interior had any power to direct or approve such a survey; that the powers of these officers are defined and limited by law, and, as the law gave them no power to include in the survey or patent land the claim to which was not confirmed to San Francisco, the patent must read as relinquishing only the right of the United States in the land included in the description in the decree. Furthermore, that the United States had no interest to relinquish in lands below ordinary high-water mark, inasmuch as the title to such lands attached to the state of California.

There was never any demarkation of the boundaries of the pueblo lands by the authorities of Mexico. The right or title of the defendant in the pueblo lands was therefore incomplete when California was ceded to the United States; but it is unimportant whether the right to the pueblo lands, such as it was, was complete or incomplete, perfect or imperfect. If a claimant un-

der a Mexican grant, which gives a perfect title, has presented his claim to the land commissioners appointed under the act of congress of 1851, and it has been confirmed and surveyed, and patent issued, but by the survey a portion of the land included in the judicial measurement of the Mexican authorities was excluded, the claimant is estopped from asserting title to land not included in the survey made by the United States, (*Cassidy v. Carr*, 48 Cal. 339;) not only the claimant, but all other persons, except such as may have derived a title from the Mexican government before the grant or cession upon which the claimant secured a confirmation. In *Moore v. Wilkinson*, 13 Cal. 487, it was said: "The title to the grantees to the land contained within the map (*deseno*) may be admitted to have been perfect, and yet no conclusion follows against the claim of the plaintiffs. If they have accepted the land described in their patent as satisfying their claim, no other persons can object that a portion of the land thus taken is without the boundaries of the grant, unless their prior rights are interfered with." Whatever may be rights of the respective parties to this action, their rights are not affected by the circumstance that the right of the pueblo to lands was or was not perfect or complete. In *Moore v. Wilkinson* a portion of the lands surveyed, and patented by the United States, was without the limits of the tract to which, it was claimed, the predecessors of the plaintiff had received a perfect title from Mexico.

We are to inquire what were the powers of the surveyor general and land department under the acts of congress relating to claims to land derived from Mexico, or existing under the laws of that state. We need not consider the act of June 14, 1860, as none of the proceedings for the confirmation of the pueblo title were taken, so far as appears, under that act. The fourth section of the act of July 1, 1864, provides that in certain circumstances the district court may order a case appealed from the commissioners to be transferred to the circuit court. The pueblo claim was so transferred. But, with reference to such cases, the powers of the circuit court and of the surveyor general and officers of the land department were the same as were, in other cases, the powers and duties of the district court and surveyor and other officers of the land department. By the treaty of Guadalupe Hidalgo, the United States had stipulated that property rights acquired under the former sovereign should be respected. The act of congress of March 3, 1851, "to ascertain and settle the private land claims in the state of California," made provision for the appointment of commissioners, to whom should be presented all claims to land derived from the Spanish or Mexican government. It further provided that when a case should be ready for hearing, etc., the commissioners should proceed promptly to examine the same, "and to decide upon the validity of said claim." The act allowed an appeal to the district court, and thence to the supreme court of the United States; each court in turn to decide upon the validity of the claim. Section 13 of the act provided: "For all claims finally confirmed by said commissioners, or by said district or supreme court, a patent shall issue to the claimant upon his presenting to the general land-office an authentic certificate of such confirmation, and a plat or survey of said lands, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private land claims which will be finally confirmed to be accurately surveyed, and furnish plats of the same," etc. The first section of the act of 1864 provides that "whenever the surveyor general shall, in compliance with the thirteenth section of 'An act to ascertain and settle the private land claims in the state of California,' approved March 3, 1851, have caused any private land claim to be surveyed, and a plat to be made thereof," he shall give notice of the same by a certain publication, and, if no objections are made to such survey within the time named in the publication, he shall approve the same, and transmit a copy of the survey to the commissioner of the general land-office at Washington for his examination and ap-

proval; but, if objections are made, he shall transmit such objections, together with affidavits or proofs, that, if the commissioner disapprove of the survey, then, when a new survey is made in accordance with the directions of the commissioner, and the commissioner shall approve of the same, he shall cause a patent to issue, etc. By the acts of 1851 and 1864, the commissioners or the district or circuit or supreme court, as the case may be, have power to determine whether a claim is valid, and such as should be confirmed. The power of locating the confirmed claim is conferred upon the surveyor general, his survey being subject to revision by the executive officers authorized to supervise and direct the surveyor's action. There is no provision for a return of the survey or plat to the commissioners, or into court; but when a survey becomes final, and a patent issued, the limits of the claim as confirmed are definitely and conclusively determined by reference to the patent, and the survey therein recited. "The government had provided a board for the determination of the validity of claims to land held under Mexican grants, and a system for the survey and location of the lands, upon the recognition and confirmation of such claim. The survey and location are to follow the decree of confirmation. The approval of the survey by the proper officers is the determination—the judgment—of the appropriate department of the government that the survey does conform to such decree. That determination or judgment is not then a subject of review by the judiciary. \* \* \* The patent, which is the final document issued by the government, is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey, and its conformity with the confirmation, and of the relinquishment to the patentee of all interests of the United States in the land." FIELD, C. J., in *Moore v. Wilkinson*, *supra*. And in *Chipley v. Farris*, 45 Cal. 539, our predecessors, speaking by Mr. Justice RHODES, said: "It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. \* \* \* The patent purports to convey the lands described within the survey; and its scope cannot be extended, nor, on the other hand, can it be limited, by showing that the decree comprised a greater or less area than the survey." But section 15 of the act of 1851 declares that the decree of the commissioners, or of the district or supreme court, or any patent to be issued under the act, shall be conclusive between the United States and claimants only, "and shall not affect the interests of third persons;" and it is insisted that plaintiffs are third persons, within the meaning of the clause quoted.

If the Mexican government had power to grant lands below the line of the ordinary tides, the state of California, upon its admission into the Union, became the owner of such tide lands only as had not been previously disposed of by Mexico. No authority has been cited in support of the statement that, by the law of Mexico, tide lands could not be included within pueblo lands; and, as the proper department of our government has determined that a survey which included such lands conformed to the decree of confirmation, that question cannot be reconsidered here. The land department has power to locate all claims confirmed. It follows that the state never had any title to the land here in controversy. Conceding that the United States, from the date of the treaty to the admission of California into the Union, held the legal title to all the tide lands, not previously granted by Mexico, in trust for the state to be created, the title of the United States was not acquired previous to the acquisition of the territory, and when it passed to the state it was taken in subordination to the future action of the United States in determining the location of the older claim and title of the pueblo.

The supreme court of this state has said: "Unless a patent is issued without authority, or is prohibited by statute, or is void upon its face, its opera-

tion against the government, and those claiming by title subsequent, cannot be questioned in any collateral suit." As against a patent, issued under the law of 1851, who are parties claiming by title subsequent?

In *Leese v. Clark*, 18 Cal. 574, the court, by FIELD, C. J., said: "The defendants, taking whatever interest they possess in subordination to the future action of the government \* \* \* in determining the location of the older grant, are in no position to question these proceedings;" that is, proceedings for the location of the older grant. And the same learned judge said: "The term 'third persons' refers, not to all persons other than the United States and the claimants, but to those holding independent titles arising previous to the acquisition of the country." *Leese v. Clark*, 20 Cal. 425.

*Teschmacher v. Thompson*, 18 Cal. 11, was an action of ejectment, wherein the plaintiff relied on a patent issued upon a confirmed Mexican grant. The premises demanded were, as claimed by the defendant and assumed by the court, below the ordinary high-water mark, covered by the ordinary or neap tides, and the defendant's contention was that they were the property of the state. The court held that the land, at the date of the admission of California as a state, belonged to the state, unless it had been the subject of a previous grant by the Mexican government, which the United States, upon the acquisition of the country, were bound to protect, and which they have since recognized and confirmed. And Chief Justice FIELD, on behalf of the court, said: "Until the acquisition of the country, the land was of course under the jurisdiction, control, and disposition of the former government, and the rights acquired by the limited states were in subordination to the action of that government, so far as such action was entitled to consideration, either from the law of nations or the stipulations of the treaty of cession. In that respect, the land under the tide-waters of the bay, between low and highwater mark, stood in no different position from that of any other land over which the former government possessed the power of disposition." The court, after referring to the obligation imposed upon the government of the United States by the law of nations, and by specific provision of the treaty of Guadalupe Hidalgo, proceeds to say that the power of the government of the United States to protect by appropriate legislation, as by the act of 1851, all titles, legal or equitable, acquired previous to the cession of the territory, cannot be questioned. "The power results from the fact that it is sovereign and supreme as to all matters connected with the treaty, and the enforcement of the obligations incurred thereunder. \* \* \* It must determine for itself what claims to property existed at that date, which it is bound to protect, and consequently the lands to which they apply, and the parties by whom they were then held. In protecting those claims, it must necessarily make them good as against others asserting interests from events subsequently transpiring; otherwise, its powers to carry out the stipulations of the treaty, and the obligations imposed by the law of nations, would be limited and dependent, and not sovereign and supreme. Subsequent claimants must therefore take in strict subordination to its action. \* \* \* Nor can subsequent claimants have any just grounds of complaint; for whatever interest they may possess was acquired with full knowledge of the treaty, and of the obligations and powers of the new government." "By the act of March 3, 1851, the government has established a tribunal for the investigation of the validity of the titles asserted to have existed previous to the cession; required evidence to be presented respecting the same; designated law-officers to appear and litigate the matter on behalf of the United States; authorized appeals, first to the district, and then to the supreme court; and appointed surveyors to survey and measure off the land when once the title has been recognized and confirmed. \* \* \* As the last act in the series of proceedings, a patent is to issue to the claimant." The court then holds that the patent, "as the record of the government of the existence and validity of the grant," establishes the title

of the patentees from the date of the Mexican grant. If the boundaries of a grant had not been definitely fixed by the authorities of Mexico at the date of the cession of the territory within which California is comprised, the duty devolved upon the government of the United States to make the location. This, by reason of the duty to protect the grant. "The duty of the government attaching at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring. The patent, therefore, to the plaintiff \* \* \* is evidence that the grantees possessed at the date of the session a vested interest in the quantity of land mentioned in the grant,—a right to so much land, to be afterwards laid off by official authority; \* \* \* and that the government of the United States, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees, and attached it to the tract as surveyed. The 'third persons' against whose interest the action of the government and patent are not conclusive—under the fifteenth section of the act of March 3, 1851—are those whose title accrued before the duty of the government, and its rights under the treaty, attached."

In *Ward v. Mulford*, 32 Cal. 365, the plaintiff claimed under a decree confirming a Mexican grant, and a survey made under the act of congress of 1860, approved by a decree of the district court of the United States, which included tide lands. But in the opinion of the court (by Mr. Justice SANDERSON) *Teschemacher v. Thompson* is approved, and it was said that, when the state of California came into the Union with her claim to such lands as she then acquired by virtue of her sovereignty, she acquired such claim in subordination to the prior equities of grantees under the former sovereign, and was bound by such action as the federal government might take in ascertaining and settling such equities. "In this respect no distinction can be made between the lands acquired by federal grants and such as she took by virtue of her sovereignty. In respect to the latter, as well as the former, the United States succeeded to the title, and took it upon precisely the same terms upon which the Mexican government held it at the date of the cession, and so of the state."

Nothing is decided in *More v. Massini*, 37 Cal. 432, which is in conflict with the views above expressed. There, it was held that, by the true construction of the survey set forth in the patent, the sea-shore was the southern boundary of the land granted. The court said: "The survey mentions the sea-shore as the termination of the fourth course, and the twelfth course commences at the sea-shore; but at the intermediate stations no visible object, nor any monument, either natural or artificial, is mentioned. The call for the sea-shore as the southern boundary must be regarded as the more definite and certain, 'and will prevail over a call for a mere station,' and over the courses and distances." In that case the question was whether the demanded premises were within the survey recited in the patent, and the court held they were not. In the case at bar the complaint avers that the lands described therein are within the plat and survey finally approved, and which include the lands patented. Here, the lands in dispute are embraced by the patent, and by the lines of the survey. Therefore, as said in *More v. Massini*, (page 435,) *Teschemacher v. Thompson*, and *Ward v. Mulford*, *supra*, are decisive of this case.

Our conclusions are: (1) The land, the title of the United States wherein is granted by the patent to the city and county of San Francisco, is the land embraced in the approved survey set forth in the patent; (2) the patent is conclusive evidence of the right of defendant to all the lands embraced within the survey, except that it does not affect the interests of the "third persons" mentioned in section 15 of the act of 1851; (3) the plaintiffs are not a "third person" within the meaning of section 15 of the act. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

PATERSON, J. I dissent. Conceding that the state is not a "third person" within the meaning of that phrase as employed in section 15 of the act of 1851, there is but one question left for determination in this case. It is a question simply of construction. It is not a question of collateral attack. The decree and patent must be read together. In fact, we know that it is the practice of the land department to make the decree a part of the patent. The case, in effect, is one simply where the plaintiff claims that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes lands not included within the natural boundaries; that defendant claims an interest in the lands lying between the natural and the artificial lines; that plaintiff is the owner of all of the lands between the two lines, and his title thereto should be quieted, because the natural and permanent boundary lines given in the deed should prevail over the description by metes and bounds. The city could in no way be prejudiced by a determination of this question. No survey would be required to fix new lines. The work that has been done would not be undone. The location of the south line would not be disturbed. To determine the issue here, it would be necessary only to draw upon the earth a line corresponding with the metes and bounds given in the patent; and unless the plaintiff could show that some portion of the land in controversy lies between that line and existing, well-defined natural and permanent boundary lines, indicating the line of high-water mark referred to in the decree, they would, of course, fail to make out their case. It cannot be presumed, in aid of the demurrer, that the shore of the sea which bounds the land in question on three sides has been obliterated. The complaint alleges as a fact which must be taken as true, that the lands in controversy lie below ordinary high-water mark. If a patent should describe a tract of land as bounded on three sides by well-known, natural, and perpendicular walls, like those of Yosemite, or should describe it as lying in a triangle at the junction of navigable streams, like that adjacent to the confluence of the Sacramento and San Joaquin rivers, and should also give a description by metes and bounds, the former, for the purposes at least of stating a cause of action,—a *prima facie* case,—would be preferred to the latter. The lands are described in the decree as being bounded on three sides by the bay of San Francisco and the Pacific ocean. The court cannot say, as a matter of law, that no portion of the land in controversy, although admitted to be below high-water mark, lies in a portion of the peninsula where the ocean or the bay is not a natural, fixed, and certain boundary line, and that therefore the metes and bounds given in the survey are in no way controlled by the natural boundaries. The admission kills the conclusion.

The questions here are not whether the state courts can review the action of the officers of the land department or whether the land department of the United States could divest the state of her title to the land in controversy, or whether the patent protects the grant of the conferee from collateral attack. The questions are: What is the effect of the action of the land department? Has the state been divested of her title through this patent, in view of its descriptions and recitals? Which description shall prevail,—that by metes and bounds, or that by natural monuments? In determining these questions, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. Surely, if the surveyor had run his lines through the bay of San Francisco and included lands of the state in the county of Alameda, which she became owner of by virtue of her relations to the paramount source of title, the state, as such owner of land across the bay, would not be bound by the survey so long as that natural monument and limit of boundary, the bay of San Francisco, remained where it is, a notice

to all the world; and the decree of confirmation, which is a link in the chain of title, remained as a public muniment of title.

No case has been cited inconsistent with the rule that in cases of this kind the natural and permanent boundaries will prevail. In many of the cases cited there was no variance between the decree of confirmation and the patent. In *Teschmacher v. Thompson* the grant was assumed to be one of quantity only. The grant was confirmed by the court, and its boundaries as defined in the decree were followed in the patent which was issued in November, 1857; at which time the federal courts controlled the surveys, and were empowered and expected to make them conform to the decree. In none of the cases cited is the question of the power of the officer to issue a patent for land not embraced in the decree considered. *More v. Massini*, 37 Cal. 432, is directly in point. In that case the patent did not show upon its face that any land below high-water mark was included in the tract granted, but the fact was shown at the trial by witnesses,—surveyors; and it was there held that the clause of the decree of confirmation which confirmed the tract bounded by the sea-shore, should prevail over a description by metes and bounds. In the case of *Chipley v. Farris*, 45 Cal. 528, upon which respondents place their chief reliance, there were two inconsistent descriptions, but both were descriptions given by a surveyor, and it is expressly admitted by respondent in that case in his written points that if the side line of the tract in controversy were the sea-shore, a different rule would apply and that *More v. Massini* would be in point; the line of high-water mark in such cases being considered by the government the more certain boundary line. Of course, where both descriptions are lines established by surveyors for the decree and for the patent, the last—that one contained in the survey, and incorporated into the patent—will control. Where water-courses, mountains, or other natural objects are called for in patents, it has been said that distances must be lengthened or shortened, and courses varied, so as to conform to these objects, because mistakes in distances and courses are more probable and more frequent than mistakes as to trees, rivers, mountains, and other objects capable of being clearly and accurately fixed. *McIver v. Walker*, 9 Cranch, 177. In the case at bar three sides of the triangular tract described are bounded by the shores of the ocean and bay. Unless we must shut our eyes to what every resident of the peninsula can see, we know judicially that a great portion of those lines have remained for ages as they now appear; but if they have changed it is a matter of defense which should be alleged, and which may be easily proved.

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HASTINGS v. YOUNG. (No. 11,613.)

(*Supreme Court of California.* March 29, 1888.)

In bank. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by C. S. Hastings against L. A. Young, a member of the board of supervisors of Lake county, to cause defendant's removal from office for violation of official duty, and to secure for complainant the penalty of \$100, pursuant to act of March 30, 1874, (St. 1873-74, p. 911.) Complainant obtained judgment, and defendant appeals.

R. W. Crump and J. J. Bruton, for appellant. Crawford & Tabor, for respondent.

PER CURIAM. On the authority of *Fraser v. Alexander*, (No. 11,564,) 16 Pac. Rep. 757, (decided February 20, 1888,) the judgment and order appealed from are reversed, and the court below directed to dismiss the action.

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RIGGS v. POSTON. (No. 11,603.)

(*Supreme Court of California.* March 29, 1888.)

In bank. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by E. C. Riggs against Dallas Poston, a member of the board of supervisors of Lake county, to cause defendant's removal from office for violation of official duty,



and to secure for complainant the penalty of \$100, pursuant to act of March 30, 1874, (St. 1873-74, p. 911.) Complainant obtained judgment, and defendant appeals.

*E. W. Britt* and *S. K. Welch*, for appellant. *Oliver P. Evans* and *Ben P. Tabor*, for respondent.

PER CURIAM. On the authority of *Fraser v. Alexander*, (No. 11,564,) 16 Pac. Rep. 757, (decided February 20, 1888,) the judgment and order appealed from are reversed, and the court below directed to dismiss the action.

(75 Cal. 459)

ANDRADE v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 12,427.)

(Supreme Court of California. March 30, 1888.)

PARTNERSHIP—SURVIVING PARTNER—JURISDICTION OF PROBATE COURT.

In California the probate court has jurisdiction to require a surviving partner, who does not deny that a partnership between himself and the decedent formerly existed, to file an account of the partnership affairs, and, as an incident thereto, to examine such survivor as to the sufficiency of the account filed.

In bank. Appeal from superior court, city and county of San Francisco; *J. V. Coffey*, Judge.

*Ryland B. Wallace*, for petitioner. *John A. Wright*, for administrator. *E. R. Taylor*, for absent heirs.

SEARLS, C. J. This is a proceeding to review the action of the superior court of the city and county of San Francisco (department 9, in probate) in requiring the petitioner to testify touching certain lands and property. It appears, from the petition, that Philip A. Roach is the duly-qualified and acting administrator of the estate of Thomas H. Blythe, deceased, which estate was and is being administered in said court, and under the jurisdiction thereof. That on, to-wit, July 25, 1887, said Roach, as administrator, represented to the court in probate that the petitioner was the surviving partner of the said Thomas H. Blythe, deceased, in certain lands and enterprises in the republic of Mexico; that thereafter the court made an order requiring petitioner to render an account as to said matters, as such surviving partner; that in obedience to said order petitioner rendered an account as required by said order; that thereafter, and on the 18th day of November, 1887, the said court ordered this petitioner to be sworn, at the instance of the administrator, and to answer questions concerning said account, and concerning said lands and enterprises. Counsel for petitioner objected to the examination upon the ground that the court had no jurisdiction to so order, or to examine the petitioner as to the matters aforesaid; and the objection being overruled, and the court having proceeded to such examination, and continuing the same, petitioner sues out a writ of review. An examination of the record shows that the court proceeded upon the theory that Andrade was a surviving partner of Blythe. The petition of the administrator upon which the order for an accounting was made avers such to be the fact; the order of the court requiring him to account describes him as such; and, while his account is preceded and followed by a protest against being required to render such account, he nowhere, so far as we can see, expressly denies his *status* as such surviving partner. The report as rendered the court by petitioner was objected to by the administrator as affording no adequate information in respect to the matters of and concerning which petitioner was required to account; and on the 11th day of November, 1887, the matter coming on regularly for hearing, upon the objections of the administrator to the sufficiency of the account, counsel for the administrator called Andrade as a witness, claiming the right to examine him, under oath, touching the matters involved in said account. Counsel for Andrade objected to his being sworn, or compelled to testify, upon the ground that the court, while exercising probate jurisdiction thereof, had no jurisdiction to

compel such oath, or the giving of such testimony. The court overruled the objection, to which ruling an exception was noted. Counsel for petitioner put certain questions to him with a view to showing, as he claimed that there had been since the death of Blythe, certain breaches of a contract or contracts by the estate, existing between Blythe and the petitioner, whereby the partnership, or trust relation, between petitioner and the estate of Blythe had ceased, and, therefore, that the estate had no further interest in the property. Objection was made to this testimony upon the ground, as nearly as we can see from the record, that, if there was a partnership at the date of Blythe's death, the right to an accounting existed, etc. Objection sustained. But little progress was made when a continuance of the examination was had, and, pending such continuance, the application was made to this court for a writ of review as in the petition stated.

"When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business; but the interest of the decedent in the partnership must be included in the inventory, and appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator. \* \* \* Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and, in case of neglect or refusal, may, after notice, compel it by attachment, and the executor or administrator may maintain against him any action which the decedent could have maintained." Code Civil Proc. § 1585. The probate court has no authority to settle and adjust accounts between a surviving partner and the representative of a deceased one. Its power is limited to requiring the survivor to account. The right to demand and have an account includes the right to have all that the term imports, viz.: such a detailed statement of the partnership affairs as will afford information of the condition of the business,—the assets, the credits, and indebtedness of the firm as such, and the condition of the accounts as between the partners themselves. Under the authority conferred by section 1585, *supra*, we have no doubt but that, upon the coming in of an account by a surviving partner which is lacking in the essentials imported by the term, the court may require and enforce such other and further account as may be in the power of the survivor to furnish, and necessary to a correct understanding of the affairs of the partnership. This duty performed, and the limit of power is reached. The court cannot settle and adjust the account. If unsatisfactory, this can only be done by a court of equity. In *Theller v. Such*, 57 Cal. 447, it was said: "The probate court has no more jurisdiction to provide for a partnership account, and decree a balance, where the partnership has been dissolved by the death of a partner, than where it has been dissolved by any other cause." The assets which pass to the executor or administrator consist of the individual estate of the decedent. Partnership assets, as such, form no part of such individual estate; the residuum only, after satisfying liabilities and advances, if any, made by the survivor, becomes the property of the estate. If questions arise, in the course of settlement of partnership affairs, which cannot be adjusted without recourse to the courts, the probate court is not the forum in which such questions can be solved, but, like other questions cognizable in courts of equity, they must be determined in the last-named courts. If the existence of a partnership between a decedent and survivor is denied by the latter, the probate court cannot adjudicate the question, and decree the existence or non-existence of the relation. The *status* being admitted, the court may be called upon to render an account. As ancillary to the right of the court to enforce an accounting by the surviving partner, and to enable it to determine whether what purports to be an account is such in reality, or whether another and further account is requisite, the right to examine the

surviving partner under oath, or any other witness or witnesses, who may possess information germane to the question, would seem proper. The court cannot be supposed to know intuitively, when such an account is presented, whether or not it is, in substance and detail, such as should be furnished under the statute. The needed information can only be acquired through the medium of testimony. Petitioner was a competent witness by whom to establish facts which the court had a right to possess before approving the account rendered. Assuming then, as we do, that the record shows the existence of a partnership between Blythe and petitioner at the time of the death of the former, we hold that the court had authority to require the latter to file his account of the partnership affairs; and, as an incident thereto, to examine witnesses, the petitioner included, for the purpose of determining the sufficiency of the account as filed.

The judgment of this court is that the proceedings of the court below be, and they are hereby, affirmed.

We concur: MCFARLAND, J.; THORNTON, J.; PATERSON, J.; TEMPLE, J.; SHARPSTEIN, J.

(75 Cal. 452)

DAVIS v. COUNTY OF YUBA. (No. 11,880.)

(*Supreme Court of California*. March 30, 1888.)

MUNICIPAL CORPORATIONS—BONDS—PAYMENT—INTEREST ON COUPONS.

Bonds issued in pursuance of the California act of 1872, (St. 1871-72, p. 662,) authorizing "the county of Yuba to issue bonds for the purpose of constructing and repairing wagon roads and bridges in said county," are not authorized to be paid prior to the expiration of 20 years from their issue, except out of a surplus remaining after payment of interest due, in the "wagon road and bridge interest and sinking fund" provided for in the act; and an attempt by the county to pay such bonds before maturity in any other manner than out of such surplus is void as against a non-assenting holder, and such holder, having presented his coupons to the county treasurer for payment, is entitled to interest thereon from that time.

In bank. Appeal from superior court, Yuba county; PHIL W. KEYSER, Judge.

For statement of facts, see former opinion in same case, 13 Pac. Rep. 874.

W. C. Belcher, for appellant. E. A. Forbes and A. L. Hart, for respondent.

PER CURIAM. A rehearing was granted and the case resubmitted. After carefully considering the matter, we still adhere to our former opinion, except that we think the plaintiff should recover interest on his coupons from the time he presented them to the county treasurer for payment. Judgment and order reversed, and a new trial ordered.

(2 Cal. Unrep. 854)

HUGGINS *et al.* v. HANDY *et al.* (No. 11,347.)

(*Supreme Court of California*. March 29, 1888.)

APPEAL—PRACTICE—FAILURE TO APPEAR—REHEARING.

That a case was set for the last day of the session of the supreme court, and the court for years past had never been able to finish the calendar, and that defendants' attorney did not expect the case to be reached, is not sufficient to justify setting aside a judgment of affirmance, made because there was no appearance, or points or authorities on file, for defendant.

Department 2. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

This case was set for hearing at the January term, and, on being reached on the calendar, there was no appearance, and no points or authorities on file, for appellant. The judgment of the lower court was affirmed. Subsequently, on motion, an order was made to show cause why the order of affirmance

should not be set aside, and the accompanying affidavit was filed on the hearing of the order to show cause:

"I, W. S. Goodfellow, being duly sworn, depose and say as follows: I am the attorney for the appellants in this cause. On Thursday last the judgment and order appealed from were affirmed by this court, for the reason that there was no appearance by counsel for appellants, and no points and authorities on file. My failure to appear personally, or to file points and authorities, was due to the following causes: On the day on which this cause was reached on the calendar of this court I was engaged in the actual trial of a case in the superior court of Tulare county at Visalia, and had been so engaged all of that week. Moreover, I did not expect this cause to be reached on the calendar. When the calendar of this court in bank and in departments was published last January, I noticed that there were only three causes to which I would be required to give my personal attention,—one in bank, one in department 1 early in February, and this cause, which I found to be set for the last day of the session. The other cases I knew would be heard, and I made preparation, and argued them in due course. I felt almost certain that this cause would not be reached this session. Since 1880 this court has been so much overburdened with work, and with the hearing of cases of public importance, and the returning of prerogative writs, which are specially set and do not appear on the regular calendar, that, as I believe, neither department has hitherto been able to finish its regular calendar at the San Francisco session. I am told by a deputy in the clerk's office that this is the first occasion in his experience in which the court has been able to dispose of all the cases on the San Francisco calendar. As I have said, therefore, on reading the calendar in January I concluded that this case would not be reached, and I was afterwards confirmed in that opinion when the order was made postponing all cases on the calendar two weeks. I would perhaps have noticed the progress the court was making had I not been absent in the country a considerable portion of the time. During the past five weeks I have been absent attending to cases in four different counties outside of San Francisco, namely, in Contra Costa, Tuolumne, Santa Clara, and Tulare. I was absent from San Francisco—on the trial of the case at Visalia, and afterwards for one day attending to a case in Fresno,—from Saturday, the 3d day of March, until the afternoon of Saturday last, the 10th day of March; and on my return on the last-named day I discovered for the first time from the Law Journal that this case had been reached, and disposed of in my absence. The same afternoon I tried without success to find the presiding justice of this department, intending to make application for an order to show cause why the judgment should not be set aside. If I had not been absent in Tulare county, as above stated, I certainly would have been in attendance in the supreme court on the day this cause was reached. There is now, and for more than thirteen years there has been, published in this city a daily Law Journal in which appears the calendar of the day of every court of record holding court in this city and county. I have always been accustomed to rely upon the Law Journal for information as to what cases will be called for trial each day. I keep a diary of prospective events, but its chief purpose is to note the expiration of time to plead, etc. I sometimes, though not always, note upon that diary the dates of causes set for trial. [This cause was not noted on the diary.] I depend and have always depended upon the Law Journal to ascertain what causes are set for trial each day, and to protect me from allowing them to go by default. When cases are specially set, that fact also appears in the Law Journal. The calendar of this court, as a whole, was not published, as I believe, after January 23d, but there was published each day the list of cases to be heard on that day. My invariable practice is and has been to consult the Law Journal on my first arriving at the office in the morning. As an evidence that this system is sufficiently safe I may say, as the fact is, that in my experience of nearly thirteen years I have never omit-

ted to be present in the supreme court when any case in which I was interested was called for hearing; nor, as far as I can remember, have I ever failed to be present on the trial of any cause in any of the other courts of record in this city and county. If I had not been absent in Visalia I would have seen the calendar of this department for March 8th, which was duly published on that day, and I would, of course, have been in attendance. When I am absent I have some one to attend to my cases, of course, but for the reasons above stated I gave no directions as to this particular case. The clerk who was with me when the case was tried in the superior court, and who attended to preparing the appeal, left me nearly three years ago, and nothing has been done in connection with the case since. Although, therefore, the case appeared in the Law Journal of Thursday last, in my absence it was not recognized by any one as a case in which the office was interested.

"I further depose and say that this appeal was taken and has been prosecuted in perfect good faith in the belief that the judgment of the court below is erroneous, and not in any degree for the purposes of delay, or from other unworthy motives. The amount involved is \$2,000, with several years' interest. The action is upon a written contract for the payment of money upon certain contingencies, and the only question is whether upon facts almost undisputed the contingencies have happened or not. The judgment below was in favor of the plaintiffs. The defendants are fully solvent, and have, besides, given an adequate bond conditioned to stay execution. The defendants, as I believe, fully and fairly stated to me as their counsel the facts of the case. I also heard all the evidence given in open court. After such statement, and also after such hearing, I believe, and so advised them, and, so far as I can know, they each believe, that they had a good and sufficient defense to the action and grounds of appeal on the merits. I reside in the county of Alameda, and, so far as this is an affidavit of merits, or such affidavit as required, I make it on behalf of the defendants, for the reason that I do not know where at present they can be found. The transcript in this cause is not long, nor are the questions involved specially intricate. If the judgment herein be vacated I will be prepared to argue the cause orally at a moment's notice, or I can file a brief in five days' time, or even less, if time be material. I know no reason why the judgment entered on Thursday last cannot be vacated without prejudice or injury to the rights of the respondents or either of them.

"Subscribed and sworn to before me this 12th day of March, 1888."

The following order was then entered by the court: "Upon reading and filing the affidavit of W. S. Goodfellow in the above-entitled cause, it is ordered that the respondent show cause before this court, department No. 2, on the 22d day of March, 1888, at 10 o'clock in the forenoon of that day, why the order heretofore made affirming the judgment and order of the court below should not be vacated and set aside, and it is further ordered that a copy of said affidavit, and of this order, be served upon the attorney for the respondents five days before the said 22d day of March, 1888."

*W. S. Goodfellow*, for appellants. *S. F. Leib*, for respondents.

PER CURIAM. The showing made is not sufficient to justify the setting aside of the judgment of affirmance herein, and the motion is denied. So ordered.

(75 Cal. 426)

HEILBRON *et al.* v. FOWLER SWITCH CANAL CO. (No. 11,800.)

(Supreme Court of California. March 29, 1888.)

1. INJUNCTION—TO RESTRAIN DIVERSION OF WATER.

Plaintiffs owned a ranch bounded for 30 miles by a river, a branch of which flows through the land, and used the water for irrigation and to supply about 10,000 cattle. The river at its lowest stages carried about 1,000 cubic feet per second, all of

which flowed through the branch, and during the time of melting snows a much larger volume, sometimes as much as 15,000 feet. *Held*, that to divert from 300 to 1,500 cubic feet per second would produce a material injury, to prevent which an injunction will be granted.

2. **SAME.**

In a suit against a corporation to enjoin it from diverting water from a river by means of a canal, the fact that it had instructed its head-gate keeper that, whenever the water was low in the river, and there could be cause of complaint by any one, to shut down the gate at the head of the canal, and only take water when it would make no appreciable difference in the quantity, is no defense.

3. **SAME—INTEREST TO MAINTAIN PERPETUAL INJUNCTION—LEASEHOLD.**

Possession of land under a lease for years is sufficient to enable the tenants to sustain a suit for perpetual injunction to restrain the diverting of water necessary to the enjoyment of the land, the injunction necessarily ending with the estate.

4. **PLEADING—AMENDMENT—PLEA IN ABATEMENT.**

Originally the parties to two suits for injunction pending at the same time were precisely the same, and the latter suit differed from the former in that no judgment for damages was asked. After a plea in abatement was filed, plaintiffs, by leave of the court, amended by making new parties coplaintiffs. *Held* that, the parties not being the same, the plea in abatement could not be sustained.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Suit for an injunction by August Heilbron, Adolph Heilbron, and others, against the Fowler Switch Canal Company. Judgment for plaintiffs, and defendant appeals.

*Edward J. Pringle and E. C. Winchell*, for appellant. *Brown & Daggett and Terry & Terry*, for respondents.

TEMPLE, J. The facts constituting the plaintiffs' case in this action are pretty much the same as in the case of *Heilbron v. Ditch Co.*, 17 Pac. Rep. 65, recently decided by us. Plaintiffs are in possession of the Rancho Laguna de Tache, containing about 50,000 acres of land, under a lease for 10 years, with the privilege of purchasing during their term. Kings river forms a boundary of this farm for 30 miles, and, dividing at a point within this distance, one channel of the river, called "Cole Slough," flows through the rancho for a distance of 10 miles. Plaintiffs claim under a Mexican grant made January 10, 1846. The claimant filed his petition for the confirmation of his title with the land commissioners to ascertain and settle private land claims in California, February 15, 1853; and, the title being confirmed, a patent was issued for the same March 6, 1866. Kings river rises in the Sierra Nevada mountains, and carries at its lowest stages only about 1,000 cubic feet of water per second, and at the highest stages, during the time of melting snows in the spring and summer, a much larger volume, sometimes as much as 15,000 cubic feet per second. During ordinary stages of water Cole slough carries the larger portion of the waters of Kings river, and during the period of low water all that reaches the point of divergence. For more than two years before the bringing of this action, the plaintiffs had maintained and cultivated about 3,000 acres of alfalfa upon the land; and to irrigate the alfalfa, water their stock, and increase the productiveness of their land, they had built a dam in Cole slough, and constructed canals and ditches leading out of Cole slough, conducting the water over their land, increasing its productiveness, and furnishing water for their cattle, amounting to 10,000 head, which were entirely dependent upon the river for water to drink. The defendant is a corporation, organized to appropriate and divert the water of Kings river, and avers in its answer that it has taken all the steps required under the Civil Code to authorize it to appropriate 1,500 cubic feet per second, flowing continuously, and at great expense has constructed a canal with a capacity of from 1,000 to 1,500 cubic feet per second, sufficient for irrigating 240,000 acres of land; that the stockholders own about 60,000 acres of land along the canal and its branches. The land owned by the stockholders is a long distance from the river, none of them being riparian owners, and no portion of the water

would ever find its way again into the river. It was found as a fact that the defendant threatens, and unless enjoined will, divert 300 cubic feet of water per second, and as much as 1,500 cubic feet of water per second when there is the last-named quantity flowing in the river at the head of defendant's canal, and the Rancho Laguna de Tache will be deprived of a material and substantial quantity of water; that plaintiffs will be deprived of the use of water with which to irrigate said land, their cattle of sufficient quantity to drink, and that great damage and injury will occur annually, and of such extent that the same cannot be justly computed or estimated, and an action for damages would not afford an adequate remedy. The defendant does not deny that it threatens to divert from the stream 1,000 cubic feet of water per second, but denies that it proposes to take all the water of Kings river, or a sufficient quantity to injure the lands of plaintiffs, and alleges that defendant claims the right of withdrawal of water only in proportion to the supply which may be flowing in the river, and does not intend to divert the whole amount provided in its articles of incorporation, nor 300 cubic feet as alleged in the complaint. The answer also avers that defendant was incorporated for the purpose of acquiring the title to 1,000 cubic feet of water per second, which amount they purchased from one Dusy; and that since they have taken under the Code 500 additional cubic feet per second; and that it has commenced the construction of a suitable dam and head-gate sufficient to divert the amount of water, the canal being 80 feet wide and 5 feet deep, and had so far completed the work as to be able to divert 1,500 cubic feet of water per second, "so appropriated and owned by defendant, into its canal, and to conduct the same along and through its said canal a distance of 21 miles;" and that they have expended in its construction \$110,000. Plaintiff recovered judgment, and the defendant appeals from the judgment, and from an order denying its motion for a new trial. The appeal from the judgment, not having been taken within one year, must be dismissed. On the trial the defendant attempted to prove its right as an appropriator by showing its compliance with the provisions of the Code. This evidence was excluded, on the objection of plaintiffs, and defendant excepted. The court also excluded, against the exception of the defendant, evidence tending to show that there was no appreciable difference in the quantity of water in Kings river at a time when defendant was taking water, and at a time when it was not taking water, from the river. In like manner the court refused to permit the defendant to show that its officers had instructed its head-gate keeper that, whenever the water was low in the river, and there could be any cause of complaint by any one, or it would make an appreciable difference in the quantity of water in the river, he was not to take water, but to shut down his gate, and only take water when it would make no appreciable difference in the quantity flowing in the river.

The first point made by appellant is that where a party suffers no appreciable injury, and is threatened with none, he cannot invoke the aid of a court of equity to restrain a trespass, but will be left to his remedy at law. Perhaps this proposition might be admitted without affecting the merits of this appeal. It does not follow because the injury is incapable of ascertainment, or of being computed in damages, and therefore only nominal damages can be recovered, that it is trifling or inconsiderable. It is doubtful if it can properly be said that there is any evidence in the case which tends to show, or if that which was offered would have tended to show, that the injury to plaintiffs was inconsiderable. That it was unascertainable, and in that sense inappreciable, may be a good reason why an injunction should issue. This question is, however, not an open one in this state, but has been repeatedly passed on and settled in unmistakable terms. *Lux v. Haggin*, 69 Cal. 258, 10 Pac. Rep. 674; *Moore v. Water-Works Co.*, 68 Cal. 150, 8 Pac. Rep. 816; *Stanford v. Felt*, 71 Cal. 249, 16 Pac. Rep. 900; *Parke v. Kilham*, 8 Cal. 77; *Ferrea v. Knipe*, 28 Cal. 341. No doubt there are cases in which a court will refuse to

interfere by injunction to prevent a trespass, where it can see that the injury will be slight, and the injunction may work great injury. Here the defendant professes to take from plaintiffs their property, really, upon the plea that it is worth but little to the plaintiffs, and much to the defendant. It is not an ordinary trespass. It is a perpetual taking of the property of the plaintiffs, —a continuous nuisance, which, may ripen into a right unless prevented. The injury is one, also, which, in its nature, cannot be estimated. In the recent case of *Heilbron v. Ditch Co.* it was said: "The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation, and the growth and decay of vegetation add not only to the fertility, but to the substance and quantity, of the soil." If this be so,—and it cannot be doubted,—it is obvious that in a climate like that where this land is situated, the benefit derived from a flow of water for 30 miles along its boundary, and 10 miles through it, cannot be inconsiderable; but yet the extent of benefit must ever be an unknown quantity. The defendant here states that the channel of the river above and along this land is deep, and, therefore, at times of ordinary flow, the seepage cannot be great. If so, it must be important to plaintiffs that the channel should carry a full stream, and evidently at such times the percolation would be increased.

The right claimed by the defendant is not to appropriate the surplus waters of extraordinary floods, when the flow is more destructive than useful. It claims as an appropriator a certain quantity of water, adversely to the riparian proprietor; and, if the claim be valid, it may be asserted at any stage of the water. But the rights of the riparian proprietor do not depend upon the quantity of water flowing in the stream. Nor can that flow be said to be an extraordinary flood which can be counted upon as certain to occur annually, and to continue for months. The defendant has no reservoir to retain the surplus waters of casual and unusual freshets, and its works would be of little value if its dependence were only upon such waters. And certainly it would be a poor protection to the plaintiffs to have to depend upon the keeper of the head-gate of defendant to take only a proportionate amount of water, or to take water only when it could be done without injury to plaintiffs. There was no error in excluding the offered testimony.

We see nothing in the suggestion that defendant is presumably the licensee of the United States, and that the United States, being an upper riparian proprietor, could take a reasonable quantity of water as against the lower riparian owner. A riparian owner may not authorize, as against a lower proprietor, a company to take water from the stream, to be conducted at a distance, and sold. We see no occasion to discuss the question as to whether the river is navigable or not. In either event the result would be the same. The riparian owner on a non-tidal navigable stream has all the rights of a riparian owner not inconsistent with the public easement. *Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 2 Mich. 519; *Wood, Nuis.* § 485; *Smith v. City of Rochester*, 92 N. Y. 463; *Woodruff v. Mining Co.*, 18 Fed. Rep. 753. Besides, Cole slough is not claimed to be a navigable stream. The right of the state to interfere with the flow there would certainly be limited to the interest of navigation.

The estate of the plaintiffs is sufficient to enable them to maintain this action. They were lessees for a term of 10 years, with the privilege of purchasing during that time. If they fail to perfect the purchase, the fact that the injunction is in form perpetual cannot injure the defendant. If the estate which the injunction was designed to protect cease to exist, there would be no one to enforce the judgment, for there would be no one in privity with the plaintiffs. Practically it would cease to exist.

The plea in abatement cannot be sustained. The same plaintiffs, excepting only the representatives of the estate of Poly, commenced a suit for a



similar purpose against this defendant, but in that suit claimed damages. That suit is still pending, and in it defendant has appeared and answered. Originally the parties to the two suits were precisely the same, but, after the plea in abatement was filed, the plaintiff, by leave of the court, amended, making the representatives of Poly co-plaintiffs. Now the action differs from the former one in that the plaintiffs are not entirely the same, and no judgment for damages is asked, and the last complaint charges the actual diversion, and the threats to continue, at a date subsequent to the bringing of the first action. Considered merely as a matter of amendment, the court properly allowed it. The plea in abatement is not favored, and the fact that the parties are not the same justifies the ruling of the court below.

The appeal from the judgment is dismissed, and the order denying the motion for a new trial is affirmed

We concur: MCKINSTREY, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

(75 Cal. 422)

MALONEY *et ux.* v. HEFER. (No. 9,866.)

(Supreme Court of California. March 29, 1888.)

**HOMESTEAD—REQUISITES—RESIDENCE.**

A person who owns a lot having upon it a front and rear house separated by a fence cannot claim a homestead in the whole lot when she resides in one of the houses only, and has rented out the other for years.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

*E. J. & J. H. Moore*, (*Nathaniel Bennett* and *Edward J. Pringle*, of counsel,) for appellants. *N. B. Mulville*, for respondent.

SEARLS, C. J. This cause was heard and decided by department 1, in an opinion filed November 30, 1887. 15 Pac. Rep. 763. A rehearing was subsequently granted, and the cause has been reargued before the court in bank. Counsel for appellants urge that the effect of the former judgment was to reverse a finding of the court below which was not attacked. We draw no such inference from the decision. Plaintiffs and appellants sought by their action to quiet title to a lot of land claimed as their homestead, having upon it a front and rear house, the former of which was rented to tenants, and the latter occupied by them as a family residence. The wife made a declaration of homestead upon the whole property while so occupying the rear building, and had then rented such rear building, except one room therein, reserved for storing the family furniture, and had removed temporarily from the premises and remained absent therefrom for three or four months, during which time the declaration of homestead was filed and recorded. Defendant had caused that portion of the lot covered by the front house to be sold upon an execution issued on a judgment in his favor, and held a sheriff's deed therefor. Defendant claimed title to the front portion of the lot under this sheriff's deed, but did not make any claim to the rear house and premises. The court found that the front house and premises were not the homestead of plaintiffs, and that defendant had title thereto; that the rear house and premises were the homestead of plaintiffs, etc., and quieted their title thereto. Plaintiffs appealed from so much of the judgment as decreed defendant to be the owner of and quieted his title to, the front house and premises.

As to that portion of the decree which awarded the rear house and premises to plaintiffs as their homestead, and quieted their title thereto, there was no appeal. It follows: (1) That what was said in the former opinion did not have, and could not have, any reference to the rear house and premises; and (2) that, as plaintiffs claimed the front house and premises as a homestead,

all questions touching the validity of such claim were pertinent to the inquiry on this appeal. The fact that the same declaration of homestead covered the entire property, a portion of which is not in dispute, cannot preclude an inquiry into the sufficiency of that declaration, or the existence of the facts necessary to uphold it, so far as applicable to the subject of this controversy. "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated." Civil Code, § 1237. It is the principal use to which property is put, and not quantity, which furnishes the test in determining the question whether or not property is subject to dedication as a homestead. *Ackley v. Chamberlain*, 16 Cal. 182; *Gregg v. Bostwick*, 33 Cal. 220. And, if only a part of the land described in the homestead declaration be actually used and appropriated as the home of the family, the remainder not so used and appropriated forms no part of the homestead claim, in the sense of the statute. *Mann v. Rogers*, 35 Cal. 319. In *Tiernan v. His Creditors*, 62 Cal. 286, it was held that, in case of the ownership of a double house, one side of which was occupied by the insolvent as a family residence, and the other side rented to tenants, the part so rented could not be set off as a homestead to the insolvent. In *Laughlin v. Wright*, 63 Cal. 113, it was said: "But the mere filing of a declaration of homestead does not of itself constitute the premises embraced within it the homestead of the declarant. The use of the property is an important element to be considered. From the record in this case it appears that the premises in question were used by the Wrights primarily and principally as a hotel for the accommodation of the public. \* \* \* But their residence there was but incidental to the business of running the hotel. \* \* \* It would be doing violence to the statute to regard property so used as a homestead which is, and was intended to be, the place where the home is." The benign object of the statute was to protect the home of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor as a source of revenue for the support of himself or family. In view of this paramount object the justice of the distinction made, and the limitation placed upon the right of the homestead claimant, is manifest.

As to the premises in dispute, the finding of the court, which is amply supported by the evidence, is against the appellants. It is as follows: "The plaintiffs have not lived in or occupied said front house or premises for over ten years last past, but have been renting the same to tenants during that time." The findings then proceed to show that the premises in question are separated from the residence in the rear by a tight board fence, and are separate and independent from each other, etc. Premises thus separated and thus used were not subject to dedication as a homestead by the mere filing of a declaration, as provided by the statute; and, waiving all question as to a homestead right initiated by a declaration made when the parties lived upon the rear premises, but filed and recorded after they had left and temporarily rented such premises, and the conclusion is still inevitable that, as to the front lot, it did not and could not become a homestead, because not used as a home at the time of, or for many years prior to, the declaration by which it was sought to impress it with that character.

The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

(75 Cal. 419)

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*In re BULLOCK'S ESTATE.* (No. 12,204.)

(*Supreme Court of California.* March 29, 1888.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—ORDER OF COURT.

An order directing an administrator to dismiss a suit brought by him on a claim alleged to be due the estate, and finding that thereupon there is no property in the

hands of the administrator, and directing that he forthwith file his final account, is an attempt on the part of the court making it to state and settle the account of the administrator, and is erroneous.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

*Henry Thompson*, for appellant. *David McClure*, for respondent.

McKINSTRY, J. By the last will and testament of deceased, his mother, Almira W. Wheeler, was made sole legatee and devisee of his estate. She was also his only heir at law. Washington Ayer, as assignee of Almira W. Wheeler moved the superior court, wherein the administration was pending, that citation issue to George A. Worn, administrator with the will annexed of the estate of deceased, commanding him to appear and show cause why an order should not be entered directing him to dismiss a certain action theretofore brought by said Worn, as administrator, etc., against the executors of E. M. Fry, deceased, and Charles S. Neal, and then pending in the superior court of San Francisco; and further requiring the said Worn, as administrator, etc., to file his final account as such. On the return-day of the citation, Worn, as administrator, showed, or attempted to show, cause. The court below made and entered an order entitled in the transcript "Order directing administrator to file account," etc., wherein the court directed that the said administrator with the will annexed, "on the coming to him of a certified copy of this order, do forthwith file in this court an account of the receipts and disbursements made by him as administrator with the will annexed of said estate since his qualification as such, and of his actions and proceedings as such administrator since said date." The order then proceeds—and it is from that portion of the order which follows that this appeal is taken: "Which said account shall stand and serve as the final account as to such administrator. And it is further ordered, adjudged, and decreed that said George A. Worn, as administrator with the will annexed of the estate of Frank Dyer Bullock, deceased, do forthwith dismiss, abate, and discontinue, and that he do order and require to be dismissed, abated, and discontinued, that certain action hereinabove mentioned as pending in the superior court of the city and county of San Francisco, state of California, numbered 16,665, and entitled, *George A. Worn, as Administrator with the Will Annexed of the Estate of F. D. Bullock, Deceased, Plaintiff vs. J. D. Fry, Executor of the Last Will and Testament of E. M. Fry, Deceased, and Charles S. Neal, Defendants*, and that no further proceeding be had or taken therein by said George A. Worn, except as may be necessary to procure the dismissal, abatement, and discontinuance of said action. And it having appeared to the court that no property of any nature, kind, or description belonging to said estate has ever come to the hands of said George A. Worn, as such administrator or otherwise, and that there are not any claims in favor of said estate except the claim which is the subject and basis of the above-mentioned action, it is therefore ordered by the court that upon the settlement of the said account (for the filing of which order and direction has been hereinbefore made) the said George A. Worn shall be relieved and discharged from the duties of his trust as the administrator with the will annexed of the estate of said Frank D. Bullock, deceased, and that estate of Frank D. Bullock, deceased, be thereupon and immediately thereafter terminated, settled, ended and closed."

We express no opinion as to the validity of the orders contained in the portion of the decree appealed from. Void orders may be appealable. If the orders appealed from can be treated simply as orders commanding the dismissal of the action against the executor of the estate of Fry, deceased, and another, and directing the discharge of Worn, administrator, upon and after the settlement of an account not yet filed, they were premature, but not appealable. Code Civil Proc. § 963. But they were neither mere recitals nor orders inde-

pendent of the settlement of the account which was ordered in the same decree. When the court undertook to direct the dismissal of an action brought by the administrator upon a claim alleged to be due the estate, and to find thereupon that there was no property in the hands of the administrator, it undertook both to state and settle his account to that extent. It determined his rights in that regard, and settled, or attempted to settle, his account, as effectually as if the order had been made after he had filed an account. Whether an order is appealable is to be determined by what it purports to determine; not by what may be its actual operative effect. The portion of the decree appealed from was, if operative, a settlement of an account.

From what has been said, it appears that the court below erred in entering and making it. That portion of the judgment or order appealed from is reversed.

We concur: TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.

(75 Cal. 506)

MCCORMICK *et ux.* v. CENTRAL R. Co. (No. 9,925,

(Supreme Court of California. April 17, 1888.)

NEW TRIAL—GROUNDS FOR—NEWLY-DISCOVERED EVIDENCE.

The evidence was conflicting as to whether plaintiff was struck by a horse attached to defendant's car, as she alleged, or by the pole of a truck near the car. *Held*, that a new trial will not be granted to plaintiff on the affidavits of two persons that the truck did not move, and from its position could not have struck her; such newly-discovered evidence being merely cumulative.<sup>1</sup>

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

Action by John McCormick and Susan McCormick, his wife, for injuries alleged to have been sustained by the latter through the negligence of defendant, the Central Railroad Company. Verdict and judgment for defendant. Plaintiffs appeal.

*Manuel Eyre*, for appellants. *Gunnison & Booth*, for respondent.

HAYNE, C. Action against a street-car company for personal injuries. Verdict and judgment for defendants. The only point made is that the plaintiff's motion for new trial should have been granted on the ground of newly-discovered evidence. The plaintiff's theory was that she was struck by the horse attached to the car, and that the car-wheel passed over her leg. The defense was that the plaintiff was struck by the pole of a truck which was near the car, and that this was the cause of the accident. Upon this question the plaintiff testified that she was struck by the horse, and that the truck did not move at all. One Offerman and one Newman testified to the same effect. On the other hand, the driver of the car testified that it was the pole of the truck which struck her, and not the horse or car; and he was corroborated by a Miss Annie Norton, a by-stander.

The evidence which is claimed to be newly discovered is shown by the affidavits of one Galbraith and one O'Brien to the effect that the truck did not move, and from its position it could not have struck the plaintiff; and the affidavit of plaintiff's husband to the effect that a certain Mrs. Stewart had told him that the witness Norton had made declarations to the contrary of her testimony, but that Mrs. Stewart would not make affidavit to that effect. As a matter of course, this hearsay evidence is not to be regarded, and the other matters stated in the affidavit are unworthy of special notice. The affidavits of Galbraith and O'Brien are upon a subject which was much disputed at the trial and are merely cumulative and not such as to render a different

<sup>1</sup> See note at end of case.

result probable, and therefore, under the well-settled rule, were not sufficient to warrant a new trial. We therefore advise that the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

#### NOTE.

**NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.** A new trial will be granted on the ground of newly-discovered evidence when it appears that the evidence was brought to the knowledge of defendant after the trial, and could not have been previously discovered. *Greenwalt v. Tucker*, 10 Fed. Rep. 884; *Seeley v. Perry*, (Iowa,) 8 N. W. Rep. 678; *Kelleher v. Kenney*, (Cal.) 4 Pac. Rep. 1065. The granting of a new trial for newly-discovered evidence is largely in the discretion of the trial judge, *Eldridge v. Railway Co.*, (Minn.) 20 N. W. Rep. 151; the exercise of which will not be disturbed, unless it appears that it violated a clear legal right of the appellant, or that it involved an abuse of judicial discretion, *Lampsen v. Brander*, (Minn.) 11 N. W. Rep. 94; *Smith v. Smith*, (Wis.) 8 N. W. Rep. 868; *Regents v. Linacott*, (Kan.) 1 Pac. Rep. 81.

A new trial will not be granted on the ground of newly-discovered evidence when such evidence is merely cumulative, or is upon unimportant matters in the case, or is of an impeaching character, or where, in the opinion of the court, such evidence, if produced, would not affect the action or verdict of a jury. *Brown v. Evans*, 17 Fed. Rep. 912; *Marshall v. Mathers*, (Ind.) 3 N. E. Rep. 120; *Blackburn v. Crowder*, (Ind.) 10 N. E. Rep. 933; *Donnelly v. Burkett*, (Iowa,) 34 N. W. Rep. 330; *Ethridge v. Hobbs*, (Ga.) 3 S. E. Rep. 251; *Bailey v. Landingham*, (Iowa,) 3 N. W. Rep. 460; *Hickenbottom v. Railway Co.*, (Iowa,) 11 N. W. Rep. 652; *Morrow v. Railway Co.*, (Iowa,) 16 N. W. Rep. 572; *Hallday v. Briggs*, (Neb.) 18 N. W. Rep. 55; *Krueger v. City*, (Wis.) 27 N. W. Rep. 836; *Ketchum v. Breed*, (Wis.) 26 N. W. Rep. 271; *Baughman v. Penn.*, (Kan.) 6 Pac. Rep. 890; *Reed v. Draais*, (Cal.) 8 Pac. Rep. 20; *Chandler v. Thompson*, 30 Fed. Rep. 38; *De Hart v. Apter*, (Ind.) 8 N. E. Rep. 275; *Railroad Co. v. Boon*, (Tex.) 1 S. W. Rep. 632; *Walker v. Brown*, Id. 797; *Munro v. Moody*, (Ga.) 2 S. E. Rep. 688; *Hart v. Jackson*, (Ga.) 3 S. E. Rep. 1; *Fuller v. Harris*, 29 Fed. Rep. 814; *Pennsylvania Co. v. Nations*, (Ind.) 12 N. E. Rep. 909; *Cirkel v. Ellis*, (Minn.) 31 N. W. Rep. 513; *Chandler v. Thompson*, 30 Fed. Rep. 38.

On the application the party moving must show—*First*, that the proposed evidence has been discovered since the trial, and that due diligence was exercised to discover it prior to that time; *second*, that the evidence is competent and material. *Town of Manson v. Ware*, (Iowa,) 19 N. W. Rep. 275; *Carson v. Henderson*, (Kan.) 8 Pac. Rep. 727; *Brickley v. Walker*, (Wis.) 32 N. W. Rep. 773; *Fenno v. Chapin*, (Minn.) 8 N. W. Rep. 762. The affidavit must set forth the facts relied upon as constituting due diligence on the part of the applicant. *Gorachi v. Hintz*, (Neb.) 14 N. W. Rep. 379; *Smith v. Wagaman*, (Iowa,) 11 N. W. Rep. 713; *Pinschowers v. Hanks*, (Nev.) 1 Pac. Rep. 454; *Wilkes v. Wolback*, (Kan.) 2 Pac. Rep. 508; *Ross v. Sedgwick*, (Cal.) 10 Pac. Rep. 400; *Patterson v. Collier*, (Ga.) 3 S. E. Rep. 119; *Moore v. Wills*, (Tex.) 5 S. W. Rep. 675; *Allen v. Bond*, (Ind.) 14 N. E. Rep. 493; *Poullain v. Poullain*, (Ga.) 4 S. E. Rep. 81.

Where the affidavit in support of the application is met by counter-affidavits, and there is no probability upon the record that the result would be affected, a new trial will be refused. *Peterson v. Faust*, (Minn.) 14 N. W. Rep. 64.

(75 Cal. 568)

SIMMONS v. OULLAHAN. (No. 12,358.)

(Supreme Court of California. April 17, 1888.)

ACCORD AND SATISFACTION—COMPROMISE OF DEBT—TIME OF THE ESSENCE.

A creditor agreed to accept 50 cents on the dollar in satisfaction of his claim; the payment to be made in installments on stated days. Time was made of the essence of the agreement, and the whole indebtedness was to be revived on failure to pay any installment on the stated day. *Held*, that accord without satisfaction was no bar, and, on defendant's failure to pay on the days stated, the original indebtedness was revived.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

J. C. Campbell, for appellant. S. D. Woods and A. L. Levinsky, for respondent.

HAYNE, C. Action for goods sold and delivered. Defendant admitted that the goods were sold and delivered as alleged, but relied upon an agreement

whereby the assignor of the plaintiff agreed to accept 50 cents on the dollar in satisfaction of the claim. This agreement contained the following clause: "That each and all of said acts shall be made and done promptly at maturity; and, as to this condition, time is hereby made of the essence of this agreement; so that, in case of default or miscarriage regarding performance and payment on the day or days said sums severally become due, the whole of said original indebtedness is hereby renewed and revived."

The first installment due under this agreement was \$63.69. The court below found that only \$43.45 was paid, and we think that the evidence justifies this finding. The expressions in the receipts to the effect that the sum paid was "our *pro rata*" of the distribution amount to nothing. A receipt is never conclusive; and in view of the contract, and the admissions of the defendant, it is apparent that the sum paid was not the amount due under the agreement. Furthermore, there is no evidence that the defendant had paid the "costs, attorney's fees, and expenses incurred," mentioned in the composition agreement. It is an elementary principle that an accord without satisfaction is not a bar; and, as a matter of course, the defendant who relies upon an accord and satisfaction must plead and prove the satisfaction as well as the accord. The other points seem frivolous. We think the appeal was taken for delay, and therefore advise that the judgment and order be affirmed, with 10 per cent. damages.

We concur: BELCHER, C. C; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed, with 10 per cent. damages.

(75 Cal. 415)

PEOPLE v. YEATON. (No. 20,348.)

(Supreme Court of California. March 29, 1888.)

1. CRIMINAL LAW—EVIDENCE—CONFESSIONS—IMPEACHMENT.

It is not permissible upon cross-examination to compel a defendant in a criminal action to testify to statements, made out of court, amounting to a confession of the crime, upon the theory of showing contradictory statements to impeach the witness, unless it is first shown that such confession was voluntary.<sup>1</sup>

2. SAME.

The defendant in a criminal action upon cross-examination testified that a certain letter offered as a confession was written at the request of her mother, who visited her at the jail with A., and told her that she had consulted an attorney who had advised the writing of the letter. In connection with this matter defendant offered to prove, by her mother and A., that at that conference she told them she was innocent of the alleged crime. Held that, under the circumstances, this conference and the writing of the letter should be considered one transaction, and should all go to the jury.

In bank. Appeal from superior court, Shasta county; AARON BELL, Judge. *Jackson Hatch*, for appellant. *Atty. Gen. Geo. A. Johnson, Edward Sweeney*, and *Clay W. Taylor*, for the People.

McFARLAND, J. The defendant, a young girl about 15 years old, was convicted of the crime of an attempt to commit arson. When the prosecution had closed its case in chief, the only evidence against the defendant was circumstantial; and it was of such a character that the jury might well have considered it insufficient to warrant a verdict of guilty. The defendant then took the stand as a witness for herself. She testified to some circumstances connected with her residence as a servant with Mrs. Ludwig, (whose house

<sup>1</sup> As to when a confession is admissible in evidence, see *Steele v. State*, (Ala.) 3 South. Rep. 547, and note. As to the impeachment of a witness by showing previous contradictory statements, see *Zebley v. Storey*, (Pa.) 12 Atl. Rep. 569, and note.

she was charged with the attempt to burn,) and denied that she had anything to do with the alleged crime, or knew anything about the origin of the fire. She was then subjected to a cross-examination, which, even in its general features, went to the utmost bounds of, if it did not exceed the limits to which, under section 1323 of the Penal Code, and *People v. O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695, the cross-examination of a defendant in a criminal case should be allowed to go. But, in addition to other things, she was compelled on the cross-examination, against the objections of her counsel, to testify to statements, made by her out of court, which were not merely admissions of facts which tended to prove her guilt, but absolute confessions of the commission of the crime. And this was done without any pretense on the part of the prosecution to show, preliminarily, that the confessions were voluntary. It is true that these confessions were admitted upon the asserted theory that they were not introduced as confessions, but merely as contradictory statements for the purpose of impeaching the defendant as a witness, and upon the apparently innocent belief that the jury would not consider them at all except for the special purpose indicated. But we think that under such a guise, the prosecution cannot be allowed to introduce confessions without the proper preliminary proof required by well-settled rules of evidence. The defendant was arrested the morning after the fire, and taken to jail. She saw no attorney, or other person capable of giving her advice. She swears that Mrs. Ludwig, and the constable, and her mother, and, in fact, every one who had access to her, told her that she would certainly be found guilty, and that the best thing she could do would be to confess, and thus try to gain the kindness and mercy of her prosecutor; and that she was also offered money and other inducements to confess. The prosecution in making out its case did not offer these confessions, presumably because it could not prove that they were made voluntarily. Therefore, at the close of the evidence in chief of the prosecution, the defendant was in this condition: She either had to forego the privilege of testifying in her own behalf, and denying the charge under oath, or, if she did testify, then, upon the theory of the prosecution, it could get in the confessions, on cross-examination, without the preliminary proof. We do not think this to be the fair meaning of the law; and we think that the admission of the confessions was a material error.

One of the confessions introduced was a letter written by defendant, when in jail, to Mrs. Ludwig. Defendant testified that this letter was written at the request, and on the advice, of her mother, who visited her at the jail with one Mr. Oxendine, and told her that she (her mother) had consulted an attorney, who had advised the writing of the letter. In connection with this matter defendant offered to prove by her own testimony, and by the testimony of her mother and said Oxendine, whom she called to the witness stand for that purpose, that at that conference she told her mother and Oxendine that she was entirely innocent of the alleged crime. This testimony was rejected, and, we think, erroneously. Under the circumstances this conference and the writing of the letter should be considered as one transaction, and should all have gone to the jury.

We are not prepared to say that the appointment of an elisor to summon the jury was erroneous, or that it was a matter that can be reviewed on this record. In such matters, however, courts should follow the statutes as closely as possible. The instructions to the jury were very voluminous; but we do not see any material error in them, except as they may be inconsistent with the views hereinbefore expressed. Judgment reversed, and new trial ordered.

WE CONCUR: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.

v.17p.no.6—35

(75 Cal. 412)

**KIMPLE v. CONWAY et al.** (No. 9,700.)

(Supreme Court of California. March 20, 1888.)

**DIVORCE—SALE OF COMMUNITY PROPERTY—CONFIRMATION.**

In California there is no law requiring the confirmation of a sale of land made by a sheriff under a decree for the sale of the community property of a husband and wife to whom a divorce has been granted, and no such confirmation being required in the decree, the sale is complete without confirmation.

Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. McGUIRE, Judge.

Action to quiet title by Kate Kimple, appellant, against Margaret Conway, Patrick Conway, and Patrick Connolly, sheriff, appellees.

*Aug. M. Heslep* and *D. L. Smoot*, for appellant. *W. R. Daingerfield*, for respondents.

**SHARPSTEIN, J.** This is an action to quiet title. Judgment was entered against the plaintiff. She moved for a new trial, which was denied, and from that order and the judgment this appeal is taken. The only question before us is whether the evidence is sufficient to justify the decision. The grounds on which the court below based its decision, as stated in the transcript, are as follows: "Defendants, Margaret and Patrick Conway, were husband and wife. A divorce was decreed between them, and their community property, including the land in controversy, was ordered to be sold by the sheriff, Mathew Nunan. The sheriff, under the decree, sold the property to the plaintiff, and, without reporting the sale to the court, executed a deed for the same to the plaintiff. After the execution of the deed, the sale was reported to the court, and the court refused to confirm it. Plaintiff claims title to the land in controversy under this deed. The sheriff, in executing the decree aforesaid, was not acting as sheriff, but as a commissioner, an agent of the court. As a commissioner his sale was incomplete until confirmed by the court. The deed made by the commissioner, without such confirmation, was void. A certificate of purchase, so called, was issued by the sheriff to the plaintiff. It conveys no title, and is of no effect as a receipt for the money paid by plaintiff on the unconfirmed purchase. Plaintiff's claim of title to the land in controversy, resting solely upon the deed and certificate aforesaid, is entirely without legal foundation." It appears that the property was sold by an order of the court, which is in the following words: "On motion of counsel for plaintiff, counsel for defendant consenting, it is further ordered and decreed that the property hereinbefore described be sold by the sheriff of the city and county of San Francisco, state of California, in the manner prescribed by law. \* \* \* And the said sheriff is hereby ordered and directed to sell said property forthwith, and pay the said commissioner and said attorneys the sums of money hereinbefore specified in the order named; and in case a surplus remains, after making such payment, to divide such surplus equally between plaintiff and defendant."

Section 147 of the Civil Code authorizes the court granting a divorce to order a sale of the community property, and a division or other disposition of the proceeds. Section 684 of the Code of Civil Procedure provides that "when the judgment requires the sale of property, the same may be enforced by a writ reciting the judgment or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." The power conferred is ample, and the sheriff appears to have followed the directions contained in the judgment by making the sale in conformity therewith. The judgment did not direct the sheriff to report the sale to the court for confirmation, and the Code does not require the confirmation of such sales. In the absence of such requirement we are not prepared to hold that the sale and conveyance are void because the sale was not confirmed. Some judicial sales become complete and valid



on being confirmed, and not before, but the Code expressly requires confirmation in such cases. The judgment of the court in this particular was subject to revision on appeal. Civil Code, § 148. No appeal was taken, and, as the court did not exceed its jurisdiction in the premises, the purchaser who purchased at sheriff's sale cannot, without manifest injustice, be deprived of the property for which she has paid and received a deed in due form. In this case neither the Code nor the order of the court required that the sale should be confirmed before becoming complete, and we are of the opinion that the court erred in holding that the sale in this case was void for want of such confirmation, and for that error the motion for a new trial should be granted. Order denying the motion for a new trial reversed.

We concur: MCFARLAND, J.; THORNTON, J.

(7 Mont. 356)

WEST GRANITE MOUNTAIN MIN. CO. v. GRANITE MOUNTAIN MIN. CO.

(Supreme Court of Montana. January 16, 1888.)

MINES AND MINING—LOCATION—MARKS—SUFFICIENCY.

Rev. St. U. S. § 2324, relating to the location of mining claims, provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." The location in this case was 300 feet wide and 600 feet long, and the stakes were set within the statutory limit, but outside the claim, and upon the corners of adjoining claims. Held a sufficient marking.

Appeal from district court, Silver Bow county; before Justice GALBRAITH. Robinson & Stapleton, for appellant. Knowles & Forbes, for respondent.

MCLEARY, J. This action was brought in the district court, to determine the right to a small piece of mining ground, which, by the plaintiff, is called the "Fraction," and by the defendant, the "Harrison" mining claim. There was a jury trial in the court below, and upon the general verdict and the special findings the court rendered judgment in favor of the plaintiff, from which the defendant appeals to this court. The only exception presented in the record and briefs of counsel is to the action of the court in denying the motion of the defendant to strike out all evidence on the part of the plaintiff in regard to the location of the "Fraction" lode, on the ground that the evidence showed no valid location. The appellant claims that the plaintiff never acquired any right to the "Fraction" lode claim, because the boundaries of said claim were not marked on the ground contained therein, so that they could be readily traced. The record shows that whatever marking of the boundaries of the "Fraction" lode claim was done, was by stakes set for corners on adjoining claims, the "Rattlesnake," "James G. Blaine," "Granite Mountain Extension," and the "Sunnyside," and not on the claim itself.

The matter is, then, narrowed down to this: whether or not such a marking of the boundaries as this complies with the act of congress. Section 2324, Rev. St. U. S., says: "A location must be distinctly marked on the ground, so that its boundaries can be readily traced." All that the statute requires, in our opinion, is that the land should be so marked upon the ground that the boundaries can be readily traced. This does not mean that the marks shall be upon the actual ground included within the mining claim, but they may be upon any ground adjoining, near enough to readily designate the boundaries. It was certainly never intended that a slight mistake in the setting of stakes should invalidate a location. All that was intended is that a person seeking to make a subsequent location could go upon the ground referred to, and from the marks made find the boundaries of the claim. *Gleeson v. Mining Co.*, 13 Nev. 462, 463; *Anderson v. Black*, 70 Cal. 230, 11 Pac. Rep. 700; *Taylor v. Middleton*, 67 Cal. 657, 8 Pac. Rep. 594; *Mining Co. v. Mining Co.*, 9 Min. B. 538, 539. There was an entirely parallel case decided by the supreme

court of California on the 30th of June, 1887. The learned justice delivering the opinion in that case says: "It seems to be admitted that the location would have been a good one if all the ground covered by it had been vacant, as then it would have been so marked out that its boundaries could be readily traced. But it is insisted that when Stoughton placed his monuments upon adjoining claims, which were held under valid locations, he was a trespasser, and could acquire no rights by such trespassing; that his acts were void, and he could claim nothing by reason of the monuments so placed; that the parcel of land in controversy was not so marked on the ground that its boundaries could be readily traced, and therefore his attempted location was wholly invalid. If this be so, then it must follow that if the locator of a mining claim should happen, through mistake or otherwise, to place some of the monuments necessary to mark out his boundaries upon another's claim, though they might be over the line only a yard or a rod, still his location must wholly fail. We do not think this is or ought to be the law. It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. In such cases the question as to the ground covered by two locations has been: Which location was prior in time and superior in right? And it has never been held, so far as we know, that either of them must wholly fail because of the conflict. On the contrary, in so far as the ground taken was vacant, each location, if properly made in other respects, has been considered to be valid and sufficient." *Doe v. Tyley*, 14 Pac. Rep. 376.

The case which would seem most nearly to support the position of the appellant is one decided by this court in 1882. In that case the boundaries, as marked upon the ground, made the claim 2,000 feet in length; and Mr. Chief Justice WADE, in delivering the opinion of the court, says: "Before there can be a valid location there must be a discovery. Taking the discovery as the initial point, the boundaries must be so definite and certain as that they can be readily traced; and they must be within the limits authorized by law, otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of location would not impart notice, and would be equivalent to no boundaries at all. A discovery entitles the person making the same to a mining claim embracing the discovery, not to exceed one thousand five hundred feet in length by six hundred feet in width. Within these limits, if the boundaries are properly marked on the ground, and the location properly made and recorded, the grant of the government attaches, and third persons must take notice. But they would not be required to look for stakes or boundaries outside of or beyond the utmost limits of location as authorized by the statute." *Hauswirth v. Butcher*, 4 Mont. 307, 308, 1 Pac. Rep. 714. But in that case the stakes were set beyond the limits fixed by the statute. In this case they were set within the statutory limits, but on adjoining claims. The claim located is a small fraction,—300 feet long and 600 feet wide, surrounded by other locations,—and it appears that "the location was marked on the ground, so that the boundaries can be readily traced." This is all that is required. There is no error apparent from the record, and the judgment is affirmed.

McCONNELL, C. J., and BACH, J., concur.

(7 Mont. 473)

WHITESIDE *et al.* v. LEBCHER.

(*Supreme Court of Montana*. January 23, 1888.)

1 MECHANICS' LIENS—NOTICE TO OWNER OF PROBABLE VALUE OF MATERIAL, ETC.

Rev. St. Mont. div. 3, §§ 821, 822, provide that subcontractors shall give notice to the owner at the time of furnishing any material, or performing any labor, of the

probable value thereof. *Held*, that the words "probable value" mean that the employer should be notified of some particular sum approximating the value; which requirement must be strictly complied with, and a complaint containing no allegation of such notice will not support a judgment.

2. SAME—NOTICE OF LIEN—DESCRIPTION OF PROPERTY.

A notice of lien given by Rev. St. Mont. div. 5 § 821 *et. seq.*, which describes the property as the "said building, and the lot of ground upon which said building was erected and now stands, said lot known and described as lot 8 in block 32 of the town of Miles City, county and territory aforesaid, as platted and filed for record in office of recorder of deeds of said county and territory," is a sufficient description for the purposes of the act.

Appeal from district court, Custer county; before Justice BOCK.

This action was brought by the plaintiffs, Fred Whiteside & Bro., as subcontractors, to enforce a lien for materials furnished one Greenwood, who was constructing a building for the defendant, Chester B. Lebcher. The court heard the case without a jury, and gave judgment for the plaintiffs, and then set the judgment aside, and granted a new trial, from which order the plaintiffs appeal.

*Andrew F. Burleigh*, for appellants. *Strerell & Garlock*, for respondent.

GALBRAITH, J. This was an action brought by the appellants to enforce a mechanic's lien against the property of the respondent. They were the subcontractors of one Greenwood, who has a contract with the respondent for the construction of the building against which, as well as the premises on which it was built, the lien was sought to be enforced. The cause was tried by the court, sitting without a jury. The court made and filed its findings of fact and conclusions of law, and upon these rendered judgment for the appellants, and decreed that it should be a lien upon the property described in the complaint. There was a motion for a new trial, which was by the court sustained. From the order sustaining this motion this appeal is taken.

For any of the causes mentioned in the statute, which materially affected the substantial rights of the respondent, a new trial should be granted. Several of these causes are urged by the respondent; but, if it shall appear that any one of them is such a cause, the order of the court granting a new trial should be sustained. One of these is, substantially, "insufficiency of the evidence to support a verdict or decision." It is urged by the respondent, in support of the court's action, that one of the findings of fact made by the court, which was material to the issue, is not supported by any evidence. This finding is as follows: "(7) That on or about October 7, 1885, and just previous to furnishing certain lumber and material to be used in said building, to the amount and value of \$631.00, plaintiffs notified said Chester B. Lebcher of their intention to furnish the same, and of the probable value thereof, to-wit, \$631.00; and that said Chester B. Lebcher then and there provided that he would see plaintiffs paid for the same; and that thereafter plaintiffs furnished lumber and material to the amount of, and value of, \$631.34, and the same were used in the construction of the said building." The mechanics' lien law relating to this subject, and in force at the time of the transaction in controversy, was as follows: "Every subcontractor wishing to avail himself of the benefits of this chapter shall give notice to the owner or proprietor, or his agent or trustee, before or at the time he furnishes any of the things aforesaid, or performs any of the labor, of his intention to furnish or perform the same, and the probable value thereof." Rev. St. Mont. div. 5 § 821. "And the employer shall become surety of the contractor to the subcontractor for the amount due for such work and labor or things, not, however, exceeding the value thereof as notified under section 821." Rev. St. div. 5, § 823. It was essential, under these provisions of the statute, that the respondent should have been notified, before or at the time the materials were being furnished, of the probable value thereof, and a certain sum

as the probable value thereof then specified. This sum must be shown by the testimony. It is not sufficient that the evidence should merely show that the respondent was notified of the probable value of the materials, without also proving the amount of such value. This requirement of the statute must be strictly complied with, in order to entitle the subcontractor to his lien. These two provisions explain each other. The latter certainly contemplates that a sum certain is meant in the first provision; for its language is, "not, however, exceeding the value thereof as notified under section 821." That a notification that the value of the materials is a certain, specific sum was intended, is apparent when we consider that under these provisions the subcontractor is not entitled to a lien in excess of the "value as notified under section 821." But it seems to us that it is apparent that the proper construction of the above provision from section 821 is that a sum certain should be proved without reference to the context. The words "probable value" mean that the employer should be notified of some particular sum, approximating the value of the materials, above which he is not entitled to a lien. Of course, the intention of the legislature is more apparent when the two provisions are construed together. We have examined the testimony contained in the record, and the following is all thereof relating to this subject: Fred Whiteside, one of the appellants, testified as follows: "I told him we were furnishing the materials, and about the value of them." A. L. Peters, a witness for the appellants, testified on direct examination: "He also gave him the amount then due, and the probable cost of that still to be furnished;" and on cross-examination: "I do not remember the figures plaintiff gave defendant for probable value; I do not know that he stated any amount." Chester B. Lepcher, the respondent, testified: "*Question.* Did either of the plaintiffs ever state to you the probable value of the materials to be furnished to Greenwood, the contractor, for the building in question? *Answer.* No, sir." There is no testimony tending to show that the respondent was notified of any particular sum at which the materials were valued, as required by law. The above finding of fact is therefore not sustained by the evidence, and upon this ground alone the court properly granted a new trial.

It is urged, also, by the respondent in his brief, that the complaint is insufficient, and does not state facts sufficient to support the judgment, because it contains no allegation that the appellants notified the respondent of the particular sum at which the materials were valued, before or at the time of furnishing them, as required by law. The objection that the complaint does not support the judgment may be raised for the first time in this court. This is substantially the same objection which is made to the foregoing finding of fact by the court. In this respect the complaint is deficient. This is one of the allegations which the complaint should contain, to warrant the enforcement of the lien; and in this particular the complaint does not support the judgment.

Other reasons are urged by the respondent to sustain the action of the court in granting a new trial, but, in view of the foregoing causes, we think that the motion for a new trial was properly granted, and it is unnecessary to enter upon this consideration. There is an objection, however, to the sufficiency of the description of the property against which the lien is sought to be enforced, contained in the notice of lien, which we will briefly notice. The description is as follows: "The building hereinafter described, which said debt is claimed to be a lien against the said building, and the lot of ground upon which said building was erected and now stands; that said lot is known and described as lot 8 in block 32 of the town of Miles City, county and territory aforesaid, as platted and filed for record in the office of the recorder of deeds of said county and territory." This description, for the purposes of this action, we deem sufficient. The premises on which the building is erected is sufficiently described; and as long as the building remains thereon, and there

is nothing in the record to indicate the contrary, it also is sufficiently identified.

The order granting a new trial is affirmed, and the cause remanded.

McCONNELL, C. J., and McLEARY, J., concur.

(7 Mont. 464)

**FIRST NAT. BANK OF BILLINGS v. CUSTER COUNTY.**

(*Supreme Court of Montana. January 27, 1888.*)

**1. COSTS—IN CRIMINAL CASES—LIABILITY OF COUNTY—PLEADING.**

Under Comp. St. Mont. p. 479, § 410, relating to crimes, providing that in case of conviction or acquittal of defendant execution shall issue against him, and be returned unsatisfied before the county is bound to pay the costs; and, if the trial is in a county other than the one where the offense was committed, the trial judge shall certify the amount of costs incurred to the county where the offense was committed,—a complaint on a claim for costs, which fails to aver the return of execution unsatisfied, or the proper authentication by the judge, or a valid reason for his failure to so authenticate the claim, is fatally defective.

**2. SAME.**

Under Crim. Proc. act Mont. § 153, providing that no indictment for a misdemeanor shall be preferred unless the name of the prosecutor is indorsed thereon, and section 413, that, upon the trial of an indictment whereon the name of the prosecutor is indorsed, and the jury acquit, they shall return with their verdict whether the prosecutor or the county shall pay the costs, a complaint for costs, in order to hold the county liable, must allege either that the trial under which the costs were incurred was not a misdemeanor, or, if so, that the verdict of the jury made the county liable for costs.

**3. SAME.**

Under Crim. Proc. act Mont. § 423, providing that witnesses in criminal cases shall make out, under oath, a bill of their fees, and file the same with the clerk, a complaint for the recovery of fees which fails to show that this section has been observed is defective.

**4. SAME.**

Under Gen. Laws Mont. § 763, which provides that no account shall be allowed by the board of county commissioners unless it sets out the separate items and their nature, with an affidavit of their truth, a complaint which fails to allege the performance of these conditions is fatally defective.

Appeal from district court, Custer county.

Action by the First National Bank, plaintiff and appellant, against the board of county commissioners of Custer county, defendant and respondent, to recover for witness fees.

*Andrew F. Burlingame*, for appellant. *Strevell & Garlock*, for respondent.

McCONNELL, C. J. This is an action brought to recover \$117.80, witness fees, claimed by one Joseph Sheldon for attendance as a witness for the defendant in the case of *Territory of Montana* against *Maurice Sullivan*, tried in the county of Yellowstone on change of venue from the county of Custer, on the 25th of November, 1885. Plaintiff claims to be the owner of said account by purchase from Sheldon. There was a demurrer to the complaint, which was sustained, and the plaintiff chose to abide its amended complaint, and not to further amend. The case is here upon the judgment roll. It is averred in the demurrer that said complaint does not state facts sufficient to constitute a cause of action. The following extracts from the complaint are sufficient to present the questions for our determination, to-wit: "(3) That at a regular term of the district court in and for said county of Yellowstone, holden on the 23d day of November, 1885, a criminal action was then and there pending in said court, wherein the territory of Montana was plaintiff and Maurice Sullivan defendant; that said action had been removed to said county of Yellowstone for trial on a change of venue from the county of Custer; (4) that one Joseph Sheldon was a material witness for the defendant in the trial of said cause; that a subpoena was duly issued and served upon said Joseph

Sheldon, requiring him to attend said court as a witness; that he obeyed said subpoena, and did attend said court to testify in said action at the instance of said defendant therein at the time and place named in said subpoena; (5) that the defendant, Maurice Sullivan, was tried and acquitted of the offense charged in said indictment on the 25th day of November, 1885; (6) that on the 27th day of November, A. D. 1885, said witness, Joseph Sheldon, made the necessary affidavit, as required by law, of his said attendance and mileage, which amounted to the sum of \$117.80; that said account was thereafter approved by the district attorney of said judicial district, but was not certified by the acting judge of said district, nor by any other judge since that date; (7) that on or about the 29th day of November, 1885, said Joseph Sheldon assigned and transferred said claim for attendance and mileage to plaintiff, for a valuable consideration, and that plaintiff now owns the same; (8) that on the 9th day of December, 1885, the plaintiff presented his said claim to the board of commissioners of Custer county, at a regular meeting of said board, duly verified for allowance, but they failed and refused to allow the same, or any part thereof." This complaint is fatally defective in several particulars.

1. Section 410, p. 479, Comp. St., provides: "In case the defendant shall be acquitted, or in case he shall be convicted, the executions shall issue against him for the costs, and shall be returned unsatisfied, in whole or in part, the costs remaining unpaid shall be paid by the county in which the offense was committed, and in case the conviction or acquittal shall be in a county other than that in which the offense was committed, it shall be the duty of the judge before whom the trial was had, and the district attorney prosecuting such defendant, to certify under their hand, authenticated by the seal of the court, the amount of such costs; and it shall be the duty of the board of county commissioners of the county in which such offense was committed to audit and allow the amount of such costs, and issue an order therefor upon the county treasurer of such county." It will be seen that the complaint simply alleges in substance that the witness, Joseph Sheldon, was a material witness for the defendant in the trial of said cause, and that a subpoena was duly issued and served upon him to attend court as a witness, and that he obeyed said subpoena, and did attend said court, and testified in said action, at the instance of said defendant, at the time and place named in the subpoena; that the defendant in that action was Sullivan, and that he was acquitted of the offense charged in the indictment; that said witness Sheldon made the necessary affidavit, as required by law, of his attendance and mileage, which amounted to the sum sued for; that the account was approved by the district attorney, but was not certified to by the acting judge of the district, nor by any other judge since that date; and that said witness Sheldon assigned and transferred the claim for his attendance and mileage for a valuable consideration, and that the plaintiff now owns it. It appears from the complaint that the offense was committed in Custer county, but by change of venue was tried in Yellowstone county. In cases of this kind the statute provides that it shall be the duty of the judge before whom the trial was had, and the district attorney prosecuting such defendant, to certify under their hand, authenticated by the seal of the court, the amount of such costs. The complaint alleges that the claim was certified by the district attorney, but not by the acting judge of said district. In this, then, it fails to aver that the claim was authenticated as required by the statute. In such cases the claim must be authenticated according to the requirements of the statute, or a good and sufficient reason given why it was not done. It is insisted on the part of the appellant that the presiding judge upon said trial was removed or suspended by the president from the discharge of his functions as such judge, and that this is the reason why he did not certify the claim. If this is true, it would be a good reason why such certificate was not given, and should have been averred in the complaint. We hold that all such claims must be authenti-

cated as prescribed by the statute, or some good reason given why it was not done, before the board of county commissioners of the county where the offense was committed can allow such claim. The statute already quoted provides that executions shall first issue against the defendant for the costs, and shall be returned unsatisfied, in whole or in part, before the county is bound to pay such costs. They are first a debt against the defendant, and the county is only liable upon condition that they cannot be collected from the defendant on the running of an execution, and the return of the same unsatisfied, in whole or in part, as the evidence upon which the liability of the county attaches, and the complaint should have set out this fact.

2. Section 153 of the criminal practice act provides that, "no indictment for any trespass against the person or property of another, not amounting to a felony, or for the first offense of petit larceny, shall be preferred unless the name of the prosecutor is indorsed thereon, except when the same is preferred upon the information or knowledge of two or more grand jurors, or on the information of some public officer in the necessary discharge of his duty, in which case a statement of the fact shall be made at the end of the indictment, and signed by the foreman of the grand jury." Section 413 of the criminal practice act provides that, "if upon the trial of an indictment whereon the name of the prosecutor is indorsed as such, according to law, the jury shall acquit the defendant, they shall determine and return, together with their verdict, whether the prosecutor or the county shall pay the costs, and the court shall render judgment accordingly." The complaint does not show for what offense Sullivan was indicted, whether it was a felony or misdemeanor. If it was a misdemeanor of the description given in section 153, *supra*, not preferred upon the information or knowledge of two or more of the grand jurors, or on the information of some public officer in the necessary discharge of his duty, but by a prosecutor, then it would have been the duty, upon the trial of such indictment, for the jury to have returned with their verdict of acquittal whether the prosecutor or the county shall pay the costs, and the court should have rendered accordingly. It is silent upon this whole subject, and as to what the judgment of the court was. In this event the prosecutor might have become primarily liable for the costs. Hence it will appear upon the foregoing statutes that before the county was bound to pay the fees of this witness the property of the defendant himself must first be exhausted, and in the event it was a misdemeanor brought upon the prosecution of some one, it was proper for the jury to say whether the prosecutor should not pay the costs in preference to the county. The plaintiff seems to have treated the claim as one of primary liability against the county, presented it not authenticated according to law, and, upon the refusal of the commissioners to allow it, brought his action in the district court.

3. Section 423 of the criminal practice act provides that "witnesses in criminal cases shall make out a bill, under oath, of the fees to which they are entitled in each case, and file the same with the clerk of the district court." Under this section it was the duty of the witness to make out a bill of his fees, itemizing it, specifying what part was for mileage, and what part for attendance, the number of miles traveled and the number of days he was in attendance, so as to make out an itemized bill of costs. It does not appear from the complaint that this was done.

4. Section 762 of the General Laws provides that "no account shall be allowed by the board of county commissioners unless the same shall be made out in separate items, and the nature of each item stated, nor unless the same be verified by affidavit, showing that said account is just and wholly unpaid. \* \* \* But nothing in this section shall prevent such board from disallowing any account, in whole or in part, when so rendered." It will be seen from this provision that it is the duty of the board of county commissioners not to allow any account unless it is made out in separate items, and the nat-

ure of each item stated. All these essential prerequisites to the payment of a claim of this sort by the commissioners must be averred in the complaint, and proven, in order to warrant a judgment against the board of county commissioners for the same.

5. Section 764 of the General Laws provides that "whenever a claim of any person against a county shall be disallowed, in whole or in part, or when any tax-payer of the county shall feel aggrieved by any allowance made by the board as excessive, unjust to the county, or illegal, such person may appeal from the decision of such board to the district court of said county by causing a written notice of appeal to be served upon the clerk of such board within 30 days after the making of such decision or allowance, and executing a bond to such county, with surety to be approved by the clerk of such board, conditioned to prosecute such appeal to effect, and to pay all costs that shall be adjudged against the appellant." It will be seen from this statute that the plaintiff could have appealed directly to the district court from the county board in disallowing his claim; but we do not decide that he may not bring his action at law, notwithstanding this statutory right of appeal.

For the foregoing reasons we hold that the complaint was fatally defective, and affirm the action of the court below in sustaining the demurrer, with the costs of this appeal.

GALBRAITH and MCLEARY, JJ., concur.

(7 Mont. 434)

FIRST NATIONAL BANK OF HELENA v. MCANDREWS *et al.*

(Supreme Court of Montana. January 24, 1888.)

APPEAL—TO UNITED STATES SUPREME COURT—SUPERSEDEAS—TIME OF TAKING.

Under Rev. St. U. S. § 1007, providing that, where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error on the adverse party, or by filing a copy with the clerk within 60 days after the rendition of judgment, and section 1012 providing that appeals shall be subject to the same rules as writs of error, where no appeal has been taken within 60 days from rendition of judgment, no *supersedeas* can be obtained.

Appeal from district court, Deer Lodge county.

Hearing on a motion to vacate an order fixing the amount of a *supersedeas* bond in the case of the First National Bank, plaintiff, and appellant, against James S. McAndrews *et al.*, defendants and respondents.

Toole & Wallace and Sanders & Cullen, for appellant. T. L. Napton and Robinson & Stapleton, for respondents.

McCONNELL, C. J. This case was heard at the July term of this court, 1887, and a judgment pronounced in favor of the appellant for \$3,000, with interest from the 31st of May, 1879, at 10 per cent. per annum, making the total amount of the judgment, exclusive of costs, more than \$5,000. See 14 Pac. Rep. 763. On a former day of this term the respondents moved the court to fix the amount of a *supersedeas* bond, with a view of taking this case to the supreme court of the United States, and obtain a writ of *supersedeas* to stay the collection of said judgment until the case could be reviewed in said court. Said bond was fixed at the sum of \$7,500. At a subsequent day of this term the appellant moved the court to vacate said order fixing the amount of said *supersedeas* bond, and this motion is the only matter before us for determination.

We find under section 1008, Rev. St. U. S., "that no judgment, decree, or order of a circuit or district court in any civil action, at law or in equity, shall be reviewed in the supreme court on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order." Hence an appeal will lie from a judg-



ment of this court at any time within two years from its rendition. We find under section 2 of an act of congress approved April 7, 1874, "that the appellate jurisdiction of the supreme court of the United States over the judgments and decrees of territorial courts, in cases of trial by jury, shall be exercised by writ of error, and, in all other cases, by appeal, according to such rules and regulations as to forms and modes of proceeding as the said supreme court has prescribed, or may hereafter prescribe." This statute has been construed in the case of *Story v. Black*, 119 U. S. 235, 7 Sup. Ct. Rep. 176. Chief Justice WAITE delivered the following opinion, to-wit: "This is a writ of error to the supreme court of the territory of Montana, to bring up for review the judgment in a suit where there was not a trial by jury. Under the act of April 7, 1874, c. 80, § 2, (18 St. 27,) the case should have been brought up by appeal, and the writ of error is therefore dismissed. *Hecht v. Boughton*, 105 U. S. 235; *U. S. v. Railroad Co.*, Id. 268; *Woolf v. Hamilton*, 108 U. S. 15, 1 Sup. Ct. Rep. 139. The question is no longer open in this court. The statutory rule is jurisdictional." Section 1909 provides that "writs of error and appeals from the final decisions of the supreme court of either of the territories of New Mexico, Colorado, Utah, Dakota, Arizona, Idaho, Montana, and Wyoming shall be allowed to the supreme court of the United States in the same manner, and under the same regulations, as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds five thousand dollars, exclusive of costs." By an examination of the record in this case we find that the case was tried below by the court without a jury, a jury having been expressly waived. Hence the only mode by which this judgment can be taken to the supreme court of the United States is by appeal; and the question for our determination is whether a *supersedeas* can be obtained to stay proceedings upon the judgment pending such appeal.

"At common law a writ of error was a *supersedeas* by implication." Bac. Abr. tit. "Supersedeas," D 4. But by the judiciary act of 1789, vol. 1, p. 85, § 23, it is provided "that a writ of error shall be a *supersedeas*, and stay execution, in cases only where the writ of error is served, or a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after the rendering of the judgment complained of." This statute changed the common law, so that, in order that a writ of error shall operate as a *supersedeas*, the copy of the writ must be lodged for the adverse party in the clerk's office where the record remains, within 10 days, Sundays exclusive, after the rendering of the judgment, or passing the decree, complained of; and, if this was not done within 10 days, it would not operate as a *supersedeas*. This statute was construed in the cases of *Hogan v. Ross*, 11 How. 297; *Railroad Co. v. Harris*, 7 Wall. 575. This statute is silent as to any security for *supersedeas*, for the reason that it had to be given before the writ of error issued; and, inasmuch as the writ of error had to be served within 10 days in order that it should operate as a *supersedeas*, in all such cases where the *supersedeas* was desired the security was given before the writ issued. In 1794 it was enacted that the security be required and taken on the signing of a citation on any writ of error which shall not be a *supersedeas*, and a stay of execution shall be only for such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error. In 1803 appeals were granted in cases of equity, admiralty, and maritime jurisdiction, and made subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error, (2 St. 244, § 2;) and hence an appeal, to operate as *supersedeas*, must be perfected, and the security given, within 10 days after the rendition of the decree under the act of 1789, in like manner as it was required to be done by that act in cases of writs of error; and the

allowance of the appeal was the equivalent of the writ of error. *Adams v. Law*, 16 How. 148; *Hudgins v. Kemp*, 18 How. 535; *French v. Shoemaker*, 12 Wall. 100; *Bigler v. Waller*, Id. 149. The law in regard to *supersedeas* upon writ of error or appeal remained in this condition until it was enacted, in 1872, (17 St. 198, § 11,) "that any party or person desiring to have any judgment, decree, or order of any district or circuit court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give security required by law therefor, within 60 days after the rendition of such judgment, decree, or order, or afterwards with the permission of the judge or justice of the appellate court." This statute was construed in the case of *Telegraph Co. v. Eyster*, 19 Wall. 419. In this case it was held that where the security was given after 10 days, but within 60 days, *supersedeas* followed as a matter of right, but that the bond may be executed within 60 days after the rendition of the judgment, and later with the permission of any one of the judges designated in said act. Hence it would appear that, under this act, a *supersedeas* could be obtained by permission of the justice or judge of the supreme court of the United States at any time within two years allowed for appealing to the supreme court, or taking the case there by writ of error. But under Rev. St. § 1007, we find that, in "any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, or lodging a copy thereof for the adverse party in the clerk's office where the record remains, within 60 days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law; but, if he desires to stay process on the judgment he may, having served his writ of error as aforesaid, give the security required by law within 60 days after the rendition of such judgment, or afterwards with the permission of the judge or justice of the appellate court; and in such cases, where a writ of error may be a *supersedeas*, execution shall not issue till the expiration of said term of 60 days." But at the next session of congress after the adoption of the Revised Statutes, it was enacted that the time for withholding execution should be limited to 10 days. 18 St. 318. By section 1012, Rev. St., it is provided, "that appeals from the circuit, and district courts acting as circuit, courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error." This was an amendment of the law touching appeals passed in 1803, as noticed *supra*. It will be seen, then, that the limitation of time within which a *supersedeas* can be obtained in a law case when taken to the supreme court of the United States by writ of error, applied in equity and non-jury cases when taken to the supreme court by appeal. In the case of *Kitchen v. Randolph*, 93 U. S. 92, the court says: "We are therefore of the opinion that, under the law as it now stands, the service of a writ of error, or the perfection of an appeal, within 60 days, Sundays exclusive, after the rendering of the judgment, or the passing of the decree, complained of, is an indispensable prerequisite to a *supersedeas*, and that it is not within the power of a justice or a judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done." The appeal in the case at bar has not yet been taken, and, as more than 60 days have elapsed since the rendering of the judgment complained of, no *supersedeas* can be obtained. Hence it was error to make the order fixing the amount of such bond. Said order is therefore vacated and annulled.

MCLEARY and BACH, JJ., concur.

(7 Mont. 384)

## TERRITORY v. HARRIS.

*(Supreme Court of Montana. January 18, 1888.,*

## APPEAL—REQUISITES—NOTICE—SECOND APPEAL.

Where an appeal has been dismissed for want of service of notice of the appeal upon the clerk, as required by law, without prejudice to a new appeal, and the appellant given leave to use the same transcript on the second appeal, the mere adding to the old notice the admission of the clerk's acceptance of service does not constitute a new appeal.

Appeal from district court, Lewis and Clarke counties.  
Motion to dismiss appeal of Ben. E. Harris.

GALBRAITH, J. This is a motion to strike the above appeal from the calendar for the reason that no appeal has been taken therein, and also for the reason that this court has no jurisdiction of the case. The following facts appear of record on this motion. On the 19th day of December, 1887, the motion for a new trial made by the appellant was overruled, and judgment pronounced against him. On the same day the appellant filed his notice of appeal. The transcript was filed in this court on the 28th day of December, 1887. On the 14th of January, 1888, this appeal was dismissed, for the reason that the notice of the appeal had not been served upon the clerk as required by law, but without prejudice to another appeal. This was upon the authority of the case of *Territory v. Hanna*, 5 Mont. 246, 5 Pac. Rep. 250, where the same proposition was decided. At the time of the dismissal of this appeal, the appellant obtained leave of the court to use the same transcript. On the 14th of January this transcript was filed in this court. The record shows that the notice of appeal is the same as that in the appeal which was dismissed, with the single addition of the name of the clerk of the district court signed to the acceptance of the service of the notice of appeal. This is the only notice of appeal which appears in the record. This does not make it another appeal. It is the same appeal as that which was dismissed on the 14th of January, 1888. This is a case similar to *Rogers v. Law*, 21 How. 526, in which it was held that "after an appeal had been docketed and dismissed, under the 63d rule of court, at a prior term of the court, the same case cannot be docketed without a new appeal." This appeal has already been dismissed, and this transcript is stricken from the records of the court.

McLEARY and BACH, JJ., concur.

(7 Mont. 429)

## TERRITORY v. HARRIS.

*(Supreme Court of Montana. January 24, 1888.)*

## 1. APPEAL—DISMISSAL—JURISDICTIONAL DEFECTS.

Under Rev. St. Mont. § 406, (providing that "an appeal shall not be dismissed for any informality or defect in the taking thereof. If the same be corrected within a reasonable time after the appeal has been dismissed, another appeal may be taken,") the court may make an order dismissing an appeal, when there is a defect of jurisdiction to hear the appeal; but the appellant must be allowed to take another appeal within a reasonable time.

## 2. SAME—SECOND APPEAL—FAILURE TO SERVE NOTICE.

An appeal was dismissed January 14, 1888, for want of service of notice of appeal upon the clerk, and a new appeal was taken, and transcript filed containing an admission of service of notice by the clerk, dated January 18, 1888, and a notice of appeal, and an admission of its service by the county attorney, dated December 19, 1887. *Held*, that the court would take judicial notice of the fact that the service on the attorney was prior to the dismissal of former appeal, and that the appeal would be dismissed for want of service of the new appeal on the attorney.

Appeal from district court, Lewis and Clarke counties.  
Motion to dismiss appeal of Ben. E. Harris.

BACH, J. The history of this case has already been written by Mr. Justice GALBRAITH in an opinion delivered by him on a motion to strike a transcript from the files of this court. To that opinion reference is to be had for a full statement of the facts. An appeal was sought to be taken in this case on the 19th day of December, 1887. Notice of appeal was served upon the county attorney upon that day. At the present term of this court a motion to dismiss that appeal was granted, for the reason that no notice of appeal had been served upon the clerk of the court below. The order dismissing provided that the appeal was dismissed without prejudice, and was dated January 14, 1888. On January 20th the present transcript was filed. It contains a notice of appeal, and an admission of service, signed by the clerk of the court below, dated January 18, 1888; also a notice of appeal, and an admission of service, signed by the county attorney, dated December 19, 1887. The motion to dismiss is based upon the ground that it does not appear that any notice of appeal has been served upon the county attorney since the dismissal of the appeal heretofore made on the 14th day of January, 1888; and the court has therefore not acquired jurisdiction of the cause. The appellant claims that this is not a second appeal; that it is merely a correction of the first appeal; that this court had no jurisdiction to dismiss the appeal, because no appeal had ever been taken, although an attempt had been made so to do; and that the order of dismissal heretofore made was improperly worded.

The decisions of the supreme court of California are decidedly conflicting upon this point. In many cases contained in the reports of that court, prior to volume 48, appeals had been dismissed where the jurisdictional requirements of the statute had not been complied with. In *Dinan v. Stewart*, 48 Cal. 567, notice of appeal had not been served upon respondent's attorney until after the time allowed by law. A motion to dismiss the appeal was denied, "because no appeal had been taken." In *Harlan v. Pratt*, 50 Cal. 94, a motion to dismiss the appeal, made upon the same ground, was denied, for the same reason as in *Dinan v. Stewart*, *supra*. But in *Whittle v. Renner*, 55 Cal. 395, an order was granted dismissing the appeal, because notice was not served upon respondent's attorney. A similar order was made in *Prescott v. Salthouse*, 53 Cal. 221. In *Boyd v. Burrell*, 60 Cal. 280, the appeal was dismissed because the undertaking was not filed in time; and in *Reed v. Allison*, 61 Cal. 462, the opinion of Mr. Justice MCKEE concludes as follows: "This court does not acquire jurisdiction of an appeal unless the record shows that the notice of appeal was served according to law." The motion to dismiss was granted, and the appeal was dismissed. However, in *Biagi v. Howes*, 6 Pac. Rep. 100, the court reverted to the doctrine asserted in *Dinan v. Stewart* and *Harlan v. Pratt*, *supra*, and denied a motion to dismiss the appeal, which motion was based upon a failure to file an undertaking; and the court say: "We cannot consider the notice of appeal from the judgment as of any avail, and, inasmuch as no appeal from the judgment is pending, the motion to dismiss is denied. The practice with respect to such attempted appeals has not been uniform. Sometimes they have been dismissed. But, as such dismissals should be without prejudice, the form of the order is not very material. We consider it better practice, however, simply to refuse to hear the party who claims to have appealed, without having appealed in fact." On the other hand, in *Stratton v. Graham*, 68 Cal. 168, 8 Pac. Rep. 710, the appellant, after filing and serving a notice of appeal, deposited with the clerk a sum of money in lieu of an undertaking on appeal; but the deposit was not made until after the time allowed by law. Upon these facts a motion was made to dismiss the appeal. FOOTE, C., wrote the opinion of the commission on appeals, and following the authority of *Biagi v. Howes*, just cited, held that the appellant "should be refused a hearing by this court;" but the order which was granted by the court in that case was as follows, to-wit: "For reasons given in the foregoing opinion the appeal is dismissed." The last reported case upon this

point decided by the supreme court of California is that of *People v. Bell*, 70 Cal. 33, 11 Pac. Rep. 327. The transcript in that case did not show service of the notice of appeal on any one. In the opinion of the court we find the following language: "This [referring to the above fact] being the case, the appeal cannot be considered." But the report of the case shows that the order entered by the court was, "Appeal dismissed." We have great respect for the opinions and decisions of the supreme court of California, and, owing to the similarity existing between our Code and that of California, this court has always considered the decisions of that court upon practice in civil, as well as criminal, cases as controlling; but we cannot undertake to be guided by those decisions, even upon a point of practice, when they do not agree with one another. Now, turning to our own reports, we find that this court in former cases has considered and granted motions to dismiss similar to the one granted herein on the 14th of January, 1888. *Courtright v. Berkins*, 2 Mont. 404, the appeal was dismissed for want of jurisdiction, the appellant not having followed the statute then in force defining how appeals should be taken. The appeal was dismissed for a jurisdictional defect in *Territory v. Hanna*, 5 Mont. 246, 5 Pac. Rep. 250.

Even if this was a new question in this court, we would be of the opinion that we can dismiss a case for want of jurisdiction to hear the appeal. It is difficult to see how the supreme court can make one order, and not another, where there is a jurisdictional defect in the record. If there is any force in appellant's position, a court could not pass upon a demurrer setting out the statutory ground that the complaint upon its face shows that the court has no jurisdiction; if the appellant is right, the court could not sustain the demurrer, it having no jurisdiction whatever in the case.

Section 406 of criminal practice act (Rev. St.) provides: "An appeal shall not be dismissed for any informality or defect in the taking thereof. If the same be corrected within a reasonable time after the appeal has been dismissed, another appeal may be taken." The meaning is rather obscure, for it declares that an appeal shall not be dismissed, and then declares what may be done when an appeal has been dismissed. The first clause undoubtedly means that the defendant shall not be absolutely deprived of the right of appeal, but that he must be allowed to take another appeal, and may do so within a reasonable time.

We have no doubt that where an appeal has been properly taken, but the transcript fails to show it, the appellant may suggest a diminution of the record, and the cause may then be remitted for correction. That practice was upheld by this court in *Pardee v. Murray*, 4 Mont. 35, 1 Pac. Rep. 737, and in *Territory v. Young*, 5 Pac. Rep. 248, upon that point. But the appellant in this case did not ask to have the record corrected. The appeal was dismissed, and appellant was allowed to take another appeal. This he has the right to do, under section 406, above referred to. But, in attempting to take the second appeal, he has fallen into the same error for which his first appeal was dismissed. This court does take notice of its own orders. It takes notice that the first appeal was not dismissed until January 14, 1888, and that consequently the admission of the service of a notice of appeal, dated December 19, 1887, and signed by the county attorney as of that date, was not a service of a notice of appeal taken by permission of the court after January 14, 1888. Each appeal must stand and fall by itself. The reason of this is apparent when we consider that it is only by a second service upon him of the notice of appeal that the county can know that the defendant intends to avail himself of the right to a second appeal; which knowledge was necessary before the county attorney would be formally called upon to prepare for argument, and is now necessary before he must deem it incumbent upon him to inform the attorney general of the standing of the case in the lower court.

The appeal is dismissed. The defendant has the right to another appeal.

When an appeal shall have been properly taken in this case, and not before, we may be called upon to decide whether the appellant has corrected his appeal within the reasonable time as limited in section 407.

GALBRAITH and MCLEARY, JJ., concur.

[7 Mont. 443]

FANT v. TANDY *et al.*

(*Supreme Court of Montana*. January 25, 1888.)

1. APPEAL—STATEMENT—STENOGRAPHER'S NOTES.

Where there is nothing in the transcript on appeal to show where the statement on motion for a new trial begins, or what papers are included therein, a mere transcript of the stenographer's notes of the evidence cannot be regarded as a statement on motion for a new trial, or a statement on appeal; and evidence thus presented to the supreme court will not be considered.

2. SAME—RECORD—OPINION OF TRIAL COURT.

The opinion of the trial court, purporting to be ordered by said court to be taken as findings of facts and conclusions of law thereon, will not be considered by the supreme court, on appeal, to be a part of the record, where there is nothing to indicate such order except a note to that effect posted on a page of the transcript over another memorandum.

Appeal from district court, Lewis and Clarke county.

*Turner & Shelton*, for respondent. *Wade, Toole & Wallace*, for appellants.

MCLEARY, J. This controversy arose in the United States land-office at Helena by the application of Tandy and others for a patent to the land in dispute as a *placer* mining claim. This application was adverse to Fant, and, under the United States statute, this suit was brought to determine the question whether or not the mineral patent should issue. The case was tried before the court without a jury, and, on findings of fact and conclusions of law made by the court, judgment was rendered in favor of the plaintiff, from which this appeal was taken. The court, in rendering judgment, also delivered an oral opinion, which was taken down by the stenographer, written out and filed among the papers of this case, and is made a part of the record herein, in accordance with the statute. There was a motion for a new trial made and overruled, from which order only this appeal is taken. There is nothing in the transcript to show where the statement begins, or what papers are included therein. One hundred and sixteen pages of the transcript are covered with questions and answers to and by the witnesses who were supposed to have testified in the case. It may be possible that this is a transcript of the stenographer's notes taken in the case, but there is nothing in the record to show this. It has been repeatedly decided by this court that the mere transcript of the stenographer's notes, giving the questions and answers propounded to and made by the witnesses, cannot be regarded as a statement on motion for new trial, or a statement on appeal; and evidence presented to this court in such a manner will be disregarded. It is not the business of this court to wade through over 100 pages of questions and answers, composed largely of irrelevant matter, to ascertain what are the material points presented in the evidence. In making up a statement, it is the duty of counsel to condense the testimony of witnesses into narrative form, omitting all irrelevant matter, and presenting only so much of the evidence as bears upon the points in controversy on appeal. Then, after notice and amendments by the opposite party, the same should be approved and allowed by the court, and signed as such, and appear in the transcript as a statement, either on motion for a new trial or on appeal. Unless this is done, the appellate court must be confined in the consideration of the case, where the appeal is taken from the judgment, to the judgment roll alone. Section 438, div. 1, Comp. St. Mont. 178. For these reasons the evidence introduced in this case cannot be considered by this

court in the manner in which it is presented. *Raymond v. Thaxton*, ante, 358; *Griswold v. Boley*, 1 Mont. 545.

This transcript is made out in a very slovenly manner, and entirely disregards rule 6, and should not have been filed by the clerk, as he is forbidden to file such a transcript by the ninth rule of this court. Some stress is laid by the appellant on the fact that the opinion of the court delivered in the case was, by order of the court, to be taken as findings of fact and conclusions of law therein. A note to that effect is inserted in the transcript, on page 123, by being pasted over some other note or memorandum, which is thereby rendered illegible. Such a mutilation of the transcript, whether it was done under the authority of the district clerk or not, should not be tolerated. We cannot regard this order, presented in this manner, as properly a part of the transcript in this case. Rules Sup. Ct., *in extenso*; Comp. St. Mont. 523, p. 198. But it is not the intention of the statute that the written opinion of the district court, placed on file in the case, shall be taken in lieu of findings of fact and conclusions of law. It is merely made a part of the record to aid this court in the determination of the issues involved. Comp. St. Mont. div. 1, § 438.

A very interesting question was considered in the court below, which is not before this court for consideration; and that is, at what time must it be determined whether or not the lands embraced within the Northern Pacific Railroad grant are mineral or agricultural in their character; or, in other words, is this question open until the patent issues to the railroad company or not? The district court held that the matter could be inquired into by an adverse claimant at any time prior to the issuance of the patent to the railroad company; but, as the decision of this question was in favor of the appellant, it has not been brought here for review. No appeal from the judgment having been taken, and the evidence not being properly incorporated into the statement on motion for new trial, there is nothing left for this court to consider.

In order to enable this court to consider cases tried in the district courts, and to reverse the judgment in case error is found therein, it is absolutely necessary that the record should be presented in accordance with the statutes and the rules of court. There being no error in the record as properly presented here, the judgment of the court below must be affirmed.

GALBRAITH and BACH, JJ., concur.

(7 Mont. 479)

SHERMAN v. HIGGINS.

(*Supreme Court of Montana. January 28, 1883.*)

1. **APPEAL—RECORD—STATEMENT—REFUSAL OF TRIAL JUDGE TO SIGN STENOGRAPHER'S NOTES.**

When a party fails to comply with an order of the trial court, requiring the stenographer's minutes filed in the action to be reduced to the form of a statement, on a motion for a new trial, it is proper for the trial court, overruling the motion, to refuse to sign the same as a statement.

2. **SAME—REVIEW—ERRORS NOT APPARENT ON RECORD.**

On an appeal from a judgment, there being no bill of exceptions nor statement on appeal, the question of error in refusing an application for continuance is not properly before the appellate court, although the affidavit for continuance appears in the transcript.

3. **SAME.**

Comp. St. Mont. §§ 296, 297, p. 135, requires an application for a new trial to be made either on affidavits, minutes of the court, bill of exceptions, or upon a statement of the case. *Held*, that on an appeal from an order overruling the motion for new trial, where there is neither a statement of the case, bill of exceptions, nor minutes of the court, but the transcript contains an application for a continuance based on affidavits, which were not certified to as having been used on the motion for new trial as required by statute, the application for continuance will not be reviewed.

v.17p.no.6—36

Appeal from district court, Meagher county.

*Toole & Wallace and I. D. McCutcheon*, for appellant. *Carter, Clayberg & Maddox*, for respondent.

MCLARY, J. This is an appeal from a judgment of the district court of Meagher county, rendered on the 25th day of March, 1887, against the defendant, for \$1,000 and costs of suit. The amended complaint was filed on the 8th day of April, 1886, and was duly followed by answer and replication. On the 25th of March, 1887, the defendant made an application, through his attorney, William Wallace, Jr., for a continuance of the cause, which was overruled by the court and the cause submitted to a jury, who returned a verdict in favor of the plaintiff, and judgment followed accordingly. On the 6th day of June, 1887, defendant filed his motion for a new trial, and to set aside and vacate the judgment, which was, on the 15th day of October following, overruled. And from this order overruling the motion for a new trial, and from the judgment itself, this appeal is taken.

It is noted in the order overruling the motion for a new trial that, "in consideration of an order heretofore made by this court requiring the defendant to reduce the stenographer's minutes filed in said action to the form of a statement, upon motion for a new trial, not having been complied with, the said judge declined and refused to sign the same as a statement." This action of the district judge in refusing to settle a statement wherein the evidence is composed entirely of the stenographer's notes, without being reduced to proper form, and having irrelevant matter eliminated, was entirely correct. It is the proper practice, and we hope to see it universally adopted hereafter by the judges of the trial courts. As is said in the case of *Fant v. Tandy*, ante, 560, (decided at this term,) it is not to be expected of this court to take the trouble of extracting from the stenographer's notes the material evidence bearing upon the points presented here. Counsel seem to misunderstand the object of filing the long-hand copy of the stenographer's notes. This is done to enable counsel to prepare their statements in accordance with the facts presented on the trial, and to preserve an authentic record to which the judge may refer in settling statements as prepared by counsel. But the transcript of the stenographer's notes is not intended to take the place of the statement to be prepared by counsel, or to relieve them of the labor of preparing the statement itself. It is unnecessary to enlarge upon this matter, and we will content ourselves in referring to cases heretofore decided, in which we have announced the rule of practice which will hereafter be followed. *Fant v. Tandy*, 7 Mont. —, ante, 560; *Raymond v. Thexton*, 7 Mont. —, ante, 258. In so far as the appeal is taken from the judgment, we can only consider the judgment roll, which, in this case, should consist of the summons, pleadings, verdict of the jury, bills of exception, statement, and a copy of the judgment. Comp. St. Mont. div. 1, § 306, p. 139. The question of whether or not the court erred in refusing to grant the continuance is not properly brought before us on the appeal from the judgment, because there is neither bill of exceptions nor statement on appeal incorporated in the transcript. The affidavit of counsel on his application for continuance, although inserted in the transcript, has no proper place there, because it is neither embodied in a bill of exceptions nor a statement; hence it cannot be noticed in considering an appeal from the judgment. *Blessing v. Sias*, 14 Pac. Rep. 664; *Kleinschmidt v. McAndrews*, 4 Mont. 8, 223, 5 Pac. Rep. 281, 2 Pac. Rep. 286; *Noteware v. Sterns*, 1 Mont. 314; Hayne, New Trials & App. § 261 *et seq.* This brings us to the question of whether or not the court erred in overruling the defendant's motion for a new trial. Our statute in regard to new trials provides that the application shall be made either upon affidavits, or upon the minutes of the court, or upon a bill of exceptions, or upon a statement of the case. Comp. St. Mont. §§ 296, 297, p. 135. An examination of the transcript will



show that no statement was ever settled or signed, and no bills of exception were ever prepared or allowed, and the minutes of the court do not appear. Then this motion must be considered, if at all, as being based upon the affidavits presented at the hearing of the motion. Upon examination of these affidavits it will be found that there is no certificate that they were used by the court below upon the hearing of the motion, as is required by the statute. They should have been included either in a bill of exceptions or a statement on motion for a new trial, or otherwise certified, so as to be identified properly not only as a part of the record but also to show that they were used by the court upon the hearing of the motion. Comp. St. Mont. div. 1, § 438; *Mining Co. v. Weinstein*, ante, 108; *Raymond v. Thexton*, 7 Mont. —, ante, 258; Hayne, New Trials & App. § 264, and cases there cited from the California courts. We consider this motion for a new trial as an application to vacate and set aside the judgment under section 116 of our statutes, for no attempt has been made to comply with that section. And, even if that section had been complied with, and the matter passed upon by the judge at chambers, still, it being a matter entirely within his discretion under the statute, and no abuse of that discretion having been shown, we could not disturb the judgment on that account. Comp. St. Mont. div. 1, § 116, p. 88; *Whiteside v. Logan*, 7 Mont. —, ante, 34. From the manner in which this appeal is presented to this court it would seem that there is a misapprehension among the members of the bar as to the practice upon this subject. This may probably arise from the change in the law of California. Our statute is similar to the old practice in California, under which there was a separate provision for a statement on appeal, and a statement on motion for a new trial, and one could not be used for the other. Under the present law of California the parties may consent to use the statement on motion for a new trial for a statement on appeal. But this does not change the rule in regard to what can be considered and reviewed by the court on an appeal from the judgment, and on an appeal from an order overruling a motion for a new trial, respectively. On an appeal from the judgment errors of law alone can be reviewed; but, on an appeal from an order overruling a motion for a new trial, the facts also may be inquired into. Our statute provides that certain orders are deemed excepted to, and, in order to have them reviewed by the supreme court, it is not absolutely necessary that a bill of exceptions should be prepared and signed, but they may appear in the statement on appeal, and must appear in either the one or the other when the appeal is from the judgment, including such orders. There being no bill of exceptions, and no statement, either on motion for new trial or on appeal, in this case, the order overruling the application for a continuance has not been properly brought before this court, it having no independent place in the judgment roll.

All presumptions being in favor of the correctness of the judgment of the court below, and no error having been properly presented in the transcript, the judgment of the district court is accordingly affirmed.

McCONNELL, C. J., and GALBRAITH, J., concur.

(7 Mont. 436)

SHERMAN v. HIGGINS.

(*Supreme Court of Montana*. January 23, 1886.)

Following *Sherman v. Higgins*, ante, 561.

McLEARY, J. This is a case arising between the same parties and in the same court as the preceding one, and is entirely similar except that there was a default taken, and judgment rendered thereupon in favor of the plaintiff, which makes a stronger case for the respondent in this court. For the reasons set forth in the foregoing opinion there is no error properly presented in the transcript for review by this court. The judgment is affirmed.

McCONNELL, C. J., and GALBRAITH, J., concur.

(7 Mont. 486)

## CITY OF HELENA v. GRAY.

(Supreme Court of Montana. January 28, 1888.)

## MUNICIPAL CORPORATIONS—ORDINANCES—REGULATION OF HACK STANDS—MISDEMEANORS.

An ordinance providing that cabs shall stand on certain parts of certain streets, and that any violation of this ordinance is a misdemeanor, does not make a person standing a cab elsewhere than as provided guilty of a misdemeanor.

Appeal from district court, Lewis and Clarke county.

*Chumaseiro & McCutcheon*, for appellant. *Alex. C. Botkin*, for appellee.

BACH, J. The defendant appeals from a judgment of the court below adjudging him guilty of a misdemeanor for the violation of an ordinance of the city of Helena, which reads as follows: "The cabs shall stand on Broadway, between Jackson and Warren street, except in front of the post-office; on the east side of Jackson street, between Broadway and Breckenridge street; and on the south side of Sixth avenue, between Jackson and Clore street; and on Bridge street, from Clore to Main street; and on the north side of Bridge street, from Main street to opposite Water street. Sec. 2. Any person violating this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine not exceeding twenty-five dollars." It is admitted that the defendant did keep a cab standing on Main street, in the city of Helena, for the space of two hours.

The only question which we will consider is whether the ordinance makes the act of the defendant a misdemeanor. A crime or misdemeanor is an act committed or omitted in violation of a public law forbidding or commanding it. Such is the definition given by Blackstone in Book 4 of his Commentaries, and it has been universally accepted by the courts and text writers. There is nothing in the ordinance directly forbidding the admitted act of the defendant; and if the ordinance is, by implication, to be considered as forbidding this particular act, it must be considered as forbidding any act which violates the terms of the ordinance; hence all such acts would, by implication, become a misdemeanor. The ordinance thus considered would be so unreasonable that courts of law would not uphold it. See *Field, Corp.* § 296, and cases cited; *Bish. Writ. Law*, § 22. Considered as a command, the ordinance is equally uncertain and indefinite. The city undoubtedly has the right to regulate the use of public streets by ordinances reasonable in their nature. But the ordinance must be specific and definite, using such words as will state, without resort to implication, what constitutes a violation thereof. The judgment is reversed.

GALBRAITH and MCLEARY, JJ., concur.

(2 Ariz. 592)

O'TOOLE *et al.* v. MELANDER *et al.*

(Supreme Court of Arizona. April 2, 1888.)

## APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an equitable action where the evidence is contradictory, the verdict obtained in the court below will not be disturbed on appeal.

Daniel O'Toole *et al.*, plaintiffs, brought action to quiet title against Daniel Melander *et al.*, defendants. Verdict for defendants. Plaintiffs appeal. *Ben Goodrich*, for appellants. *Neering & Neering*, for appellees.

PER CURIAM. The only question arising in this cause is whether or not the assessment work of \$100, required by the act of congress, was done in the year 1885. The action was to quiet title. A jury was had, which jury rendered a verdict for the appellees. The testimony was contradictory, and it is

too well settled to require citations of authorities, that the supreme court will not disturb the verdict of the jury when such a contradiction exists. This being an action in equity, and the verdict being only advisory, the trial judge would feel less hesitancy to disregard the verdict than in an action at law. The judge, as well as the jury, was brought face to face with the witnesses, and could judge of their credibility. The injunction is dissolved, and the judgment affirmed.

WRIGHT, C. J., and PORTER and BARNES, JJ., concur.

(4 N. M. [1914.] §96)

MILLER v. PRESTON.

(Supreme Court of New Mexico. January Term, 1888.)

1. SUBSCRIPTION—ACTIONS TO RECOVER—PLEADING AND PROOF.

In an action to recover on a subscription paper, the declaration set out, literally, the paper, so far as it constituted the contract of defendant. *Held*, that the objection to the reading of the subscription list in evidence was properly overruled.

2. SAME—CONDITIONS—PAROL EVIDENCE TO VARY WRITING.

Defendant signed a subscription paper, subscribing a sum in aid of a railroad, writing above his name, "on the completion of the road," as the conditioned time of payment. *Held*, that parol evidence offered for the purpose of adding the words, "by September 1, 1886," was not admissible.

3. SAME—CONDITIONS ATTACHED TO OTHER SUBSCRIPTIONS.

Defendant subscribed a sum towards the completion of a railroad, writing the condition above his name, "on completion of the road." Other parties signed the same subscription list, subscribing various amounts, and adding, as to defendant, certain conditions as to their payment. *Held*, that the conditions annexed to the names of the other subscribers in no way affected defendant's liability.

4. SAME—CONSIDERATION.

In an action to compel the payment of a subscription, the plaintiff proved that he had expended money on the faith of the subscribed subscriptions. Defendant did not contradict this, but simply proved that he was not to receive anything in consideration of the subscription, and asked the court to instruct for want of consideration. *Held*, that there was not sufficient evidence of want of consideration to warrant the court to so charge.

5. INSTRUCTIONS—FAILURE TO NUMBER—HARMLESS ERROR.

The failure of the court to number its instructions in consecutive paragraphs, as required by Comp. Laws N. M. § 2059, will not justify a reversal of the judgment, it appearing that no rights of the parties were affected thereby.

Error to district court, Santa Fe county.

BRINKER, J. This is an action of *assumpsit*, begun by George C. Preston, trustee, against Edward Miller, in the court below, upon an obligation in writing for the sum of \$200. The obligation sued on was a subscription paper, and is set out in the declaration in these words: "To aid the completion of the Texas, Santa Fe & Northern Railroad, we, the undersigned, hereby promise and agree to pay, on demand, to George C. Preston, trustee, the respective sums opposite our names. ED. MILLER, \$200, (two hundred dollars,) on completion of the road." The declaration then averred the completion of the road, and a demand upon the defendant, Miller, to pay, and a refusal; and also contained the common counts. The defendant filed three pleas. The first was the general issue; the second, that the defendant was induced to sign the paper by representations and promises of plaintiff, upon which defendant relied, that unless the road was completed to the city of Santa Fe on or before September 1, 1886, he was not to be called on to pay the amount of his subscription; that these representations and promises were indorsed in writing upon the paper before he signed it, and that the road was not completed to Santa Fe until long after that time; the third, that the contract was a gratuity, and that there never was any consideration for the signing of the same. To the first plea plaintiff filed a *similiter*, and to the second and third he filed replications putting in issue the matters in those pleas alleged. There

was a trial and judgment for plaintiff. A motion for a new trial was made and denied, and defendant brings the case here by writ of error.

To reverse the judgment the defendant assigns as error: (1) The action of the court in permitting the subscription list to be read in evidence; (2) in permitting testimony to go to the jury that it was understood generally that the completion of the road meant its building from Espanola to Santa Fe; (3) in not permitting the defendant to testify whether or not any representations had been made to him at the time of the signing of the subscription list that unless the road was completed to Santa Fe by the 1st day of September, 1886, he was not to be called upon to pay his subscription; (4) in not permitting defendant to testify whether or not the indorsement on the subscription list, "unless the road is completed by September 1, 1886," and other indorsements of like character, were written on the list before he signed it, and whether he signed it subject to the terms so written, and the representations then and there made to him by the person presenting the list; (5) in refusing to give to the jury the instructions asked by the defendant, and in not indorsing the refused instructions "Refused," as required by statute; (6) in giving to the jury that portion of the court's instruction as follows: "The conditions annexed to the names of other subscribers would not change the liability of the defendant;" (7) in failing to instruct the jury upon the issue raised by the plea of want of consideration; (8) in failing to give its instructions in consecutively numbered paragraphs; (9) in failing to file the instructions asked by the defendant, so that the same might become a part of the record; (10) in overruling the motion of defendant for a new trial.

A reference to the declaration will dispose of the first point made. The writing sued on was, so far as it constituted the contract of defendant, copied literally into the declaration, and even if the statute contemplated the filing of a writing of the kind here sued on, which may be doubted, (*Workman v. Campbell*, 46 Mo. 305,) the requirement was fully met in this case, (section 1921, Comp. Laws 1884,) and the objection to its admission in evidence was properly overruled.

As to the second point,—that the court erred in permitting testimony to go to the jury that it was generally understood that the completion of the road meant its being built from Espanola to Santa Fe,—it is only necessary to say that the record shows that this testimony was elicited from Mr. Knaebel, a witness for defendant, on cross-examination, and was admitted without objection. Section 2197, Comp. Laws.

The third and fourth assignments of error can be considered together, as they present really but one question, and are based upon the action of the court in sustaining objections to the following questions propounded to the defendant: "*Sixth*. State if, at the time you signed that paper, whether there were no conditions made between you and Dr. Longwill that it should not be paid unless the road was built by the 1st of September?"

The seventh question was but a restatement in substance of the sixth.

"*Eighth*. Mr. Miller, state whether, at the time of signing, this paper had this indorsement just above your name, 'on completion of the road by September 1, 1886.' Was that indorsement written on that paper before you signed it?"

The instrument sued on was a subscription list, the body or heading of which was as follows: "To aid the completion of the Texas, Santa Fe & Northern Railroad, we, the undersigned, hereby promise and agree to pay, on demand, to George C. Preston, trustee, the respective sums opposite our names." Then follow about thirty names with the amount of the subscription of each set opposite each name, and in addition thereto many of these are followed by various conditions, such as: "\$250, as soon as a satisfactory contract is made for the completion of the road;" "\$200, on completion of the road;" "\$100 on completion of road by Sept. 1, 1886;" "\$300, on completion

to Santa Fe by Sept. 1886." The names of the three persons which appear immediately above defendant's are followed by the words, "on completion of the road by Sept. 1, 1886." Then follows, "ED. MILLER, \$200 (two hundred dollars) on completion of the road." The paper about which it was sought to interrogate the witness we assume was the subscription list, as no other paper appears in the record. This paper constituted the several contracts of each of the subscribers. It is not pretended that it is in any sense joint, for it could not be maintained that any one of the subscribers could be held for the amount subscribed by any other than himself. If the various persons had contented themselves with simply putting down their names and the amounts they were willing to pay, then this would clearly have been the separate agreement of each to pay on demand. But many of them have seen proper to add conditions to the contract so far as it affects them, and the condition opposite any particular name limits and determines the liability of that particular subscriber. The condition following the name of defendant is, "on completion of the road." Now, the question numbered sixth sought to add to this, by parol, the words, "by Sept. 1, 1886," and this the court very properly refused to permit. 1 Greenl. Ev. § 277. The eighth question was intended to elicit from witness the fact whether the words, "the completion of the road by September 1, 1886," were on the paper before he signed it. It is not pretended that these words were put there by defendant, or by his direction; but it was the purpose of defendant to have the fact that these words were on the paper go to the jury, so that the jury might infer that they constituted a part of his agreement. If one of these conditions preceding the name of defendant formed a part of his contract, then all of them that were placed there before his signing also entered into it; and if this be so, what was his contract? and upon what condition did his liability to pay depend? Was he to pay when a satisfactory contract for the completion of the road was made? or when the road was completed? or when completed by September 1, 1886? or when completed to Santa Fe by September 1, 1886?

As has been said, this is clearly the separate undertaking of each signer, and if this be true, the fact that all the contracts are on one paper cannot change the nature of the agreements. Suppose they had been on separate papers, each with the same general heading, but with the several conditions, and let it be supposed that these papers were all exhibited to defendant at the time he signed, and thereupon he signed a paper containing a like heading, but added the condition to his name, in the words of this agreement, "on completion of the road," could he with any show of reason say that the conditions on those other papers entered into his contract? The statement of the proposition refutes it. If these several conditions preceding his name were not a part of his agreement, then the question whether they were on the paper or not before he signed was wholly immaterial. If it had been inquired of defendant what he meant by "completion of the road," or what he understood by those words, the inquiry would have been proper, because the words, standing alone, do not clearly express a definite meaning. This is justified by the rule that where the agreement is expressed in short and incomplete terms parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms. 1 Greenl. Ev. § 282. This rule, however, does not permit the addition of words that will vary or change in any manner the meaning of the writing. The inquiry here suggested would have brought out the conversation, if say, that took place at the time of the signing, and would have enabled the jury to determine whether defendant meant that his payment should have become due upon the completion of the road to Santa Fe, or to Cerrillos, or as contemplated in the road's charter; but it would not have permitted conversations as to the time of completion. Defendant's liability depended on completion, no matter when it should be accomplished.

It is contended that defendant had tendered an issue in his second plea, upon the question of the time of completion, and that plaintiff joined issue thereon, and therefore the evidence was competent. The issue was joined on defendant's contract, and not upon the contracts of other persons, and it was the duty of the court, upon inspection of the writing, to determine whether the words upon the paper and embraced in the interrogatory tended to establish an issue in favor of defendant, and rightly decided that they did not.

The defendant was asked in another question as to what representations had been made to him concerning the completion of the road, which he was not permitted to answer. This question may have been intended to elicit what was said at the time the paper was signed to induce him to sign it, but it does not so state, and we are not justified in divining what may have been intended; we must look at the question as it appears in the record to ascertain its purpose. As it thus appears it is too broad; it would justify the detailing of any conversations or representations as to the completion of the road, wherever and whenever made, and by any person whomsoever.

The fifth assignment relates to the refusal of the court to give instructions asked by the defendant, and failing to indorse them "Refused." It is sufficient to say, in disposing of this, that the record nowhere shows that defendant asked any instructions. As one of the grounds stated in his motion for a new trial, he complains of the refusal of instructions, but there is nothing in the record to sustain this ground. If no instructions were asked by defendant and refused, it would be difficult for the court to mark instructions, as defendant insists he should.

The sixth assignment is fully covered by what has been said concerning the conditions annexed to the names other than defendant's, and need not be repeated here.

The seventh is based upon the failure of the court to instruct upon defendant's plea of want of consideration. The plaintiff proved that he had expended money on the faith of these subscriptions. Defendant offered no evidence to contradict this; he simply proved that he was not in any manner to receive anything as consideration for the subscription. This was not sufficient evidence of want of consideration to warrant the court in charging the jury on that issue. In *Workman v. Campbell*, 46 Mo. 305, it is said: "Where notes or promises are made by way of voluntary subscription to raise a fund to promote an object, these notes or promises are open to the defense of a want of consideration, unless their payee or promisee has expended money or entered into engagements which, by legal necessity, must cause loss or injury if payment is not made to him." Citing *Pars. Bills & N.* 202. This is the universal rule. *Koch v. Lay*, 38 Mo. 147, and cases cited.

The eighth assignment is that the court failed to number its instructions in consecutive paragraphs. Section 2059, Comp. Laws, requires this to be done, but we are of the opinion that this section is merely directory. No rights of defendant were sacrificed or prejudiced by a failure to comply with this section, and if such failure is error, it is not such error as will justify a reversal of the judgment.

The ninth assignment is answered by our observations upon the fifth, *supra*.

The tenth is for overruling the motion for a new trial. We have seen that no error was committed on the trial, therefore this motion was properly denied.

The judgment is affirmed.

LONG, C. J., and HENDERSON, J., concur.

REEVES, J., having presided in the court below, did not sit.

(5 N. M. 34)

## TERRITORY v. FEWEL.

*(Supreme Court of New Mexico. February 23, 1888.)***HOMICIDE—TRIAL—INSTRUCTIONS.**

Where the evidence in a murder trial shows that the defendant intended to do the killing, the question for the jury is whether the killing was justifiable or not; and it is error to charge the jury that they might find the defendant guilty of a degree of murder in which the intent to kill is entirely wanting.

Appeal from district court, Rio Arriba county.

*Wm. Breeden*, Atty. Gen., *M. A. Breeden*, Asst. Atty. Gen., and *W. B. Sloan*, for the Territory. *N. B. Laughlin*, for defendant.

**BRINKER, J.** The defendant was charged in the indictment with the crime of murder in the first degree, and upon the trial was convicted of murder in the third degree, and sentenced to imprisonment in the penitentiary for 10 years. There was a motion for a new trial filed and overruled, and the case is brought here by appeal.

The evidence as preserved in the record discloses the following facts: About 10 or 12 days before the homicide, the deceased, Edward Norman Bachelidor, was sitting in a saloon in the town of Espanola, when the defendant came in and sat down. Some conversation was had, when the deceased said: "Somebody swore down in court that we were notified of a certain sale." Defendant said, "I guess I am the man that testified to that." Deceased replied: "The man who swore it, swore a damned lie." Then ensued a quarrel between deceased and defendant, which resulted in their going out into the street, and engaging in a fight, during the progress of which defendant threw deceased to the ground, and gave him a severe whipping. Deceased asked the defendant to let him up, which the defendant did. Thereupon deceased renewed the attack, and defendant fled. Deceased pursued him, and in the pursuit secured a piece of plank, with which he endeavored to strike defendant. Defendant escaped, however, unhurt. From that time on, bad blood existed between the combatants and both went armed. On the 18th day of August, 1886, about dark, deceased was in a saloon, engaged in playing a game of cards with several other persons, among whom was the proprietor of the saloon. Defendant came into the saloon, stepped up to the bar, and, calling the proprietor, told him he wanted to pay an account which he owed. The proprietor went behind the counter, and defendant handed him a five-dollar bill. The proprietor took the bill and laid the change in coin upon the counter. Defendant took the money from the counter, and at that moment deceased, who had arisen from the card-table, approached defendant, and said, "We will settle that thing now," or something to that effect, and at once struck the defendant on the head,—whether with his fist or open hand does not clearly appear, as the witnesses differ on this point. The force of the blow was such as to stagger defendant, and throw him towards the door, or he retreated to the door, and, some of the witnesses say, out of the room. Defendant, immediately after getting to the door, or, as some say, outside the door, fired in rapid succession two shots at deceased, both of which took effect, and one of them causing his death in a very short time. After the shooting defendant left, and went to the rear of a boarding-house in the vicinity, where he was found shortly afterwards by the keeper of the house, who told him to go to his room and stay there until the authorities should arrest him. This he did. There was evidence of threats made by deceased against defendant at the time of the first difficulty, and by defendant against deceased afterwards and before the shooting. When deceased was taken up from where he had fallen a large revolver was found upon his person.

Among other instructions given upon the trial was the following: "The court further instructs the jury that if they believe from the evidence that the

defendant is not guilty of murder in the first or second degree, but find that defendant killed Bachelder in a heat of passion from a provocation given at the time of the killing, which was not justifiable or excusable, and not from a premeditated design to effect death, they might then decide from the evidence whether the defendant was guilty of murder in the third degree; and if the jury should find that he was guilty of murder in the third degree, they will assess his punishment at imprisonment in the territorial penitentiary for a period not less than three years nor more than ten years. On this you will decide from the evidence." To the giving of this instruction defendant at the time excepted, and made it one of the grounds of his motion for new trial, and now insists that it constituted error sufficient to justify a reversal of the judgment. There are many exceptions in the record based upon alleged errors occurring during the trial; but as a determination of this one must result in sending the cause back for a new trial, I have deemed it unnecessary to discuss the others.

The statute defining murder in the third degree is as follows: "The killing of a human being without design to effect death, in heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute justifiable or excusable homicide, shall be deemed murder in the third degree." Section 699, Comp. Laws 1884. The punishment prescribed is imprisonment not less than three nor more than ten years. Section 703, *Id.* This statute is almost a *verbatim* copy of the Missouri statute defining manslaughter in the third degree, and was evidently taken from that state. The only difference in the two statutes is that in Missouri the words "cruel" and "unusual manner" are joined with a disjunctive "or," while in section 699, *supra*, they are connected with the conjunctive "and," and the offense is called in the former, "manslaughter in the second degree," and in the latter, "murder in the third degree." Rev. St. Mo. 1845, p. 345, § 11; Wag. St. Mo. 1872, p. 447, § 11. The essential elements of the offense are the same in both statutes, except that in Missouri, it seems, an unintentional killing in heat of passion would be manslaughter, if committed in either a cruel or unusual manner, while here it must be done in both a cruel and unusual manner. Is there anything in the evidence which would justify the giving of the instruction complained of? Bishop, in his work on Criminal Procedure, thus states the rule: "The charge should state the law in its application to the facts. \* \* \* If, for example, there are different degrees of an offense, the law of each degree which the evidence tends to prove should be given, but not of any degree which it does not tend to prove." Section 980.

In the case of *State v. Alexander*, 66 Mo. 148, the court, in discussing the action of the trial court, in giving an instruction based upon section 11 of the statute of the state, above cited, says: "In the sixteenth instruction the court declared that if defendant, without a design to effect death in a heat of passion, did kill Norrick in a cruel and unusual manner by shooting him with a shotgun, they should find him guilty of manslaughter in the second degree. Frank Crook, a witness for the state, testified that defendant shot twice with a double-barreled shotgun; that defendant raised his gun and shot, and that deceased was about two feet from Alexander, (defendant.) Eldridge Kyler, for the state, testified that defendant raised up his gun, deliberately took aim, and fired. On that point there was no contradictory evidence. In his written opinion, on the application of defendant to be admitted to bail, the judge who tried the cause correctly stated the law as follows: A man is taken to intend that which he does, or which is the immediate or necessary consequence of his act. To illustrate, if a man within shooting distance of another raises his gun, takes aim, and fires, and the ball inflicts a mortal wound, from which death ensues, the fair presumption is that he intended to kill his victim, and, if so, the act is certainly murder, unless done in self-defense. The case sup-



posed by him to illustrate the principle is the very case here, and it is a little remarkable that the court, having so clear a view of the law, should have given the sixteenth instruction. That the defendant intended to kill Norrick is beyond a doubt. In the case of the *State v. Phillips*, 24 Mo. 475, SCOTT, J., delivering the opinion of the court, said: 'It follows, then, that this was no case for an instruction as to the law of manslaughter in the second degree; for there can be no doubt, unless we stultify ourselves and refuse to permit our judgment to be influenced by considerations which govern all the rest of mankind, that Sullivan Phillips intended to kill Watson.' Those remarks are equally applicable to this case, and it was error to give the sixteenth instruction. And here it may be observed that defendant was found guilty of manslaughter in the second degree, the very degree in regard to which the improper instruction was given; of which crime there was not a particle of evidence to warrant his conviction. He was either guilty of murder in one of the degrees of which an intention to kill is an element, or the killing was justifiable." This court said in effect that, where an offense consisted of different degrees, to instruct upon a degree of the offense not shown by the evidence to have been committed was error.

PRINCE, C. J., says: "In a case of murder by an ordinary pistol shot, to include in the charge the sections as to the killing in a cruel and unusual manner would simply confuse and mislead." *Territory v. Young*, 2 N. M. 105. This, it is true, was said by way of argument and illustration, but it nevertheless states the law in harmony with the rule quoted from Bishop, *supra*.

In *Territory v. Pridemore*, 13 Pac. Rep. 96, HENDERSON, J., in delivering the opinion of this court, after stating the elements of murder in the second degree, said: "In the third, however, we think there must have been both the absence of the intention to kill and the presence of the motive to inflict bodily or mental suffering from the effect of which the injured person died. Again, killing a human being by means of a shot or shots from a Colt's revolver is not, as the history of criminal trials shows, an unusual manner of effecting death."

The facts in *Alexander's Case* were very similar to those in this case. In *Young's Case* the facts are not stated. In *Pridemore's Case* the facts show that deceased was killed by a pistol-shot fired by one of two persons engaged in shooting at each other, but with whose quarrel deceased had nothing to do. In all of these the principle is clearly recognized that it takes something more than a killing with a pistol-shot fired during a difficulty to authorize the court to charge the jury as to murder in the third degree.

The evidence shows that deceased assaulted defendant then and there, or in so short a time afterwards as to be almost inappreciable, drew his pistol, and fired two shots at deceased, killing him almost instantly. There was certainly nothing cruel in this within the meaning of the statute, unless all killings may be considered cruel; and there was nothing unusual in it, as Judge HENDERSON, says, "as the history of criminal trials shows." That the legislature recognized the fact that there might be killings which are not to be deemed cruel, as contemplated by this section, is shown by reference to the other sections of the statute.

The definition of the words "cruel and unusual," quoted from *Pridemore's Case*, is certainly clear and satisfactory, and I adopt it here. That defendant intended to kill the deceased is shown beyond any question by the circumstances attending the homicide, and there is no pretense on the trial to the contrary. Then where do we find a basis for the assumption that defendant acted "without design to effect death?" Heat of passion was present, and the killing of a human being; but these were the sole ingredients of murder in the third degree developed on the trial. A glance at the statute will show how far they fall short of its requirements. The defendant was convicted of the very degree to sustain which there was not a particle of evidence. As said

by Judge HENRY in *Alexander's Case, supra*: "He was either guilty of murder in one of the degrees of which an intention to kill is an element, or the killing was justifiable,"—and the attention of the jury should have been confined to that issue.

The attorney general contends that even if this instruction be held erroneous, it was an error committed in defendant's favor, and he cannot complain. This may or may not be true. If it could be said from a consideration of the whole case, and in any view of it, that the defendant would have been convicted of a higher degree if this instruction had not been given, then the position might be sound. But if, from a fair and impartial examination of the evidence, the jury might have returned a verdict of not guilty, had their attention been confined by the instructions to an intentional killing constituting crime, or an intentional killing justified by law, then the defendant was prejudiced by the failure of the court to confine the attention of the jury to this issue. From a careful consideration of this evidence, in view of the rule that the jury is the sole judge of its weight, and the credibility of the witnesses from whom it is elicited, it cannot be said that the jury was bound to find defendant guilty of an intentional killing without lawful excuse. This being true, an instruction which leads them away from the real issue is erroneous. The instruction complained of was calculated to, and as shown by the verdict did, lead the jury to a conclusion wholly unsupported by the evidence, and was, therefore, improperly given. This error was prejudicial to the defendant, as we have seen, for it deprived him of the reasonable hope of a possible acquittal if the mind of the jury had been confined to the legal effect of the facts proved. *State v. Phillips*, 24 Mo. 475; *State v. Alexander, supra*; *State v. Sloan*, 47 Mo. 604.

From these considerations it is clear that the judgment should be reversed, and the cause remanded, with directions to award a new trial.

LONG, C. J., and HENDERSON, J., concur.

REEVES, J. I concur in granting the new trial.

(16 Or. 107)

#### STATE v. PHENLINE.

(Supreme Court of Oregon. February 29, 1888.)

##### 1. CONSTITUTIONAL LAW—TITLES OF LAWS—STATUTES—AMENDMENT.

Act Or. Feb. 16, 1887, entitled "An act to amend an act to amend section 14 of title 1 of chapter 28, General Laws of Oregon \* \* \* as amended October 17, 1876," is not repugnant to Const. Or. art. 4, § 20, which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title," when construed with reference to Const. art. 4, § 22, which provides that "no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at length."

##### 2. SAME—INTOXICATING LIQUORS—SALES TO MINORS.

Crim. Code Or. 1874, c. 8, § 686, entitled "An act to prohibit the selling or giving of intoxicating liquors to minors without the written consent of parents or guardians," sufficiently expresses the subject of the act, as amended by act of February 16, 1887, which makes the prohibition to "sell or give intoxicating liquors to minors" absolute, under Const. Or. art. 4, § 20, which provides that the subject of an act "shall be expressed in the title."

Appeal from circuit court, Washington county.

*Handley & Huston*, for appellant. *T. A. McBride*, Dist. Atty., for respondent.

THAYER, J. Appeal from a judgment of conviction obtained in the circuit court for the county of Washington. The appellant, John Phenline, was indicted and convicted in the said circuit court for disposing of intoxicating

liquor to a minor, contrary to the act of the legislative assembly of this state entitled "An act to amend an act to amend section 14 of title 1 of chapter 28, General Laws of Oregon, being section 686, chapter 8, Criminal Code, published in 1874, by authority of the legislative assembly of the state of Oregon, as amended October 17, 1876," approved February 16, 1887. The appellant claimed in the circuit court that said act, under which he was indicted, was unconstitutional and void, and made that one of the grounds of his defense to the indictment. The circuit court held that the act was valid; and upon that question the case is brought to this court. The appellant's counsel contend that the title to an amendatory act, which merely refers to the law to be amended by number of section, does not express the subject of the act as required by the constitution of the state. They contend, also, that the title of the original act does not express the object of the amendatory act.

The constitution of this state provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." Article 4, § 20, State Const. The title of the original act is, "An act to prohibit the selling or giving of intoxicating liquors to minors without the written consent of parents or guardians." It was passed in 1864, took effect, by operation of the constitution, January 20, 1865, and is included in the General Laws of Oregon, as published in 1864, as section 14 of title 1 of chapter 28 thereof. The amendment of 1876 is entitled "An act to amend section 14 of title 1 of chapter 28, General Laws of Oregon, being section 686, chapter 8, Criminal Code, published in 1874, by authority of the legislative assembly of the state of Oregon," which amendment was approved October 17, 1876. The amendment of 1887, under which the appellant was indicted, has already been set out above. The provision of the constitution referred to was not designed to prevent the legislature from including different subjects in the same act so much on account of the objection to an act embracing more than one subject, as to prevent the smuggling into a bill provisions of a pernicious character, and foreign to the object indicated in its title, or with freighting it with matter which has no merit. It was to avoid loading onto a wholesome measure subjects which otherwise would not receive legislative sanction that led to the adoption of the restriction. Requiring the subject of the act to be expressed in its title tends to thwart such practices in legislative affairs; as it renders them nugatory if it is not observed. All of the departments of the state government, under our system, are only so many agencies; and the acts of those who administer them, like the acts of other agents, have no power or efficacy when done outside of the scope of their authority. The constitution has wisely set a limit to the power of all the functionaries of the state. It has circumscribed it by a palling of privileges and restrictions which marks the boundary; and if they overstep it, although acting under color of office, their acts are no more binding than though they had never been clothed with authority. Whenever an alleged right is claimed, under such a usurpation, and is sought to be enforced in a court of justice, it cannot legally be maintained. If a legislative body, in this country, attempts to enact a statute in violation of any of the provisions of the constitution, and a right is attempted to be upheld under it in a court of justice, it is the duty of such court to declare such pretended statute null and void. All legitimate deductions drawn from rational logic sustain this conclusion. But courts will not pass upon so important a question hastily nor pronounce a statute unconstitutional, unless in a clear case, admitting of no reasonable doubt, and will give every just intendment in its favor; but when, in the opinion of the court, there is an irreconcilable conflict between the statute and the constitution, the latter must necessarily prevail. The principal question in this case is whether the said provision of the constitution is applicable to a statute which is amendatory of a section of an original one. Said provision must be construed with reference to other provisions of that instrument relating to the

same matter. Section 22 of said article 4 provides that "no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length." This provision of the constitution relates specially to amendatory statutes; while the former one is general in its terms, and would seem to apply more particularly to original acts,—acts to which the title expressing their object is prefixed at the time of their adoption. Amending a section of an existing act requires no new title. The same title applies as much to the act as amended as it did to the original one; and the title expresses the subject of it, unless there has been a clear departure, and complete change of substance, from the original. Is, therefore, the subject of such an amendatory statute anything more than the changing of the substance of a section in an existing one, and is not the constitutional requirement answered in such case when the section as amended is "set forth and published at full length?" The question does not turn upon the construction that would be given to said section 20—which requires the subject to be expressed in the title of the act—if standing alone. The two sections must be taken together; and it seems to me that it would not do violence to the constitution to construe it as intending that it is sufficient, in amending a section of an existing law, to designate such amendment as the subject of the amendatory act. I think it may clearly be inferred from the language of said section 22 that, if an amendment were made in conformity therewith, it would be regular and valid without any further expression of the subject in its title. I think the language of the section last referred to implies that an act may be revised, or a section be amended, by setting it forth and publishing it at full length, and that its title need not indicate any further object. Such seems to have been the course pursued by the legislature of the state in many instances where statutes have been amended, and which would be determined unconstitutional if we were to hold as insisted upon by the appellant's counsel. A hypercritical view of the subject would certainly not be justifiable when such mischievous consequences must necessarily result from such holding.

Upon the other objection to the validity of the act,—that the subject of it under the amendment is not expressed in the title of the original act,—I do not think there can be much question. The title of the act is "to prohibit the selling or giving of intoxicating liquors to minors without the written consent of parents or guardians." This clearly indicates the object and purpose of the act; which was not, certainly, to allow the selling or giving to that class of persons intoxicating liquors upon the written consent of their parents or guardians, but to inhibit it in all cases except where such written consent had been given. The written consent was a sort of special license under which the right "to sell" or "give" might be exercised, and the amendment took away this right, rendering the prohibition to "sell or give intoxicating liquors to minors" absolute. The amendatory act is more restrictive in its terms than the original one; but the end and aim of each was the same. The other matters prohibited in the amended act are properly connected with the subject thereof, and it was not necessary that they be expressed in the title. It is apparent that the general design of the original act, and of the various amendments thereto, was to prevent a pernicious practice from becoming prevalent in the community, which was liable to have an injurious effect upon the health and morals of the youth of the country, and prove detrimental to the general welfare of the state. It is a subject towards which all the legislation mentioned has been directed. Some changes have been made in the provisions of the original act, and its title is not strictly appropriate to it as amended. The words, "without the written consent of parents or guardians," have no application to anything contained in the body of the act as it now stands; but they might have been dispensed with in the outset, and the title still been sufficient. It would have expressed the subject of the act without them, suffi-

ciently to answer the constitutional requirement; and their remaining as a part of it does not, as I can perceive, affect its validity as amended. The counsel for the appellant contend that the title of the original act, without anything in the title of the amended acts indicating in what particular the provisions of the former were changed, would be misleading. But if parties interested in the matter had no other source of information than that imparted by the titles of several acts referred to, they would have sufficient to put them upon inquiry, and could easily ascertain what provisions had been adopted, if desirous of observing them. Parties, however, in this state, as a matter of fact, have other sources besides the Session Laws from which to acquaint themselves with the legislative enactments. A policy was adopted four or five years after the state organization began the exercise of its functions, which has ever since been maintained, of periodically collecting and publishing, under legislative authority, in the order and method of a code, the General Statutes in force, under their appropriate heads and titles; also a syllabus of each section at the beginning of each chapter or title, as the case may be; and a well-digested alphabetical index of the whole. Statutes collected and published in that manner have usually been amended by reference to the section, title, and chapter as thus arranged. That was the mode pursued with respect to the adoption of the amendments under consideration, and I can discover no grounds of objection to it whatever. The legislative assembly, in order to render statutory enactments more easy of access and conveniently understood, has adopted provisions for arranging them as mentioned; and an amendment thereof, by such reference, conduces to their intelligibility. A mere reference to the statute as originally published, in a majority of cases, would create confusion. A great majority of the Session Laws that have been published are accessible to but few persons. I do not believe that the constitution intends the observance of a nicety which, if adhered to, would occasion embarrassment. There is no such sanctity attending the publication of an act of the legislature as would prevent its republication in a more convenient form, or preclude a reference to it in that form, in event of an amendment. That the subject of an act is ascertained from its title is a mere theoretical hypothesis at most; and the claim that the object of requiring the title to express it is to enable legislators to vote understandingly upon it, and to inform the community as to what measures are pending before the legislative assembly for its action, as often asserted, although practically true, is not strictly correct in theory. An act, as suggested by the respondent's counsel, may not have the same title as the bill for the act. The final question upon the passage of a bill is, "Shall the title of the bill stand as the title of the act?" which takes place after the legislators have done all their intelligent voting upon the measure, and the community obtained all the information which the title is supposed to furnish; and yet the title of the bill may not "stand" as the title of the act,—it may not express the "subject" of the act. Such a character of information, theoretically, would therefore be very unreliable. But the purpose of the requirement need not be considered; it is a mandatory direction, which the legislature must obey. When such a body undertakes to give to its acts the force and effect of law, it must follow the mode prescribed by the instrument which created it. I think it did so in the adoption of the act in question substantially, and that it is a valid law.

The judgment appealed from will therefore be affirmed.

(16 Or. 102)

LOCKWOOD v. HANSON.

(*Supreme Court of Oregon.* February 29, 1888.)

**COSTS**—ACTION FOR "RECOVERY OF MONEY"—JUDGMENT FOR LESS THAN FIFTY DOLLARS. Plaintiff sued for \$251 for services rendered, less a payment of \$45, and recovered \$45.50. Held, that this was not "an action involving an open mutual account," under

Deady's Code Or. § 539, subd. 3, but was "for the recovery of money," under subd. 5; and, the amount recovered being less than \$50, defendant was entitled to his costs, under section 541, providing that, in such cases, costs shall be allowed to defendant of course.

Appeal from circuit court, Baker county.

*Olmstead & Anderson*, for appellants. *G. O. Holman* and *Shaw & Gregg*, for respondents.

LORD, C. J. The plaintiff sued the defendant, in the circuit court, for services rendered by himself and team, for \$251, less the sum of \$45 to be deducted as a payment, and claimed judgment for \$206. The defendant, after making the usual denials, "except as hereinafter stated," set up that the agreement between the plaintiff and himself was that the plaintiff was to furnish a team and driver to carry guests to and from his hotel, and that he (the defendant) was to furnish the hack, and board the driver, etc., and also alleges a tender of \$36.50, which he claims is all that he owes the plaintiff under such an agreement, with the deductions to which he is entitled. The reply put in issue this matter. A trial was had, and a verdict rendered for the plaintiff for the sum of \$45.50, for which the court on motion gave judgment, with costs.

The only question presented is the allowance of costs,—the defendant contending that, the sum found to be due the plaintiff under the agreement being less than \$50, he was not entitled to costs, under Deady's Code, § 539, subd. 5; and the plaintiff contending that the matter in litigation was an open mutual account, and, under section 539, subd. 3, being more than \$150, the judgment for costs was allowed, and there was no error. According to the plaintiff's statement, this is not a case of mutual accounts, but simply a claim for a balance due for work after deducting a payment of \$45, as stated.

Payments on a claim are not items of account in favor of the party making them, and the plaintiff certainly cannot claim that effect for them. Accounts are said to be mutual, where each party makes charges against the other in his books for property sold, services rendered, and money advanced. *Edmondstone v. Thompson*, 15 Wend. 556. In the language of an elementary writer: "Mutual accounts are made up of set-off. There must be a mutual credit, founded upon a subsisting debt, on the one side, or an express or an implied agreement for a set-off,—mutual debts. \* \* \* There must be a mutual, or, as it has been expressed, an alternate, course of dealing. Where payments on account are made by one party, for which credit is given by the other, it is an account without reciprocity, and only upon one side." Ang. Lim. § 149. So that, taking the statement of the plaintiff as an account for services rendered, the balance for which he sues shows that the payment was appropriated, and left nothing outstanding except such balance. Upon this theory the defendant had no claim against the plaintiff. But he seeks now to construe it as a mutual account by considering it in connection with the matter set up in the answer. The answer, however, only shows what the real agreement was between the parties, and that the defendant kept his part, and offered or tendered payment of what he conceived to be the balance due the plaintiff. There is nothing in the transaction which indicates there were mutual dealings or accounts, and reciprocal demands, between the parties. If the plaintiff had sued on account, for services rendered, and the defendant had set up items as a set-off, or counter-claim, growing out of their mutual dealings, which constituted an affirmative claim in favor of the defendant,—a case, so to speak, where each party had a claim against the other upon which either party might sue,—it would come within the meaning of mutual accounts. As it is, we do not think this is a case to which the subdivision of the section referred to can apply.

It is claimed by the defendant that the plaintiff was not entitled to recover costs under section 539, subd. 5, because the amount recovered was less than

\$50, and that it was error to refuse or deny his motion for costs. Section 541 provides that costs are allowed of course to the defendant, in the actions mentioned in section 539, unless the plaintiff is entitled to costs therein. Under section 539, subd. 5, in an action for the recovery of money or damages, to entitle the plaintiff to costs he must recover \$50 or more. The plaintiff in this case recovered less, and was not entitled to costs; and according to section 541, *supra*, he was entitled to costs of course. This would seem to be the plain reading of the subdivision and sections referred to, although it seems that subdivision 5, *supra*, has been subject to some fluctuation of judicial opinion in New York whence the sections, with the subdivisions, were taken. See *Kalt v. Lignot*, 3 Abb. Pr. 190; *contra*, *Crane v. Holcomb*, 2 Hilt. 271; *Thayer v. Holland*, 63 How. Pr. 180. In *Crane v. Holcomb*, *supra*, it was held that in actions for the recovery of money, unless the plaintiff recovers \$50 or more, the defendant is entitled to costs of course, and that a judgment entered in favor of the defendant for his costs, after deducting the sum found due the plaintiff, was regular. HILTON, J., said: "The plaintiff's right to costs 'of course' is not dependent merely upon his being the prevailing party, but rests entirely upon the fact whether, in an action falling in the subdivision referred to, he recovers 'fifty dollars or more.' In this case, the recovery being under \$50, it is very clear that the plaintiff is not entitled to costs; and as section 305 provides that 'costs shall be allowed of course to the defendant in the action mentioned in the last section, unless the plaintiff is entitled to costs therein,' it seems equally clear that the judgment in the action, in favor of the defendant, was properly entered, and the motion to vacate it must be denied." An appeal being taken from this decision to the general term, DALY, J., said: "As the plaintiff, by the fourth subdivision of the 304th section, is not entitled to costs, it follows, in my judgment, as a matter of course, from the 305th section, that the defendant is entitled to costs. The fourth subdivision of section 304 declares, in effect, that the prevailing party shall not recover costs in actions for the recovery of money, unless he recover fifty dollars or more, and the next section, 305, provides that, if in such action the plaintiff is not entitled to costs, that costs shall be allowed to the defendant. These two sections are clear and explicit, and are not controlled by anything contained in section 303." And this, too, seems to be the construction in *Baine v. City of Rochester*, 85 N. Y. 526, although the point was not directly involved, in which the court say: "By the fourth subdivision of section 3228, the plaintiff is entitled to costs in an action on money demand other than those previously specified, provided he recovers \$50 or more; and, by section 3229, the defendant is entitled to costs in an action specified in section 3228, unless the plaintiff is entitled to costs as therein specified." It follows that it was error to allow the plaintiff costs, and the judgment must be reversed, with directions to enter judgment in accordance with this opinion.

(16 Or. 72)

BEEZLEY v. CROSSEN *et al.*

(Supreme Court of Oregon. February 11, 1888.)

1. SHERIFFS—UNLAWFUL SEIZURE—ATTACHMENT OF PROPERTY TO SECURE DEBTOR'S INTEREST.

An action against a sheriff for conversion cannot be maintained under a complaint alleging the tortious conversion of the whole of certain wool, where the defendant seized the wool under an attachment against one who owned an interest in it.

2. ASSIGNMENT—OF LEASE—EVIDENCE.

In an action for conversion of certain wool, plaintiff's ownership depending upon the assignment to him of a lease of sheep, and with it a claim made under it to the wool, uncertain evidence from the lessee that he received notice from plaintiff of the transfer of the sheep, and the testimony of the lessor that plaintiff took the sheep under the terms of the lease, held insufficient to prove an assignment of the lease and of the claim under it.

v.17 P.no.6—37

Appeal from circuit court, Wasco county.

*E. B. Duffer*, for appellants. *Atwater & Story* and *A. S. Bennett*, for respondent.

THAYER, J. This appeal comes here from a judgment of the circuit court for the county of Wasco. The respondent commenced an action in that court to recover damages for the conversion of certain personal property. He alleged in his complaint "that on or about the 15th day of April, 1885, the defendants therein, these appellants, wrongfully and unlawfully took from the plaintiff, this respondent, all the following described personal property of this plaintiff, and kept and retained the same, and have converted the same, and the whole thereof, to their own use." The property referred to is described in the complaint as 2,787 lbs. of wool of the value of \$348.37, and 11 wool sacks of the value of \$4.95. The appellants denied in their answer the wrongful taking and conversion of the property, and justified their taking of it under attachment proceedings had in an action in said circuit court wherein the appellants White and Heisler were plaintiffs, and one William Wigle was defendant. They alleged in their answer the regular issuance of the attachment, its delivery to the appellant Crossen, who was at that time sheriff of said county of Wasco, and that said Crossen, by virtue thereof, as such sheriff, levied upon and took the said personal property, which said defendants alleged was the same taking mentioned in the complaint. The issue between the parties to the action was as to Wigle's ownership of the property, and of its being subject to the attachment. The case was tried by jury, who returned a verdict for the respondent for the full value of the property. Judgment was entered thereon, and the appellants appealed therefrom to this court. The appeal was heard here, the judgment reversed, and the cause remanded for a new trial. A report of the case will be found in 14 Or. 473, and 13 Pac. Rep. 306, which contains the main facts. It was held by this court in that case that, according to the legal effect of certain writings there referred to, the wool in question, and other wool of which it constituted a part, belonged to Joseph Beezley and William Wigle as tenants in common; each of said parties owning a one-half interest therein, subject to a deduction from the gross proceeds of the sale thereof of certain advances made by Joseph Beezley to said Wigle, and that Wigle's interest therein was liable to attachment. It was also there held that the assignments from the successive parties to the respondent of the right, title, and interest in the sheep did not transfer to respondent the lease under which the sheep were let to Wigle, nor the advances made by the lessors to Wigle under the lease; and that, without proof of such assignment, the respondent could not avail himself of the benefit of the lease, or the claim of the lessors for the advances made under it. The case was remanded for a new trial with the expectation upon the part of this court that the proof referred to would be supplied upon such trial. It appears, however, that it was not; that no proof of the assignment of the lease, or of the claim to the advances, was made, any more than on the former trial. Evidence was given of the assignment of the interest in the sheep, and the respondent's counsel attempted to show that the parties to it understood that it included the lease and said advances; but the assignment being in writing, its terms could not be enlarged by parol proof of what the parties understood it to include.

I have examined the testimony of the witnesses upon that subject with a view of ascertaining whether any proof of such assignment was given, but have been unable to discover any. There was no attempt to prove it, except by Wigle and Joseph Beezley. The former intimated that he had received notice from the respondent of the transfer of the sheep, but finally concluded that he was not certain about that. Joseph Beezley testified that respondent took the sheep under the same terms of the lease, and that he acted as agent



for respondent, in what he did after the assignment of the sheep. Such testimony was no proof of the fact of the assignment of the matters referred to. If Joseph Beezley assigned to the respondent the lease of the sheep to Wigle, and his claim against Wigle for his advances made under the lease, he could certainly have stated when and where the transaction took place, and the particulars concerning it. Proof of such a transaction should not be made by innuendoes, or left to conjecture. Joseph Beezley's claiming to have acted as agent for respondent did not tend to prove such assignment. The affair was susceptible of direct proof; and it required that character of proof to establish it. It would be presumed from the evidence in the case, as shown by the acts of the parties, that the assignment of the interest in the sheep to respondent was only colorable. Joseph Beezley claims that he bought the interest of Mrs. Booth in the sheep in the fall of 1883; that they were transferred to his daughter, Alma C. Beezley, and that the latter, on the 18th day of March, 1885, transferred all of her right, title, and interest in them to the respondent. Under this last transfer respondent claims his title. But it does not appear that he ever paid anything for the sheep, or took any interest in them. Wigle testified that he never saw him until after the action herein was commenced. Up to that time Wigle had had the sheep under the lease for nearly two years, during which time Joseph Beezley and Wigle seem to have had the whole management of the business. The former testified, it is true, that he was acting as agent for the respondent; but when the account was made up between him and Wigle, his agency disappeared. The advances claimed to have been made under the lease are all credited to Joseph Beezley as a principal, three items of which, amounting to \$1,130, appear as having been advanced by him over a month after the pretended transfer of the sheep to respondent. The account bears date May 2, 1885, one month and a half, lacking one day, after the transfer from Alma Beezley to respondent. Wigle testified that he made out the account at the request of Joseph Beezley, and that it was correct. If the respondent, when the transfer was made to him, became the owner of the lessor's interest in the lease; stepped, as it is claimed, into their shoes; became the owner of the advances made prior to that time, and made the subsequent advances himself, through his agent, Joseph Beezley,—why was not the account made out in his name? The case stands here, so far as I can see, just as it stood when here on the former appeal. There is not a particle of evidence more, showing that the respondent is the owner of the lease and of the advances than there was then, outside of the vague and equivocal statements made by the witnesses referred to, which will be found, upon examination, to contain no substance whatever. It is only by virtue of the ownership of the advances that the respondent is entitled to the interest in the wool claimed. Wigle owned the half interest attached, subject to the payment of the advances, amounting in all to \$170, diminishing his interest therein that sum. The respondent was not in a condition to claim the benefit of the advances without showing that they belonged to him. Slight proof of an assignment thereof to him would, under the circumstances, have been sufficient. The proof, however, should have been direct and certain and not left to inference from general statements of conclusions. Any fact tending directly to prove it, such as a delivery over of the account to him, by the owner, accompanied with a declaration of transfer, and intended as such, would doubtless have answered. But there is another difficulty in the way of the respondent's recovery in the action, if Wigle owned any interest whatever in the wool when the attachment was levied. The complaint, as will be seen, counts upon a tortious taking by the appellants, and it cannot be maintained unless the respondent is able to prove his entire ownership in it; for, whenever it is conceded that Wigle owned an interest in the wool, it disproves the alleged wrongful taking. The respondent had the right to attach Wigle's interest in the wool, however small it might be. The respondent has no ground of com-

plaint, except for a wrongful conversion of his interest in the property, which would arise only when a sale of it was made. Wigle's having had a leviable interest in it would justify the taking of the wool, and sale of such interest; and the respondent has no right of action except for a sale of the excess belonging to him. If, therefore, he made the proof in question, he could not recover upon his present complaint. He will have to count on a conversion as suggested. This would involve the necessity of amending the complaint, which, I am inclined to think, under the circumstances of the case, at this stage of the proceedings, should not be permitted.

The judgment must therefore be reversed, and the cause remanded to the court below, with directions to dismiss the complaint without prejudice.

(16 Or. 77)

*COFFIN et al. v. CITY OF PORTLAND et al.*

(*Supreme Court of Oregon.* February 15, 1888.)

1. TRUSTS—RESULTING—CONVEYANCES OF LAND FOR USE AS LEVEE—CONSIDERATION.  
The owner of a tract of land, without any valuable consideration, deeded it to a city in trust for a public levee, and afterwards, for \$2,500, gave a second deed, which recited the first, and stated that the grantor had certain ferry-rights in the premises, and that it was desirable that the city should hold it free from such claim. *Held*, on demurrer in an action brought by the grantor's heirs to recover the land on the ground that the city no longer used it for the purposes for which it was conveyed, that the grantor conveyed all his interest in the premises, and that there was no resulting trust.
2. DEED—CONDITION—BREACH—REVERSION.  
*Held*, also, that there were no conditions expressed in the deed upon breach of which the estate would revert to the grantor.

**Appeal from circuit court, Multnomah county.**

Action in equity, brought by George A. Coffin and others, as heirs of Stephen Coffin, against the city of Portland and the Portland & Willamette Valley Railway Company, to declare a resulting trust in favor of the complainants in certain lands conveyed to the city of Portland by Stephen Coffin. From the judgment sustaining defendants' demurrer to the complaint the complainants appeal.

*J. G. Chapman and W. R. Bilyen*, for appellants. *W. H. Adams*, for City of Portland. *McDougall & Bower*, for Portland & Willamette Valley Railway Company.

**THAYER, J.** This appeal comes here from the circuit court for the county of Multnomah. It is from a decree of that court sustaining a demurrer to the appellants' complaint. It is alleged in the complaint that appellants are the heirs at law of Stephen Coffin, deceased; that said Coffin, David H. Lownsdale, and W. W. Chapman were the town proprietors of the town of Portland, and that in 1850, in laying off said town, they attempted to dedicate certain premises as a public "levee;" that they made and published a map of the town, on which they designated them as a "public levee;" that, in a subsequent division of the town-site among the said proprietors, the part thereof allotted to Coffin included the said "levee;" that, in 1865, Coffin executed a deed of the levee to the city of Portland, but without consideration, and in trust for a public levee or landing; that, in 1871, said Coffin executed a second deed of the levee to the city of Portland in consideration of \$2,500; that the latter deed recited the former one; also that Coffin owned the right of a public ferry on the premises, and that it was desirable that the city should hold the levee free from such claim; that the premises constituting the levee, at the time said last deed was executed, were worth \$50,000, and at the time the complaint was filed were worth \$70,000; that neither the city of Portland, the state of Oregon, nor the public had ever made any use of the premises, and each had abandoned them; that the use for which the dedication and do-

nation were attempted to be made had failed, and that no public levee or landing could be maintained of any utility; that the attempted dedication and donation were upon condition that the premises should be used as a public landing or levee, and that they had not been so used, and that it was not intended to so use them; that, in 1885, the legislature of Oregon passed an act attempting to grant the premises to the Portland & Willamette Valley Railway Company, a private corporation, for its depot, wharf, and warehouse, and that said company claims the premises under such act. Wherefore the appellants claimed that a reversion and resulting trust of the premises should be declared in their favor. It is shown in the complaint that the city of Portland has exercised acts of ownership over the levee, that in 1884 it caused piling to be driven along the front thereof, upon the margin of the Willamette river, at a cost of \$4,000; and it is not pretended that the city has ever indicated any formal intention of abandoning it, or done any act from which such intention could be implied.

The inference to be drawn from the complaint in reference thereto seems to be that it cannot practically carry out the purposes of the dedication, as the appellants term it, nor employ it for the purposes designed, nor needs it. Under one aspect of the complaint, the property was given for a particular use; and, it having failed, a resulting use or trust arises in favor of the donor's heirs, which entitles them to reclaim it. Under another aspect of it, the property was given upon condition that it should be used for a particular purpose; and it not having been so used, was a violation of the condition, and operated as a forfeiture of the estate given, and entitled the heirs to a return of it to them.

The title of the city of Portland to the premises in question is derived by the purchase of them from Stephen Coffin, and, if the heirs of the latter have the right to reclaim the title granted, it arises out of the terms upon which the purchase was made. The premises were conveyed by Coffin to the city by the deeds of 1865 and 1871; and if it can be ascertained therefrom that Coffin only intended to convey to the city a partial use of the premises, reserving the residue to himself, and the complaint shows that the use so conveyed is terminated, the estate reverts to his heirs. If, on the contrary, the deeds show that Coffin intended to convey to the city his entire interest in the premises, although he limited their use to some particular purpose, and the city has diverted the use to an entirely different purpose, still neither he nor his heirs would have any right to claim a reversion of them. They would doubtless have the right to go into a court of equity, and ask that the city be compelled to devote the premises to the use intended. They would not be entitled to a return of them, for the reason that the grantor had disposed of his entire interest in them; and the property would no more revert to him or his heirs, in any event, than to a stranger. A grantor virtually becomes a stranger to the property when he alienates it absolutely. The effect of a deed to property depends upon the intent of the parties to it; and we must gather the intent of the parties in the transaction mentioned from the deeds referred to. The former rule was, even after the adoption of the statute of uses, that when one person transferred the legal seizin or possession of land to another by any of the common-law modes of assurance, without any consideration, equity presumed that he meant it to the use of himself, unless he expressly declared it to be for the use of another. *Van der Volgen v. Yates*, 9 N. Y. 219. Under that rule, it became important, when the conveyance was made without consideration, to declare for whose use it was made. But the rule did not obtain where the conveyance was executed for a valuable consideration. The grantor could not have the purchase money and the land also. Thus, it is said in *Perry on Trusts*, (section 151): "If a conveyance has been made upon a valuable consideration, there can be no resulting trust to the grantor, as the payment of a valuable consideration imports an intention to benefit the grantee in case

the trusts declared fail, or are imperfectly declared, or do not take effect for any other reason." It is doubtful whether the rule would prevail under our statute, which provides that "any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant." I hardly think it would, although the conveyance were made without any valuable consideration; and it certainly would not if made upon a valuable consideration. The two deeds from Coffin to the city cannot, taken together, be regarded as without consideration. The appellant's counsel claimed that the second one was evidently given to extinguish Coffin's ferry-right in the levee; but its recital of the former conveyance of Coffin's ownership of the ferry-right on the levee, and that it was desirable that the city should hold the property free of such claim, shows, unmistakably, that it was intended that the city should acquire an absolute title to the property, and was evidence that Coffin intended to convey every right thereto which he had not already conveyed by the former deed. I think, beyond question, that the latter deed was not only intended to convey from Coffin to the city the reserved rights of Coffin in the levee, but also to operate as a confirmation of the prior conveyance. Under this view of the case, no resulting use or trust arises in favor of Coffin's heirs, whatever disposition or use may have been made of the premises.

The other view suggested in the complaint, that the deeds were made upon condition, cannot be maintained so as to benefit the appellants. A condition subsequent in a deed, that will, under any circumstances, defeat the title conveyed, must provide that the conveyance is upon the condition, and that the failure to perform it shall operate as a forfeiture of the estate granted. When such a condition is broken by the grantee, the grantor is entitled to re-enter; but a court of equity will not entertain jurisdiction to declare the forfeiture. The grantor must go into a court of law if he desires to enforce the condition. Equity will not decree a forfeiture. These deeds contained no condition subsequent. The limitation of an estate to a particular use, in such a conveyance, does not constitute, without words of forfeiture, such a condition. *Rawson v. Inhabitants of School-Dist. No. 5*, 7 Allen, 128. "Although a deed contain a clause declaring the purpose for which it is intended, the granted premises shall be used, if such purpose will not inure specially to the benefit of the grantor, but is in its nature general and public; and, if there are no other words in the grant indicating an intent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent." LYON, J., in *Horner v. Railway Co.*, 38 Wis. 175. To the same effect is the decision of this court in *Raley v. Umatilla Co.*, 13 Pac. Rep. 890, and it is supported by a large number of authorities there cited. Upon neither of the views considered have the appellants any standing in court. Their ancestor not only dedicated the premises to the public for a public levee, but absolutely, for a valuable consideration, conveyed to the city of Portland his entire right, title, and interest in them; and by no course of reasoning can they maintain the claim they have set up, even though the city, state, and public have abandoned them, as alleged in the complaint. Parties cannot recover back property after having parted with their title to it. They have thereafter no more claim upon the property than upon property which they never owned. In all the cases where property has been recovered back after having been conveyed by the vendor, when no fraud has been practiced upon him, it has been by virtue of a reservation, either express or implied, whereby a less interest than the absolute title has been conveyed, or where the estate conveyed has been fettered by some condition.

A considerable discussion in this case has been had in regard to the manner in which the city of Portland and the public have used and treated the premises in controversy, and as to the effect of the act of the legislative assembly

of the state of 1885 mentioned in the complaint. But neither of these matters need be considered. They do not, under any view, give the appellants any ground upon which to base a claim to title, nor affect their rights any more than they do those of other citizens of the state. That the said act of 1885 is not, when properly construed, inconsistent with the purposes of the dedication of said premises, was held by the circuit court of the United States for the district of Oregon, in a suit between these same parties, and for the same cause. 27 Fed. Rep. 412. Judge DEADY, in that case, after a very thorough consideration of the allegations in the bill of the complainants, determined that by giving the said act effect within such powers as the legislature was entitled to exercise over the subject, and construing it accordingly, as the court was bound to do if it could, it was a grant to the railway company of the right to improve and use the premises as a public landing, with the added facility of direct and immediate railway connections therewith. This court, in *Railway Co. v. City of Portland*, 14 Or. 188, 12 Pac. Rep. 265, fully indorsed and adopted that view. There is no principle better settled than that the legislature has authority to regulate the public use to which property has been devoted; and, so long as it keeps within its power, the courts have no concern with its acts, except to administer their provisions. And when an act is susceptible of two constructions, one of which would render it authoritative, and the other a nullity, courts are bound, as Judge DEADY says, to give it the former construction. The legislature is not to be presumed as having intended to go beyond its powers in the adoption of an act, and the courts will give it effect in accordance with the presumed intention of that body in adopting it, when it can be done by reasonable construction.

It follows from the reasons above given that the decree appealed from must be affirmed.

Petition for a rehearing in this case was denied, March 6, 1888.

(2 Idaho [Hasb.] 453)

BOHANON v. HOWE *et al.*

(*Supreme Court of Idaho. March 7, 1888.*)

1. MINES AND MINING—LOCATION AND ACQUISITION OF CLAIM—CITIZENSHIP.

Under the act of congress of May 10, 1872, only citizens of the United States, and persons who have declared their intentions to become such, can acquire any right of possession, by location or otherwise, of mineral lands on the public domain.

2. SAME—TRESPASS—PLEADING AND PROOF.

In an action for trespass upon mining ground, and for damages, where the legal title to the ground is in the United States, and the right of possession is made by the pleadings a material issue, the plaintiff, in order to recover, must plead and prove that he is a citizen of the United States, or that he has declared his intention to become such.

(*Syllabus by the Court.*)

Appeal from district court, Lemhi county; before Justice HAYS.

*J. T. Morgan*, for appellants. *Charles A. Wood*, for respondent.

BRODERICK, J. This action was commenced in the district court in and for Lemhi county against the defendants for trespassing upon certain placer mining ground, for damages, and for equitable relief by injunction to restrain future trespasses. The case was tried by the court without a jury. Judgment for the plaintiff, and defendants appealed. The plaintiff alleged, among other facts, that he was the owner, entitled to the possession, and had been in the actual possession, by himself and through his grantors, for more than 15 years last past. The answer for the defendants denies the essential allegations of the complaint, and further alleges that the lands were on the 23d day of March, 1885, vacant and unoccupied public lands of the United States, and subject to location under the laws thereof; and that said defendants then located all of said ground.

Neither plaintiff nor defendants have alleged any facts as to citizenship. This seems to us to have been requisite. By the act of congress of May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the laws, customs, and rules of miners in the several mining districts, so far as applicable and not inconsistent with the laws of the United States. It is conceded that if this were an action in support of an adverse claim, and to determine the right of possession therein, it would have been necessary to have pleaded and proved citizenship, or what is its equivalent, in such action. But it is contended that in an action for trespass upon mining ground, and for damages by reason of such trespass, it is unnecessary to show any fact in relation to citizenship. We cannot adopt this view. The record here shows that the legal title to the ground is in the United States. The right of possession is, by the pleading, made a material issue. Unless plaintiff can establish this right, he cannot recover; and as a prerequisite he must show himself to be a citizen, or to have declared his intention to become such. *Rosenthal v. Ives*, 12 Pac. Rep. 904; *Mining Co. v. Mining Co.*, 9 Min. R. 529, 1 Fed. Rep. 522; *Hess v. Winder*, 30 Cal. 355; *Lee Down v. Tesh*, 6 Pac. Rep. 97.

The objection was first raised in this court that the complaint herein does not state facts sufficient to constitute a cause of action. This objection may be taken at any time before final judgment. We think the point well taken, for the reason hereinbefore given; but as the objection was not raised in the trial court, where the plaintiff would doubtless have been allowed to amend his pleading, we have concluded to reverse, with leave to either party to amend. The judgment is therefore reversed, and the cause remanded for a new trial, with direction to the court below to allow, on application, either party to amend generally.

HAYS, C. J., and BUCK, J., concurring.

(38 Kan. 723)

ST. LOUIS & S. F. RY. CO. v. SHOEMAKER.

(Supreme Court of Kansas. March 10, 1888.)

TRIAL—SPECIAL FINDINGS INCONSISTENT WITH VERDICT.

Where a jury renders a general verdict, and makes numerous special findings, and the special findings are inconsistent with each other, and some of them with the general verdict, it is error for the trial court to render judgment upon the special findings and general verdict, as in such condition of things neither party is entitled to judgment upon the verdict or findings; but it is the duty of the trial court to grant a new trial. The case of *Shoemaker v. Railway Co.*, 30 Kan. 359, 2 Pac. Rep. 517, cited and followed.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Greenwood county; CHARLES B. GRAVES, Judge.

On November 1, 1881, the defendant in error, Shoemaker, instituted suit against the railway company. His petition contained three counts, viz.: *First*. For digging and removing earth, stone, etc., from plaintiff's premises. *Second*. For altering and changing the course of a certain stream of water. *Third*. Damages from fire claimed to have been set out by defendant's engines. Upon this petition there was a trial, and verdict for Shoemaker on each count, which verdict the court set aside, and rendered judgment for the railway company. Shoemaker appealed, and the judgment of the district court was reversed as to the first two counts in the petition, and affirmed as to the last count. *Shoemaker v. Railway Co.*, 30 Kan. 359, 2 Pac. Rep. 517. When the case went back, it was tried upon the first two counts of the original petition, which were in substance as follows:

## "AMENDED PETITION.

"*First Count.* Plaintiff alleges that defendant company is a corporation organized under the laws of the state of Kansas; that about the 1st day of March, 1880, defendant, by its agents and employes, constructed its railway over and across the south-west quarter of section 12, township 28, range 10, in said county of Greenwood; that the plaintiff, at the time, was the owner of said lands, and in possession thereof; that the defendant, by its agents and employes, did change and alter the course and channel of a stream, fed by surface water, known as 'Salt Creek,' running through plaintiff's land, and made a new channel for said stream of water from its usual channel into a ditch, made by defendant, and thence it ran onto and overflowed the lands of plaintiff, to the extent of about three acres, to the damage of plaintiff in the sum of \$150.00. *Second Count.* Plaintiff alleges that defendant constructed its railway through the lands hereinbefore described, and that in doing so defendant went outside the right of way of the railway on the lands of plaintiff, and removed therefrom earth, stone, and gravel, and appropriated the same in the construction of the road, by reason of which plaintiff was damaged in the sum of fifty dollars.

## "DEFENDANT'S ANSWER.

"To plaintiff's amended petition defendant company answered—*First.* Denying each and every allegation contained in plaintiff's petition, severally and collectively. *Second.* Averring that defendant company did not own or construct the road laid out and located through the lands described in plaintiff's petition, or any part of it; and did not carelessly and negligently construct the ditch mentioned in plaintiff's petition, and thereby overflow plaintiff's lands, or divert the waters from the usual channel of the stream named in plaintiff's petition; and did not remove earth, stone, or gravel from plaintiff's land, or authorize, direct, or empower any one to do so; or approve or ratify or assent to any one's doing so; and that defendant was not guilty of any trespass, wrongs, or injury complained of by plaintiff; but said road through plaintiff's land was owned by the St. Louis, Wichita & Western Railway Company, a corporation created, organized, and existing under the laws of the state of Kansas, and was constructed by said corporation last named, or by contractors to whom it had let the work of constructing said road, paying them therefor a stipulated price; that before the contractor entered onto the land of plaintiff to construct the railroad, plaintiff had conveyed, by good and sufficient deed, to the St. Louis, Wichita & Western Railway Company, the right of way for its railway through the lands described in plaintiff's petition, and that said railway was carefully and skillfully constructed across said lands; and that if any water was caused to flow over the land of plaintiff, by reason of the construction of embankments on said right of way, in making the road-bed of said St. Louis, Wichita & Western Railway Company, it was the natural and necessary consequence of the work the corporation had acquired the right to do, by purchasing the land of plaintiff, for the purpose of constructing its road thereon; and if the plaintiff sustained any damage by reason of such flowage of surface water on his lands, such damage was unavoidable, and was included in the compensation agreed upon and paid to him for said right of way."

Plaintiff, in his reply, denied the new matter set up in defendant's answer. On December 16, 1885, the case was tried before a jury. The jury returned a general verdict in favor of plaintiff, and the following special findings of fact: "*First.* Did the plaintiff and his wife, in 1879, make, execute, and deliver to the St. Louis, Wichita & Western Railway Company a deed of conveyance whereby they conveyed to the said railway company a strip of land, 100 feet in width, across the lands mentioned in plaintiff's petition, for the purpose of constructing its railway thereon? *Answer.* Yes. *Second.* Did said St. Louis, Wichita & Western Railway Company, during the years 1879

and 1880, construct its line of railway through Greenwood county, and over this strip of land conveyed to it by the plaintiff and his wife? *A. Yes. Third.* Did the St. Louis, Wichita & Western Railway Company, in constructing that part of its railway over and across the lands of the plaintiff, let the contract therefor to the St. Louis & San Francisco Railway Company? And did said last-named company sublet said contract to one Riley, a contractor, who contracted and agreed to construct the same at a stipulated price? *A. Yes. Fourth.* Did said contractor, in the construction of said railway road-bed for said railway company, employ and discharge his own hands or servants at his own pleasure? *A. Yes. Fifth.* Did the St. Louis & San Francisco Railway Company employ any of the hands or servants who constructed said road-bed? *A. Yes. Sixth.* Did the hands or servants employed and under the care of said contractor construct the railway through the plaintiff's land, and, in doing so, did they go outside of the right of way, and dig and remove earth, stone, and gravel? *A. Yes. Eighth.* Was the superstructure or road-bed of said railway negligently and unskillfully constructed? If yes, in what did the negligence consist? *A. Yes.* In so constructing the ditch on the south side of the railroad as to discharge the water from the creek on the elevated land of the plaintiff during high water. *Twelfth.* Was the railway company guilty of negligence in omitting to put in a culvert or water-way a few rods east of Salt creek, on the plaintiff's farm? And do you have the verdict on that omission of the railway company? *A. No. Thirteenth.* Was it necessary for the railway, in constructing its road-bed, in order to draw the surplus water that would accumulate along the sides of the embankment, to cut ditches along the sides of the embankment into Salt creek? *A. On the north side only. Fourteenth.* Was it necessary for the railway company, in constructing its road-bed just east of Salt creek, on plaintiff's farm, in order to prevent its banks from overflowing, to make a fill of several feet in height? And, in order to make that fill, was it necessary to cut deep ditches along the side of its road-bed, in order to get sufficient earth to make said fill? *A. No. Sixteenth.* Did the defendants themselves, or their servants' counsel, aid or advise the person engaged in the construction of said railway to go upon the plaintiff's land, and outside of the right of way, and dig and remove earth, stone, gravel, or other materials? If yes, what agent or servant did so counsel or advise the trespass, and to whom was the advice given, and what did he or they say? *A. No."*

In due time the defendant filed a motion for judgment upon the special findings, which was overruled, and it excepted: In like time it filed its motion for a new trial, which was overruled, and it excepted.

*Kirkpatrick & Vestal, John O'Day, and E. D. Kenna, for plaintiff in error. Hamilton Ellis, for defendant in error.*

SIMPSON, C., (*after stating the facts as above.*) This case was tried to a jury in the Greenwood county district court, upon the first two causes of action stated in the petition, and resulted in a general verdict for the defendant in error, for \$48.78. The jury returned answers to particular questions submitted to them, and, among other things, found that the railroad was constructed through the land of the defendant in error, by a contractor, at a stipulated price, who had sole control of the employment and discharge of his own hands and servants, and that they went outside of the right of way, and dug and removed earth, stone, and gravel. They also found that the plaintiff in error, the railway company, employed hands and servants in the construction of said railroad; but they also found that such agents and servants of the railway company did not advise, aid, or abet the person engaged in the construction of the road to go outside of the right of way, and dig and remove stone, earth, and gravel from the land of the defendant in error. These special findings are so inconsistent with each other, and are so antagonistic to



the general verdict, that the case must be reversed for the same reasons given in *Shoemaker v. Railway Co.*, 30 Kan. 359, 2 Pac. Rep. 517. It is recommended that the judgment be reversed, with instructions to grant a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 744)

ATCHISON ST. RY. CO. v. NAVE *et al.*

(Supreme Court of Kansas. March 10, 1888.)

1. NUISANCE—ACTION TO RESTRAIN—SPECIAL INJURY.

Two or more persons, each owning distinct though adjoining lots and buildings on the street of a city where it is proposed to build a street railroad, without authority from the city, which, when built, will obstruct the use of the properties, and cause a common injury to such proprietors, independent and different from what the general public suffers, may unite as plaintiffs, and maintain an action to restrain the threatened obstruction and nuisance. *Palmer v. Waddell*, 22 Kan. 352.<sup>1</sup>

2. HORSE AND STREET RAILROADS—AUTHORITY TO OCCUPY STREET—TIME LIMITED.

Where a city authorizes a street-railway company to occupy a certain street, and construct a railroad thereon, at any time within six months after the authority is granted, the privilege so given must be used, if at all, before the expiration of the time limited.

3. SAME—PERMISSION TO OCCUPY STREET MERELY LICENSE.

The permission conferred by the city authorities is a mere license, and, if it is not availed of by the company within the time stated in the ordinance, no act of revocation or declaration of forfeiture is required to terminate the same; and the railway company, or licensee, cannot thereafter construct or operate the road without a renewal of the license.

(Syllabus by the Court.)

Error to district court, Atchison county; DAVID MARTIN, Judge.

Abram Nave, James McCord, and G. L. Moulton instituted an action against the Atchison Street-Railway Company, to enjoin the construction of a street railroad along Second street, in the city of Atchison, alleging that the plaintiffs had constructed large buildings on that street to be used as wholesale houses, and were adapted to that purpose, and that the construction of the railroad, in the manner threatened, would necessarily obstruct and destroy access to their property and buildings, and would be of irreparable injury and damage to them; and they further aver that they have the same interest in the subject of the action. The railway company demurred to the petition, alleging that there was a defect of parties plaintiff, and that several causes of action were improperly joined; which demurrer was overruled and excepted to. The answer of the railway company admitted the organization and existence of the city of Atchison, and of the defendant railway corporation, as well as the allegation respecting the existence and location of Second street in Atchison. It further admitted that it claimed the right, and was about, to build and maintain a street railway on Second street, as alleged. The other facts stated in the petition were denied; and the defendant set up as a third defense that the plaintiffs had no mutual or joint interest in the prosecution of the action, and were improperly joined as plaintiffs therein. The reply of the plaintiffs denies all averments inconsistent with those stated in the petition. Afterwards, upon stipulation of all the parties, John K. Landis was substituted as plaintiff instead of G. L. Moulton, it appearing that the property of Moulton had been transferred to Landis. The case was tried by the court without a jury, and the following conclusions of fact and of law were found and stated:

"CONCLUSIONS OF FACT.

"(1) All and each of the allegations contained in the first count of the plaintiffs' petition are true. (2) All and each of the allegations contained in the

<sup>1</sup>Respecting the rights of individuals in regard to nuisances which are public in their nature, see *Clark v. Railway Co.*, (Wis.) 36 N. W. Rep. 326, and note.

second count of the plaintiffs' petition are true; but since the commencement of this action, and on July 1, 1884, the plaintiff G. L. Moulton sold and conveyed to John K. Landis the real property described in said petition as belonging to G. L. Moulton, and the said John K. Landis is substituted in his stead by agreement of the parties. (3) Under the ordinance of said city, the width of said Second street subject to use for sidewalks is 12 feet on each side thereof; but the actual width occupied on the east side of said street, including the curbing, is only 11½ feet, and it has never exceeded that width. There is a stone guttering outside of the curb-stone, the depth of the guttering being about one foot from the top of the curb-stone. (4) The east end of the Atchison Union depot is at Second street, extending north to Main street; and the next street north of Main street is Commercial street, block 19 being on the west side, and block 20 being on the east side, of Second street, between Main street and Commercial street, each block being 315 feet in length,—the distance between the north side of Main street and the south side of Commercial street. (5) On November 14, 1879, the mayor and councilmen of the said city of Atchison, then a city of the second class, passed an ordinance which was duly approved on the same day, and published on November 15, 1879, granting to the Atchison Union Depot and Railroad Company, and the Missouri Pacific Railway Company, the right to extend, construct, and lay down a single railroad track from the Missouri Pacific railway track, on the south side of Main street, to the north of Main street,—the distance of 175 feet on Second street,—not to exceed 40 feet from the west side of said Second street, with power to said companies to operate the same, the said track to be used for no other purpose than mail, express, and passenger trains. And it was provided in said ordinance that the track should be made to conform to the grade of the street; and that the street should be macadamized or planked by said companies a distance of 175 feet north of Main street, so as to make said street fit for use; and that cars and engines should not be permitted to stand north of the south line of Main street at any time to exceed twenty minutes, except for necessary laying down or repair of tracks. (6) Such companies duly proceeded to lay said single track on Second street, across Main street and north thereof, the gauge of said track being four feet eight and one-half inches, or five feet from outside to outside of the rails. At a point two or three feet north of the north line of Main street, it is seventeen feet and seven inches from the curbing on the west side of Second street to the outside of the west rail; and from the outside of the east rail to the curbing on the east side of Second street the width is thirty-four feet seven inches. At a point thirty-eight feet further north, it is twenty-two feet from the curb-stone on the west side of Second street to the outside of the west rail; and from the outside of the east rail to the curb-stone on the east side of Second street the width is twenty-nine feet ten inches. At a point forty-eight feet four inches further north and opposite the south wall of the Moulton building, it is twenty-four feet from the curbing on the west side of Second street to the outside of the west rail; and from the outside of the east rail to the curb-stone on the east side of Second street the width is twenty-seven feet seven inches. At a point forty-eight feet further north, to opposite the north side of the Moulton building, it is twenty-four feet from the curb-stone on the west side of the street to the outside of the west rail; and from the outside of the east rail to the curb-stone on the east side of said street the width is twenty-seven feet seven inches. At a point twenty-four feet nine inches still further north, at the end of said curb-stone on the west side of said track, which is opposite to the middle of the front of said nave and McCord building, it is twenty-three feet and ten inches from the curb-stone on the west side of said street to the outside of the west rail; and from the outside of the east rail to the curb-stone on the east side of said street the width is twenty-seven feet and seven inches. (7) On December 20, 1881, the mayor and councilmen of said city of Atchison passed,

and on December 30, 1881, the mayor approved, and on December 31, 1881, there was duly published, ordinance No. 415, granting to the Atchison Street-Railway Company, a corporation, the right, at any time within six months after the taking effect of said ordinance, to construct street-car tracks, and operate cars thereon, over, along, and upon certain designated streets of the city of Atchison, commencing on Second street at or near the Union depot, thence north on Second street to Commercial street, thence west on Commercial street to Eighth street, and on certain other streets of said city,—but the tracks, side tracks, and switches not to be constructed nearer than fifteen feet of any sidewalk, except upon and by permission of the council of said city of Atchison; the gauge to be four feet eight and one-half inches, or five feet from outside to outside of the rails, and the tracks not to be elevated above the surface of the streets, but so that vehicles might easily cross the same; and the cars shall be propelled by horse or mule power. And it was further provided that upon the failure of said street-railway company to construct the track over and along either of the routes mentioned in said ordinance, and operate cars thereon, within six months from the time of the taking effect of said ordinance, the rights conferred thereby should cease and determine, unless such street-railway company should, by an action of law or judicial proceeding, be interrupted in the construction of such track or tracks, and the operation of cars thereon, or should be prevented by injunction, or otherwise, from constructing such track or tracks, and in operating cars thereon; in which case the time of such interruption or prevention should not be deemed or taken as any part of such period of six months. On May 15, 1882, the mayor and councilmen of said city of Atchison passed, and on May 22, 1882, the mayor approved, and on May 23, 1882, there was duly published, ordinance No. 439, extending the time for the completion and operation of the street railway until six months after the taking effect of said last-named ordinance, and providing if said street-railway company should, by an action of law or judicial proceedings, be interrupted or hindered in the construction of said track or tracks, or in operating cars thereon, the time during which such hinderance or interruption continued should not be deemed any part of said period of six months. (8) Said street-railway company did not lay down any street-railway track in Second street, aforesaid, between Commercial street and Main street, nor south of Main street, except about one hundred feet, or less, at and near the intersection of Second street with Commercial street, prior to the commencement of this action, although it was not prevented or hindered in so doing by any judicial or other proceeding; but, at the time of the commencement of this action, said street-railway company was about to proceed to the laying down of its track from Commercial street to Main street, and would have done so if not prevented by injunction. (9) Before the commencement of this action, Second street had been macadamized from Main street to Commercial street, the Atchison Union Depot and Railroad Company having furnished the material, and paid for the work, for so doing from Main street to a point 175 feet north thereof, and the city for the remainder of the distance. The grade of the street, as macadamized, was higher than the top of the rails of the railroad track that had been placed there by said depot company and Missouri Pacific Railway Company, so that the rails were covered by the macadam all of the length of the track, except at two or three places where the tops of the rails were slightly exposed. Said railway track was actually used for only a few months, and then only for the accommodation train twice a day,—once in the morning and once in the evening. Afterward the accommodation train started from, and stopped at, St. Joseph; and since that time said track in Second street had never been used. It could be used, however, by clearing the macadam from the surface of the rails, and digging the macadam from the inside of the rails sufficiently to admit of the flanges of the wheels dropping between the rails, and putting in the crossings at the south side of the Union depot,—

which crossings have been removed; and the use of said track might again become necessary at any time. (10) Railway coaches are of the width of about ten feet 4 inches to 10 feet 6 inches, so that they extend about two feet nine inches beyond the rails. The street-railway cars extend only about eight inches beyond the rails. The vibration of railway coaches in motion is about eight inches at the floor of the coach, and considerably more at the top of the coach. When passenger, mail, and express trains are operated, it requires about 14 feet on each side of the track to comfortably and safely accommodate the business. (11) The two buildings of plaintiffs', which adjoin each other, were erected with special reference to the carrying on of the wholesale grocery business. The east end, or rear, of the buildings extends to certain railway side tracks where goods are principally received into the houses, and there is no access to said buildings by wagons from the rear; and the only access by wagons is from the front, or Second street, where most of the goods are taken out, and some goods received. Large transfer wagons are and have been mostly used, some of the beds thereof having level, and others thereof slanting, surfaces,—the slope being toward the rear of the wagons. The most convenient method to load and unload wagons having the slanting surfaces is to back them up with the hind wheels to the curb-stone, the wagon then standing crosswise of the street. Farm wagons are also frequently used to load and unload, some having movable end gates, so that the most convenient method of loading and unloading is also by backing up. The length of a transfer wagon is about 20 to 22 feet, and its width, from end to end of axle, about 7½ feet. The transfer wagons having a fifth wheel can be turned almost at right angles, so as not to occupy much of the street beyond the length of the wagon, though, in turning about, double that distance is required. And farm wagons not being so constructed, although they are shorter than the transfer wagons, yet they require as much or more room when standing crosswise of the street. If the wagons were all loaded or unloaded from the sides, which it is possible, although not convenient, to do, only about eight feet of the street outside of the curbing would be absolutely required; but no wagon could pass it, while so standing, without running up on the street-railway track, provided it was not laid further than 15 feet from the sidewalk. (12) If said street-railway track should be laid 15 feet from the sidewalk on the east side of Second street, the distance between the rails of the street-car track and the railroad track would be only 7 feet and seven inches along the whole of the frontage of said two buildings. This would not be sufficient space for the railroad coaches and the street cars to pass each other in safety, and allow passengers to alight,—allowing no space for the handling of baggage, mail, and express matter on the east side of the railroad track, and between it and the street-car track; and it would be dangerous to the public to allow the street-car track and the railroad track to be so near each other; and with said street-car track as near as 15 feet to the sidewalk on the east side of Second street the business carried on in the plaintiffs' buildings would be seriously interfered with.

“CONCLUSIONS OF LAW.

“(1.) The defendant ought not to be allowed to lay down its street-car track between the railway track already there and the east side of Second street. (2) The plaintiffs Abram Nave and James McCord, and also J. K. Landis, (substituted for G. L. Moulton,) are entitled to a perpetual injunction to restrain the defendant from laying down its track between the railroad track already there and the east side of Second street, opposite the buildings of plaintiffs, so long as such buildings are used for the purposes for which they were erected. (3) The defendant ought to be adjudged to pay the costs of this action.”

The defendant moved for judgment in its favor upon the findings of fact, and also for a new trial; both of which motions were overruled, and judgment was given in favor of the plaintiffs, perpetually enjoining and restraining the defendant from laying down any track, or operating any street railway, on

Second street in front of the plaintiffs' property, and also for the costs of the action. The defendant removed the case to the supreme court for review.

*Jackson & Royse*, for plaintiff in error. *W. W. Guthrie*, for defendant in error.

JOHNSTON, J., (*after stating the facts as above.*) Two principal questions are brought up by this proceeding for our consideration and decision. The first relates to the objection of misjoinder, and arises on the order overruling the demurrer alleging that several causes of action, and several parties plaintiff, were improperly joined, and also in rendering a single judgment in favor of all the plaintiffs upon what are termed "independent causes of action." It is argued that the obstruction of access to the Nave and McCord building, which was adjoining and north of the Moulton building, in no way affected the use of the latter, and that the threatened nuisance or obstruction to the Moulton building would not have been an interference to the use and enjoyment of the Nave and McCord property. As a general principle, several plaintiffs having distinct and independent causes of action against a defendant cannot unite in a suit for the separate relief of each. The Code provides that where several persons have an interest in the subject of the action, and in obtaining the relief demanded, they may join as plaintiffs. Section 35. And, also, "when the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Section 38. The threatened injury or nuisance complained of here is one that is common to all the plaintiffs, and all have a general interest in the relief demanded. In fact the case falls fairly within the decision of *Palmer v. Waddell*, 22 Kan. 352. There the defendant erected an obstruction on a natural water-course, causing the water to overflow and injure the land of the plaintiffs. Although the several plaintiffs were the owners of separate and distinct tracts of land, it was ruled that the overflow was a common injury to all the plaintiffs. And the common interest which they had authorized them to join in a suit as plaintiffs to restrain the nuisance. The same principle is announced in the case of *Jeffers v. Forbes*, 28 Kan. 179, where it is said that the owners of different tracts of land may unite in a single action to abate a common nuisance.

The next point is that the findings do not sustain the judgment that was rendered; and that depends on whether the plaintiffs would suffer an injury special and peculiar to themselves by the threatened nuisance, and also whether the defendant railway company had any authority or right to construct a railroad in front of their premises. The findings of fact made by the court, which have been stated, and need no repetition, sufficiently show, we think, that the injury resulting from the obstruction of the street is one that is special and peculiar to the plaintiffs below, and independent of and different from the general injury to the public. The railway company, however, had no right to occupy the street, or construct a railroad on the proposed route. While the fee of the streets is in the county, the control of the same in the interest of the public is placed in the city, and, before street railways can be built or operated, the privilege must be obtained from the city authorities. *Railway Co. v. Railway Co.*, 31 Kan. 661, 3 Pac. Rep. 284; 2 Dill. Mun. Corp. § 724. It appears that in December, 1881, the mayor and council of the city of Atchison by ordinance granted to the Atchison Street-Railway Company the right to build on the street in question at any time within six months from the taking effect of the ordinance. It seems that this privilege was not used, and in May, 1882, another ordinance was passed by the mayor and council, authorizing the company to occupy the street, and build its railway, at any time within six months after the taking effect of that ordinance; and by both ordinances it was provided that, if the company was interrupted or hindered by an action at

law or judicial proceedings, the time of such hindrance or interruption should not be deemed a part of the period in which the company was allowed the privilege of constructing its road. The company did not avail itself of the privilege granted by either ordinance, and it was not hindered or prevented from so doing by any judicial or other proceeding. The case therefore stands, so far as the road in question is concerned, as if no authority to occupy the street had ever been granted to the company. The contention that the privilege granted by the ordinances remains until a forfeiture is declared is not sound. The permission conferred by the city council was for a limited time, and when that time expired the privilege no longer existed. The grant is not an irrevocable one which continues indefinitely, to be accepted or rejected at the option of the company. The consent of the city council to occupy the street is a mere license, and, until the company has availed itself of the license, no contractual obligation or relation arises which requires a judicial declaration of forfeiture. Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires the license lapses, and no revocation is needed to terminate the same. The railway company, or licensee, cannot thereafter occupy the street, or build its road thereon, without a new permission from the city authorities. *Railroad Co. v. Railroad Co.*, 63 Tex. 529, 26 Amer. & Eng. R. Cas. 114; *City of Detroit v. Railway Co.*, 37 Mich. 558. As the railway company had no authority whatever to build the proposed road, some of the questions discussed become unimportant so far as this controversy is concerned, and need not be determined here. The judgment of the district court will be affirmed.

HORTON, C. J., concurring

VALENTINE, J. Believing that the first proposition contained in the syllabus, and the corresponding portion of the opinion, comes clearly within the principles enunciated by a majority of this court in the case of *Palmer v. Waddell*, 22 Kan. 352, I concur, although, as an original proposition, I think it is at least doubtful. As to the remainder of the syllabus and the opinion I fully concur.

(38 Kan. 768)

WARREN v. JOHNSON *et ux.*

(*Supreme Court of Kansas. March 10, 1888.*)

1. USURY—PAYMENTS IN EXCESS OF 12 PER CENT.—APPLICATION TO PRINCIPAL.

Under section 3, c. 51, Comp. Laws 1885, all payments of money made by way of usurious interest, or of inducement to contract for more than 12 per cent. per annum, whether made in advance or not, must be deemed and taken to be payments on account of the principal and 12 per cent. interest per annum.

2. CONTRACTS—CONSIDERATION IMPORTED, WHEN.

All contracts in writing, signed by the party bound thereby, import a consideration.

3. INTEREST—ON NOTE—AGREEMENT FOR REDUCED RATE—VALIDITY.

Where the payee and owner of a promissory note, bearing upon its face interest at 12 per cent. per annum, enters into a written agreement with the maker of the note to take only 8 per cent. interest per annum from a specified date; and it is not shown that the agreement is without consideration, or induced by fraud: *held*, that the note should draw interest at 8 per cent. per annum only from the specified date, in accordance with the terms of the written agreement.

(*Syllabus by the Court.*)

Error to district court, Jefferson county; R. CROZIER, Judge.

*Keeler & Gephart*, for plaintiff in error. *J. B. Johnson*, for defendants in error.

HORTON, C. J. On September 13, 1873, Mead loaned the Johnsons \$1,000, for three years, at 20 per cent. per annum interest. For and upon this loan

he took from them one note of \$1,000 due in three years, with 12 per cent. per annum interest, payable annually, and also three notes of \$80 each, due in one, two, and three years, respectively, with interest after maturity at 12 per cent. per annum. These three notes were given for the excess of interest over 12 per cent. per annum. In 1878-79 these three notes were taken up on payment of \$80 for each. Commencing in 1878, payments were made from time to time, and indorsed on the \$1,000 note. On March 26, 1884, Mead wrote a letter to the Johnsons, saying that he would take from them only 8 per cent. per annum interest, after September 13, 1881. He said in the letter, "Cast all interest of the note at 8 per cent. since September 13, 1881." In computing the amount due on the note and mortgage sued on, the district court computed interest on the \$1,000 note at 12 per cent. per annum, from its date to February 9, 1878, that being the date of the payment of the first \$80 note. It then subtracted \$80 from the result, and counted interest on the amount remaining, from that date to the time when the second \$80 note was paid, and subtracted as before. The same rule was followed with regard to the last \$80 note. From November 3, 1879, the date when the last \$80 note was paid, interest was counted on the amount remaining at 12 per cent. per annum, to September 13, 1881; from the last-named date to the judgment, May 28, 1885, it was counted at 8 per cent. per annum.

The only contention in the case is as to the rate of interest since September 13, 1881. The district court allowed only 8 per cent. per annum. The plaintiff claims the proper rate to be 12 per cent. The statute in force at the time of this transaction, and at the time the judgment was rendered, reads: "All payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal and twelve per cent. interest per annum; and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid." Section 3, c. 51, Comp. Laws 1885. Prior to September 13, 1881, under this statute, only 12 per cent. interest per annum could be recovered upon the note. If the letter written by Mead on March 26, 1884, to J. R. Johnson can be considered, then the court, in accordance with its terms, properly allowed interest at the rate of 8 per cent. per annum from September 13, 1881. It is said, however, that the promise to reduce the interest was without consideration; and, therefore, not binding; hence, that Warren, as administrator, was entitled to recover interest at the rate of 12 per cent. The letter stated that Mead had received Johnson's letter of the 15th of March, 1884. The contents of the letter of March 15th are not stated. We may assume that the letter of March 26th was an acceptance of its terms; and, therefore, the final agreement of the parties. This is supported by the following clause of the letter: "Keep this, and claim it at that per cent., if any one should settle it but me." The defendants, in their answer, set up the agreement to reduce the interest to 8 per cent., and to this answer the plaintiff filed a general denial only. It is not stated or alleged that the agreement was induced by fraud, or was without consideration. All agreements in writing import consideration; and, upon the pleadings and findings, we cannot say that the written promise or agreement was without consideration. The court below allowed interest in accordance with the terms of the letter. In the case of *Dudley v. Reynolds*, 1 Kan. 285, referred to, the agreement was in parol, not in writing; therefore, in that case, there was no consideration for the promise that the note should draw a rate of interest less than that specified. The judgment of the district court will be affirmed.

All the justices concurring.

v.17p.no.6—38

(38 Kan. 702)

SWIGGETT v. DODSON *et al.*

(Supreme Court of Kansas. March 10, 1888.)

## 1. CHATTEL MORTGAGES—VALIDITY—CHANGE OF POSSESSION.

Where a chattel mortgage is executed, and the mortgagee takes the actual possession of the mortgaged property, and afterwards places it in the actual possession, care, custody, and control of the mortgagor, as the agent and clerk of the mortgagee, *held*, that there has not been such "an actual and continued change of possession" of the mortgaged property as is required by statute to support the validity of a chattel mortgage, as against the creditors of the mortgagor, and that the mortgage, in such a case, would be void, where its validity depended upon a change of the possession of the mortgaged property.

## 2. SAME—WHEN VALID AS AGAINST CREDITORS.

A chattel mortgage becomes valid, as against the creditors of the mortgagor, only when the mortgagee takes the actual possession of the mortgaged property, or when the mortgage, or a copy thereof, is deposited with the register of deeds.

## 3. SAME—RECORDING—RENEWAL—POSSESSION.

A chattel mortgage deposited with the register of deeds remains valid, as against creditors of the mortgagor, for only one year, unless, within thirty days prior to the termination of the year, a renewal affidavit is filed with the register of deeds, or unless the mortgagee has taken the actual possession of the mortgaged property.

## 4. SAME—FAILURE TO RENEW—POSSESSION BY MORTGAGOR.

Where a chattel mortgage is deposited with the register of deeds, and at the expiration of one year thereafter the mortgagor is in the actual possession and control of the mortgaged property and no renewal affidavit has been filed with the register of deeds, *held*, that the mortgage is void, as against the creditors of the mortgagor, although they may have knowledge that the mortgage has not been fully discharged or satisfied, and may know that the mortgagor holds the possession of the mortgaged property as the agent of the mortgagee.

JOHNSTON, J., dissenting.

(Syllabus by the Court.)

Error to district court, Butler county; T. B. WALL, Judge.

On November 1, 1884, and prior thereto, Andrew Swiggett was engaged in business in the village of Towanda, Butler county, Kan., as a retail dealer in general merchandise. He was also largely indebted to various persons and firms, including George Swiggett, his father, and the two firms of W. W. Johnston & Co., of Wichita, and Patterson, Bell & Co., of Kansas City, Mo. On that day, by virtue of an instrument in writing, executed by himself and his father and the two firms aforesaid, he conveyed all his property kept and used in his said business to the aforesaid firms, to be again sold by them at retail in the ordinary course of trade, and the proceeds thereof to be applied by them in a particular way for the payments of his debts to his father, and to them, and to other creditors. Immediately thereafter, the aforesaid firms took the possession of the property, and put Charles Johnston, as their representative, in the possession thereof, and also employed Andrew Swiggett as a clerk, and the business was carried on by Charles Johnston and Andrew Swiggett in the same manner as it had been carried on before. About 17 days afterwards, Charles Johnston retired from the business, and surrendered his possession of the property to Percy Longley; another representative of the above-mentioned firms, and the business was still carried on in the same manner as it had been carried on before. On February 11, 1885, the aforesaid instrument in writing was deposited with the register of deeds as a chattel mortgage. On February 12, 1885, Longley retired from the business, and Andrew Swiggett was placed in the entire possession and control of the property, and from that time on he had the sole care, custody, management, and control of the property as the agent and general manager of the aforesaid firms and their assignee, he having given bond to them for the faithful discharge of his duties as such agent and general manager, and the business was carried on in precisely the same manner as it had been carried on prior to the transfer of the goods and business by Andrew Swiggett to said firms.



The goods remained in the same building. No signs were changed. The sign on the outside of the building, reading, "A. Swiggett, Cheap Cash Corner," still remained, and this was the only sign on the building. No change was made in the books. The goods were still sold at retail in the ordinary course of trade, in the same manner that they had previously been sold, and precisely as though Andrew Swiggett had been the sole and actual owner thereof. No change was made in the manner of keeping the books, and when new goods were purchased they were purchased in the name of Andrew Swiggett, and paid for in his name, and they were intermingled with the old stock of goods, just as new goods were intermingled with the old stock prior to the execution of the said written instrument. About December 31, 1885, the said firms assigned the aforesaid instrument to George Swiggett; but George Swiggett never took the possession or the control of the goods, and the business was carried on just as it had been before. On February 11, 1886, a year had elapsed since the filing of the aforesaid instrument, and no affidavit of the kind required by section 11 of the act relating to mortgages (Comp. Laws 1885, c. 68, art. 2, § 11) had been filed, nor was such an affidavit ever filed. On April 10, 1886, H. T. Dodson, as the sheriff of Butler county, levied an execution upon a portion of said goods, which said execution was issued in an action in which Morris Barbee and Martin Barbee, partners as Barbee Bros., were the judgment creditors, and Andrew Swiggett was the judgment debtor, and Dodson, together with E. T. Beeson as his assistant, separated the goods levied upon from the others, and took the possession of those levied on. On April 14, 1886, George Swiggett commenced this present action, which is an action of replevin against H. T. Dodson and E. T. Beeson, to recover the aforesaid goods levied upon by Dodson. On September 28, 1886, the case was tried before the court and a jury, and the plaintiff introduced evidence tending to show the foregoing facts, and rested his case; whereupon the defendants demurred to the evidence, upon the ground that it did not prove facts sufficient to constitute a cause of action; and the court sustained the demurrer, and rendered judgment in favor of the defendants, and against the plaintiff, for the return of the property, or, if that could not be had, then for the value thereof, to-wit, \$1,604.58. To reverse this judgment, George Swiggett, as plaintiff in error, brings the case to this court, making Dodson and Beeson defendants in error.

*C. A. Leland*, for plaintiff in error. *Hamilton & Cubbison*, for defendant in error.

VALENTINE, J., (*after stating the facts as above.*) The first and principal question presented to this court is whether the court below erred or not in sustaining a demurrer to the plaintiff's evidence; and this question depends for its solution upon the further question whether a certain instrument in writing, executed by Andrew Swiggett and his father, George Swiggett, and the two firms of W. W. Johnston & Co., of Wichita, and Patterson, Bell & Co., of Kansas City, Mo., purporting to transfer to the aforesaid firms Andrew Swiggett's general stock of merchandise, is a valid instrument or not. If this instrument was valid on April 10, 1886, when the defendants in this action took the possession of the goods in controversy,—the goods supposed to be conveyed by this instrument,—then the ruling of the court below was erroneous; but, if the instrument was void at that time, then the ruling of the court below is correct. The parties to this action treat the instrument as though it were a chattel mortgage; and probably they correctly so treat it. If it were considered as an assignment for the benefit of creditors, then it would be void, under the provisions of the statutes relating to voluntary assignments for the benefit of creditors. Comp. Laws 1885, c. 6. It would be void in that case for the reason that it was not executed in accordance with the provisions of such statutes. If, however, it be considered as a chattel mortgage,

it may be valid or it may be void, depending upon the other circumstances of this case. It was executed on November 1, 1884; the said two firms took the possession of the property purporting to be transferred by it about November 3, 1884; and the instrument was deposited with the register of deeds on February 11, 1885. If the instrument be treated as a chattel mortgage, executed in good faith,—and we shall so treat it,—then it became valid as soon as the two firms aforesaid obtained the possession of the goods under it. *Cameron v. Marvin*, 26 Kan. 612, 625, and cases there cited; *Dolan v. Van Demark*, 35 Kan. 305, 308, 10 Pac. Rep. 848, and cases there cited; *Isenberg v. Fansler*, 36 Kan. 402, 13 Pac. Rep. 573. And although Andrew Swiggett afterwards, and on February 12, 1885, took the actual and the absolute possession of the property, and continued to hold the possession thereof until April 10, 1886, when the defendants in this action took the possession thereof, still the instrument remained valid up to February 11, 1885; for on February 11, 1885, the day before Andrew Swiggett took such possession, the instrument was deposited with the register of deeds as a chattel mortgage. Comp. Laws 1885, c. 68, art. 2, §§ 9, 11. The real question, then, for us to consider, is whether the aforesaid instrument was valid or void after February 11, 1886, and up to and including April 10, 1886, when the defendants in this action levied upon and took the possession of the property. There is no claim, nor even a pretense, that any renewal affidavit was ever filed for the purpose of keeping the instrument alive as a chattel mortgage, as required by section 11 of the act relating to mortgages, (Comp. Laws 1885, c. 68, art. 2, § 11;) nor any claim that any evidence was introduced tending to show that Barbee Bros., the judgment creditors, at whose instance the defendants levied upon and took the possession of the goods in controversy, had any knowledge that the debts, for the security of which the instrument was executed, had not been paid or satisfied, or that the plaintiff had, or claimed to have, any interest in or possession of the goods. Of course, if the instrument was a chattel mortgage,—and we shall treat it as such,—and if the holder of the mortgage, the plaintiff in this action, had the actual possession of the mortgaged property on April 10, 1886, when the defendants in this action took the possession thereof, then the instrument was valid, and the holder thereof, the plaintiff, had a right to the property, and the court below erred in sustaining the demurrer to his evidence. See the cases above cited, and also *Dayton v. Bank*, 23 Kan. 421. But was the holder of the chattel mortgage, the plaintiff in this action, George Swiggett, in the actual possession of the supposed mortgaged property at that time? Certainly, Andrew Swiggett was in the actual possession of the property at that time; and George Swiggett was not in the possession thereof at all, except by virtue of Andrew Swiggett's possession. But, as claimed, Andrew Swiggett was George Swiggett's agent, and as a general rule the actual possession of property by an agent is constructively the actual possession of the property by the principal. But this rule cannot always apply. It has its exceptions. It does not apply where personal property is mortgaged, and the mortgagee permits the mortgagor, who is, in equity, still the owner of the property, although the legal title thereto has passed from him to the mortgagee, to retain the possession of the property, or afterwards to take the possession thereof as the agent of the mortgagee; and especially not, where the mortgagor holds the property and uses it as his own, and where there is nothing in or about the property, or appertaining thereto, to inform other persons that any change of interest in or to the property has taken place. *McCarthy v. Grace*, 23 Minn. 182; *Doyle v. Stevens*, 4 Mich. 87; *Brunswick v. McClay*, 7 Neb. 137; *Grant v. Lewis*, 14 Wis. 487; *Menzies v. Dodd*, 19 Wis. 343. Schouler, Pers. Prop. 544. Under the statutes, a chattel mortgage deposited with the register of deeds continues in force only for one year, unless a renewal affidavit is filed with the register of deeds, or unless "an actual and continued change of possession" of the mortgaged property takes place. Now, "an actual and continued change

of possession" does not take place unless the actual possession passes from the mortgagor, and does not return to him. Of course, under the rules of agency, a principal may constructively have an actual possession of property in the actual possession only of his agent, and generally such an actual possession would be sufficient; but it is not sufficient in cases of chattel mortgages, where the agent holding the property is also the mortgagor, and where the principal is also the mortgagee, and where there is nothing to show, and it is not shown, that the agent and mortgagor is not the full, complete, and absolute owner of the mortgaged property. The statutes require not only a change, but a continued change, of the possession of the property. But if the mortgagor holds the actual possession, whether as agent or otherwise, there cannot be any such continued change of possession. A person having the actual possession of property by himself has the entire possession; and there cannot well be a stronger possession, nor much room for another actual possession. An actual possession by another, as by an agent, is, after all, only a constructive possession; and that kind of possession, where the person having it is the mortgagor of the property, does not meet the requirements of the statutes. Of course, the burden of proof in this case rested upon the plaintiff to show that the actual possession of the property was in himself, and not in the mortgagor. The burden of proof is generally upon the plaintiff in replevin, as this case is; and it is also upon him from the nature of the case. Whenever a person claims under a chattel mortgage, the burden of proof is upon him to show such an actual and continued change of possession or other facts as would render the mortgage valid. *McCarthy v. Grace*, 23 Minn. 182. And a constructive possession, in such a case, would not answer the purpose of an actual possession. *Crandall v. Brown*, 18 Hun, 461. We think the court below did not err in sustaining the demurrer to the plaintiff's evidence.

But it is claimed by the plaintiff that the court below erred in excluding certain evidence. Andrew Swiggett was introduced by the plaintiff as a witness. The plaintiff's counsel examined him with reference to various matters; and, so far as it is necessary to quote, the record shows as follows: "Question. I would ask whether or not the representatives of Barbee Brothers, the execution creditors in this case, have not been duly cognizant of all these steps as they have been taken, of your own knowledge,—whether you have not informed them? (Defendants object, as irrelevant, immaterial, and incompetent. Objection sustained, to which the plaintiff excepts.) Q. I would ask whether or not you are acquainted with Ed. McLean. Answer. I am. Q. I would ask whether or not he was here, and talked with you concerning the rights and claims of the Barbee Brothers, the plaintiffs in this execution, after the time this triple agreement had been made. (Defendants object, as immaterial and irrelevant. Objection sustained, to which plaintiff excepts.)" The record also shows as follows: "(1) [The plaintiff's counsel] offer to prove that I, as attorney for George Swiggett, notified the agent, and also the attorney, of the Barbee Brothers, that Patterson, Bell & Company and W. W. Johnston & Company desired to retain Swiggett—Andy—as their clerk or agent, and wished him to give bond for the performance of his duties as such agent; and told them—that is, the agents of Barbee Brothers—that, if they didn't like that arrangement, 'now is the time to kick, if at all,' and they didn't, and made no objections to his giving bond, and acting as such agent. (Defendants object to the evidence. Objection sustained, and exception noted by plaintiff to the ruling of the court.)" Who the supposed "representatives of Barbee Brothers" were is not shown; but probably they were the defendants in this action, the officer and his assistant, who levied upon and took the possession of the goods in controversy. Also who Ed. McLean was, or why the defendants in this action should be bound by what he said, is not shown. Also who the agent or agents and the attorney of Barbee Brothers

ers were at a time more than one year before this action was commenced, and prior to the time when Andrew Swiggett took the possession of the goods in controversy as the agent and clerk of the two firms of Patterson, Bell & Co. and W. W. Johnston & Co., and at a time when the supposed chattel mortgage was unquestionably valid, is not shown. And what right any of the aforesaid representatives or agents or the attorney of Barbee Bros. had to bind Barbee Bros. by anything which any one of them may have said or done is not shown. Neither is the nature or character of the supposed duties or powers of any one of these representatives, agents, or attorney disclosed or made known. From anything appearing in the case, the supposed representatives or agents or attorney of Barbee Bros. may have had no power to represent Barbee Bros., or to bind them with reference to anything connected with the subject-matter of this action. And upon all these matters, as we have before stated, the plaintiff had the burden of proof. But why should the plaintiff offer evidence of any notice to the representatives, agents, or attorney of Barbee Bros., or of anything which the Barbee Bros. may have done, or refrained from doing, which might tend to show a notice or a waiver of notice prior to February 11, 1886? It is admitted that the chattel mortgage was valid up to and including that time; and Barbee Bros. are conclusively presumed to have known that fact, for the mortgage was filed with the register of deeds just one year before that time, which made it valid up to that time. Of course, up to that time Barbee Bros. could not take any action against the chattel mortgage, nor "kick" against its validity, with any hope of success. And to prove any notice to Barbee Bros., or to any one of their representatives, agents, or attorney, prior to that time, would be folly in the extreme. The only notice to Barbee Bros., or to any representative or agent or attorney of theirs, which could be of any value whatever, would be the affidavit provided for by section 11 of the act relating to mortgages, or some proper notice given to them, or their duly-authorized agents, subsequent to February 11, 1886; and such a notice as would in effect show them clearly that the chattel mortgage had not yet been paid, satisfied, or discharged. Now, is there any claim that any such notice as this was ever given to Barbee Bros., or to any representative, agent, or attorney of theirs who had any authority from Barbee Bros. to receive any such notice? Certainly not, unless it was the supposed notice to the aforesaid "representatives of Barbee Brothers." Now, as before stated, we suppose that "the representatives of Barbee Brothers" who are claimed to have had notice of the plaintiff's rights were the officer and his assistant who levied upon and took the possession of the goods in controversy; and, if so, then, according to the case of *McCarthy v. Grace*, 23 Minn. 183, the notice was not sufficient; for, according to that case, notice to the officer is not notice to the levying creditor. See, also, *Stowe v. Meserle*, 13 N. H. 46. But is not the mortgage void, even if all the parties, including the defendants and the Barbee Bros., and all their representatives, agents, and attorneys, had notice of the existence of the mortgage, and of all the rights which the plaintiff claims to have had under it? Sections 9 and 11 of the act relating to mortgages provide, among other things, as follows:

"Sec. 9. Every mortgage, or conveyance intended to operate as a mortgage, of personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited in the office of the register of deeds."

"Sec. 11. Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless 'a renewal affidavit is filed.'"

Of course, a subsequent purchaser or mortgagee cannot, "in good faith," be such, so as to defeat or avoid a prior chattel mortgage, unless he becomes such without notice of the existence of such mortgage; and hence a subsequent purchaser or mortgagee is bound by any knowledge which he may have concerning a prior chattel mortgage. *Ament v. Greer*, 37 Kan. 648, 16 Pac. Rep. 102. Whether this would also be true with respect to creditors who might become such, with knowledge of the existence of a prior chattel mortgage, it is unnecessary now to decide; yet the great weight of authority, under statutes similar to ours, would seem to be the other way. And certainly, in all cases where the mortgagor is in the possession of the mortgaged property, and where the mortgagee has failed to file his mortgage, or a renewal affidavit, with the register of deeds, and where creditors have become such without any knowledge of the existence of a prior valid chattel mortgage. The authorities are almost, if not entirely, unanimous in declaring, under statutes similar to ours, that the mortgage is wholly and entirely void; and this, although before such creditors have attempted to enforce their claims, or before they have attempted by execution or attachment levy to obtain any specific lien upon the mortgaged property, such creditors have received full and complete knowledge of the mortgage, and of the mortgagor's claims, and that the mortgage has not yet been satisfied or discharged. *Trust Co. v. Hendrickson*, 25 Barb. 484; *Stevens v. Railroad Co.*, 31 Barb. 590; *Williamson v. Railroad Co.*, 29 N. J. Eq. 312, 336; *Sayre v. Hewes*, 32 N. J. Eq. 652, 656; *Denny v. Lincoln*, 13 Metc. 200; *Travis v. Bishop*, Id. 304; *Bingham v. Jordan*, 1 Allen, 373; *Bryson v. Penix*, 18 Mo. 13; *Bevans v. Bolton*, 31 Mo. 437; *Selking v. Hebel*, 1 Mo. App. 340; *Rich v. Roberts*, 48 Me. 548; *Sheldon v. Conner*, Id. 584; *Lockwood v. Slevin*, 26 Ind. 124; *Gassner v. Patterson*, 23 Cal. 299; *Frank v. Miner*, 50 Ill. 444; *Sage v. Browning*, 51 Ill. 217; *Lemen v. Robinson*, 59 Ill. 115; *McDowell v. Stewart*, 83 Ill. 538; *Jones*, Chat. Mortg. §§ 314-318, and cases there cited. The foregoing authorities merely proclaim the doctrine that the statutes with reference to the subject now under consideration mean what they say. Our statute says that the mortgage "shall be absolutely void as against the creditors of the mortgagor," or "shall be void as against the creditors of the person making the same," unless the statute is complied with; and we think this statute means what it says. We think the mortgage in this case was void after February 11, 1886, without reference to any knowledge of or notice to the Barbee Bros., or their representatives, agents, or attorneys; and hence for this reason, as well as for others, the court below did not err in excluding the aforesaid evidence.

The plaintiff also claims that the court below erred in rendering judgment for \$1,604.58, the value of the property—*First*, because there was no evidence of the value of the property; *second*, because the judgment of Barbee Bros., with interest and costs, would not amount to that sum. Now, the plaintiff admitted and alleged in his petition that the property was worth \$2,797, and swore in his replevin affidavit that the property was worth that amount; hence it is immaterial whether there was any evidence of the value of the property or not, for the court below did not render judgment for as much as the plaintiff admitted the property to be worth. The other point is also immaterial and unimportant, under the facts of this case; and besides, we are inclined to think that the judgment of the court below was correct. *Hall v. Jenness*, 6 Kan. 356, 365, 366. This case was tried by the defendants upon the theory that the chattel mortgage was wholly and absolutely void as to them; and such was the case. And under that theory it is proper for them to account to Andrew Swiggett, from whom they took the goods, for any surplus remaining after paying Barbee Bros.' judgment. If such surplus, however, really belongs to George Swiggett, Andrew's father, Andrew can pay it to George, or permit the sheriff, Dodson, the principal defendant in this case, to do so. It will be the duty of the sheriff to pay it to whomso-

ever it may belong. If the evidence clearly showed that the judgment of the court below was erroneous in this respect, we could order a modification of the judgment without ordering a new trial. But the evidence does not clearly so show. The judgment of the court below will be affirmed.

HORTON, C. J., concurring.

JOHNSTON, J. In my view, there was testimony tending to establish that there was an immediate delivery of the mortgaged property, which was followed by an actual and continued change of possession; and therefore the case should not have been taken from the jury. I also think the court erred in excluding testimony offered by plaintiff.

(39 Kan. 21)

SUNDERLAND v. BELL.

(*Supreme Court of Kansas. March 10, 1888.*)

NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION—PURCHASER OF BAD TITLE.

The purchaser of town-lots, receiving a warranty deed therefor from one having no title, and taking possession of said lots, and retaining possession, and not ousted by any superior title, receives some consideration for a note and mortgage given on said lots to the grantor to secure a deferred payment, and there is not a total failure of consideration for said note.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Greenwood county; CHARLES B. GRAVES, Judge.

R. P. Kelley, for plaintiff in error. Peyton, Sanders & Peyton, for defendant in error.

SIMPSON, C. Action on note, and to foreclose a mortgage. The defense was want of consideration. The material facts are that, at the time when the legal title to certain lots in Bell's addition to the city of Severy was shown by the record to be in the defendant in error, Harriett Sunderland, the plaintiff in error, bought the lots from Mrs. Bell, taking a warranty deed for the same, paying \$50 cash, and executing her note, secured by a mortgage on the lots, for the balance. At the time of the purchase, an action was pending in the district court of Greenwood county, wherein one Price was claiming that he was entitled to a one-third interest in the whole addition, and, by an agreement with the Bells, that he was the owner of these particular lots. He had fenced them, and planted shade trees, and exercised some other acts of ownership. Before Mrs. Sunderland had bought the lots of Mrs. Bell, she had leased them from Price. There is a special finding that the plaintiff in error had actual notice, not only of the pendency of the Price suit, but that she knew, in a general way, the particular claim that Price had made to an interest in the addition, and that she bought with such notice and knowledge. There is also some evidence tending to show that, at the time of the purchase, Mrs. Sunderland said that she knew all about the claim of Price, that it did not amount to anything, and that she was satisfied with a warranty deed from Mrs. Bell. There is also a special finding that Mrs. Sunderland, ever since the purchase, has been in the continuous possession of the lots, and that she is now in possession. The action in the district court of Greenwood county was, subsequent to the purchase, decided in favor of Price, and he was adjudged to be the owner of the lots. The only defense pleaded to the note and mortgage was want of consideration. Damages for the breach of the covenants of seizin in the deed of Mrs. Bell were not claimed in the action. On this state of the pleadings, and in view of the facts proved on the trial, the court rendered a personal judgment against Mrs. Sunderland for the amount of the note, with interest, but did not render a decree for foreclosure.

A motion for a new trial was filed, which we suppose, from the general statement of it, was based upon all the statutory grounds, and it was overruled. The motion is not given in the record, and we are left to search the whole of it, to see whether or not there is discernible error in overruling an indiscernible motion; but there is no error that is so prejudicial as to justify reversal. In the strict legal view, the judgment is right, and must be affirmed. Under the circumstances of this particular case, there was some consideration for the note and mortgage. Of course, there was a failure of title; but there has been no eviction, and continued possession is some consideration. This is not a case in which there is a total failure of consideration. It is said in the brief of counsel for plaintiff in error that she can recover for the breach of the covenants; but the trouble is that she has not asked any affirmative relief in the answer. It is recommended that the judgment be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(39 Kan. 23)

**TOPEKA MANUF'G CO. v. HALE.**

(*Supreme Court of Kansas. March 10, 1888.*)

**1. CORPORATIONS—SUBSCRIPTION FOR STOCK—INCONSISTENT PAROL AGREEMENT.**

A parol agreement, made at the time of subscribing for stock, and inconsistent with the written terms of a subscription, is immaterial, incompetent, and void.

**2. SAME—AGREEMENT TO PAY ASSESSMENTS.**

An agreement to pay assessments on the stock contained in the book of subscription, and signed by the party sought to be charged, will bind him, notwithstanding some verbal understanding or agreement that some other member of the corporation will release such party from such stock and liability.

**3. SAME—CANCELLATION OF STOCK.**

Where it is claimed by a stockholder that the stock held by him had been canceled, but no resolution or minute is adopted by the board of directors, and no record thereof is made; and where it is further shown that the stockholder continued to act as an officer of said company after such claim of cancellation: *held*, the question of a cancellation under such circumstances is a fact to be found by the court, and a finding on such question is conclusive.<sup>1</sup>

**4. SAME—TRANSFER—VALIDITY.**

To make a valid transfer of stock in a corporation, the transfer must be made on the books of the corporation.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

This was an action brought by George D. Hale, assignee of the Capital Iron Works, against the Topeka Manufacturing Company, to recover the sum of \$6,464.58, alleged to be due the plaintiff, and upon which claim judgment was rendered against the defendant on the 8th day of September, 1885, in the district court of Shawnee county for the full amount thereof; and afterwards, on the 12th day of September, an execution was issued in due form on said judgment, on which the sheriff afterwards made return that no property could be found whereon to levy said execution. Afterwards a motion was filed for an execution to issue against R. M. Mills, as a stockholder of said corporation, under the provisions of section 32, art. 4, c. 23, Comp. Laws 1885, which motion was heard on the 11th day of January, 1886, and was by the court sustained. The court made special findings of fact and conclusions of law, which are as follows: "(1) For the plaintiff generally, and against R. M. Mills. (2) That said plaintiff did, on the 8th day of September, 1885, recover in this court a judgment against said defendant, the Topeka Manufacturing Company, a corporation organized and existing under the laws of the state of Kansas, for the sum of \$6,800, and the sum of \$8.50 as costs, and which said

<sup>1</sup> See note at end of case.

judgment is wholly unpaid; that on the 8th day of September, 1885, an execution was issued against the property and effects of said defendant directed to the sheriff of the county of Shawnee, in the state of Kansas, upon said judgment, and that said execution was on the 8th day of September, 1885, returned by said sheriff wholly unsatisfied, and stating and certifying that there could not be found any property, real or personal, whereon to levy said execution. (3) That said R. M. Mills is and has ever been since the 1st day of July, 1883, a stockholder of the said defendant, the Topeka Manufacturing Company, and owned, and now owns, ten shares of its capital stock, of the par value of one hundred dollars per share, and aggregating the sum of one thousand dollars, upon which he has paid the sum of one hundred and fifty dollars, leaving unpaid thereon the amount of eight hundred and fifty dollars. (4) That the said defendant, the Topeka Manufacturing Company, is a corporation organized and existing under the laws of the state of Kansas, and is neither a railway, religious, nor a charitable corporation. (5) That the said defendant, the Topeka Manufacturing Company, at the time said judgment was rendered was, and ever since has been, insolvent." Upon said findings an execution was ordered issued against said R. M. Mills for the sum of \$1,850, the balance due on the stock, and for the face value of said stock; and to reverse said findings of fact and conclusions of law, said R. M. Mills brings the case here.

*J. S. Ensminger*, for plaintiff in error. *John T. Morton*, for defendant in error.

CLOGSTON, C., (*after stating the facts as above.*) The correctness of the judgment of the court below depends upon the question whether or not Mills was a stockholder of the Topeka Manufacturing Company at the time of the contracting of the debts and the rendition of this judgment. If he was, then this judgment is correct. It is claimed by the plaintiff in error, and the evidence on his part tends to establish that fact, that some time after the organization of the Topeka Manufacturing Company, trouble arose between some of its officers and its president, and that plaintiff was induced to become a stockholder in the company for the purpose of being elected president of the company, and that for such purpose he subscribed for 10 shares, of the value each of \$100, of the capital stock, which subscription upon its face shows such subscription to have been unconditional; and after such subscription he was duly elected president of said corporation, and continued to act as such president until the 29th day of December, 1883. He alleges and claims that at the time of making said subscription there was a verbal understanding between himself and some members of the company that he should be relieved of his stock after the difficulties were settled in the company, and that he paid on said stock and subscription but \$150, being the first installment due thereon; that he was notified to pay the remainder of said stock, which he refused to do, and afterwards his stock was canceled. He also claims that he afterwards turned over his receipt for the money so paid to Mr. Bean, a stockholder in said company, and that Bean paid him \$150 for his interest. The testimony of the secretary of the company shows substantially that no written notice was ever served upon the plaintiff in error notifying him to pay in the remainder of his assessments, or that his stock had been canceled, but does show that at some meeting of the directors of the company Mills was present, and by some mutual understanding it was agreed that Mills might turn over his interest to Bean, and that his stock might then be canceled; but no record was made of this understanding, and in fact no resolution or motion was made to that effect. It was also shown that the corporation was at that time, and ever since has been, insolvent. Plaintiff's *first* claim is that his subscription to said capital stock was conditional; and, *second*, if not conditional, then it was canceled by his failure to pay the amount due on said subscription; and,



*third*, if not so canceled, then by the consent of the directors his stock was transferred to Bean, and he was released from liability. It further appears that the indebtedness upon which this judgment was obtained and execution issued was contracted after said claim of transfer of said stock from Mills to Bean.

We are of the opinion that the claim of the plaintiff is not well taken. The stock books of the company, which were offered in evidence, showed clearly that the subscription was made unconditionally. He subscribed for 10 shares of the stock, and agreed to pay the amount due on said subscription to the company. No qualification is attached to it, and no mere understanding, in fact no action of the board of directors, could cancel this subscription, or change its effect, or release the plaintiff from liability, except for non-payment. The power to release from liability as a stockholder can only be exercised by the stockholders, or by the directors of a company by the authority of the stockholders; and nothing of that kind was shown in this case. The evidence shows that there was no cancellation. No record of any such transaction was shown to exist; and while it is claimed on the one hand that there was a mutual agreement that the stock should be canceled, yet, after that, we find plaintiff attempting to transfer whatever interest he may have had to Bean, and claims himself that Bean paid him \$150, the amount paid on said stock by him. This, then, shows that plaintiff did not understand that this stock was canceled by reason of non-payment. If it was canceled for non-payment, the amount paid in on the stock would have become the property of the company, and neither Mills nor the directors of the company could have transferred or given credit of that sum to any one else, and any contract or arrangement of that kind by which it was to be transferred to Bean, after it was canceled, would be *ultra vires*.

Then, was there a transfer? The statute provides how stock may be transferred, and that it can only be done upon the books of the company. Now, there is no pretense in this case that a transfer on the books of the company had ever been made. The stock in fact was never issued, and no transfer or the right to receive the stock is shown by the record to have been transferred to anybody. What arrangement Mills may have had with Bean was a matter between themselves. Mills could have directed that the stock be issued to Bean, if he wished to, but that would not have released him. Bean may have agreed to release Mills by the payment of this \$150. That was a contract between themselves. Bean may be liable on that contract to Mills; but if he is, that would not protect Mills in this action. We are therefore of the opinion that the findings of fact by the court are sustained by the evidence. It was a question of fact to be found by the court, and his findings of fact upon the evidence are conclusive. We therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### NOTE.

**CORPORATIONS—UNPAID STOCK.** The acceptance of a certificate of stock not fully and actually paid up, *ipso facto* obligates the holder to make up its par value, if the duty of the corporation to its creditors requires it, *McKim v. Glenn*, (Md.) 8 Atl. Rep. 130; *Glenn v. Scott*, 28 Fed. Rep. 804; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Flinn v. Bagley*, 7 Fed. Rep. 785; *Jackson v. Traer*, (Iowa,) 20 N. W. Rep. 764; *Lee v. Market Co.*, (Or.) 11 Pac. Rep. 270; although he originally agreed to take the stock as fully paid up, *Flinn v. Bagley*, *supra*; *Jackson v. Traer*, *supra*.

No subsequent release of the original contract or subscription, by the corporation, will avail against the claims of creditors. *Flinn v. Bagley*, 7 Fed. Rep. 785. An assignment to a corporation, by a subscriber to the capital stock, of part of his shares, in payment of an assessment, and an acceptance of such transfer by the board of directors, are *ultra vires*, and void as against a trustee of the company under a deed of assignment for the benefit of corporate creditors. *Glenn v. Scott*, 28 Fed. Rep. 804. Any secret arrangement between the corporation and its stockholders, by which the responsibility

of the latter is made less than it appears to be, is void as against creditors. *Thompson v. Bank*, (Nev.) 7 Pac. Rep. 68.

It is immaterial whether stock was to be paid for in money or by conveyance of property, as the subscriber is, in any event, liable to the creditors of the corporation, under Code Iowa, § 1082, to the extent of his subscription. *Chisholm v. Forny*, (Iowa,) 21 N. W. Rep. 664; *Singer v. Given*, (Iowa,) 15 N. W. Rep. 858. Stockholders who pay for their stock by the transfer of a worthless patent remain liable to creditors. *Chisholm v. Forny*, *supra*. Under the laws of *Wisconsin*, prohibiting the issue of stock unless fully paid, either in money, or in labor or property estimated at its true money value, a contract pursuant to which a party was to pay for stock at 50 cents on the dollar, and be appointed general manager of the company, at a salary of \$2,000 a year, is void. *Clarke v. Lumber Co.*, 18 N. W. Rep. 492. Where of the whole \$500,000 of capital the stockholders paid in \$1,000 in cash, and \$10,000 in land, a *prima facie* case is made, leaving the stockholders liable for judgments upon indebtedness contracted during their respective holdings, if the proceedings were commenced and the judgment obtained within the time limited by the statute. *Grindle v. Stone*, (Me.) 9 Atl. Rep. 183.

It has been held that a corporation free from indebtedness has the power to issue fully paid up stock to its stockholders in consideration of partly paid stock, and the surrender of accumulated profits, and that neither the corporation nor its subsequent creditors with notice can disturb such arrangement. In re *Insurance Co.*, 14 Fed. Rep. 28; *Coit v. Amalgamating Co.*, Id. 12; *Manufacturing Co. v. McAlpin*, 5 Fed. Rep. 737. But as to debts existing at the time of that arrangement, it would be void; and would not bar an action at law by the corporation against the stockholders to recover the unpaid 50 per cent. of their subscriptions. *Manufacturing Co. v. McAlpin*, 5 Fed. Rep. 737; In re *Insurance Co.*, 14 Fed. Rep. 28. Where a corporation was embarrassed, and, for the purpose of raising funds, agreed to sell additional stock at what was then the market value of the original stock, held, that the assignee in bankruptcy could compel the payment of the difference between such market value and the par value. *Flinn v. Bagley*, 7 Fed. Rep. 785. The Burlington, Cedar Rapids & Minnesota Railway Company, being indebted to a construction company on a contract under which it had coconstructed the road, as a compromise of the claim transferred to the construction company certain shares of stock, at 20 per cent. of its face value, in full settlement of the claim, and the shares were distributed among the members of the construction company. Held, that the members of the construction company could be held liable as stockholders of the railroad company for the unpaid balance of the stock so received. *Jackson v. Traer*, (Iowa,) 20 N. W. Rep. 764. Overruling *Bank v. Traer*, 16 N. W. Rep. 120.

Although the California constitution provides that no corporation shall issue stock, except for money paid, labor done, or property actually received, and all fictitious increase of stock shall be void, an increase of the capital stock of a company, and sale of such stock at the actual market value, for the purpose of enlarging the works and capacity, and supplying an increased quantity of water, is legitimate, authorized, and not a "fictitious" issue. *Stein v. Howard*, (Cal.) 4 Pac. Rep. 662.

In *California*, a corporation formed for the business of mining, smelting, reducing, refining, and working ores and minerals, etc., may sell at less than par value, shares of capital stock purporting to be fully paid, and, if there be no fraud, the creditors of the corporation have no recourse, against the purchasers or holders of such stock, for the difference between the par value and the price at which they were sold. In re *Mining Co.*, 14 Fed. Rep. 347, 5 Fed. Rep. 403.

So, also, in *Minnesota*. *Ross v. Mining Co.*, 29 N. W. Rep. 591.

A creditor who has obtained a judgment against a corporation, and is unable to realize thereon upon execution, may file a bill in equity against stockholders to subject the unpaid balance due on their subscriptions to the stock of the corporation. *Patterson v. Lynde*, 1 Sup. Ct. Rep. 432; *Bell's Appeal*, (Pa.) 8 Atl. Rep. 177; *Cornell's Appeal*, (Pa.) 6 Atl. Rep. 258; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Bissit v. Navigation Co.*, 15 Fed. Rep. 353; *Queenan v. Palmer*, (Ill.) 7 N. E. Rep. 613; *Brundage v. Mining Co.*, (Or.) 7 Pac. Rep. 314; *Thompson v. Bank*, (Nev.) Id. 68. It has been held that no one creditor can sue for himself alone, but, when a stockholder is sued, it must be in a way to put what he pays directly or indirectly into the treasury of the corporation, for distribution according to law, *Patterson v. Lynde*, 1 Sup. Ct. Rep. 432; and inasmuch as only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and that can be done only when all the other assets are exhausted, an account should be taken of the amount of debts, assets, and unpaid capital, and a decree be made for an assessment of the amount due by each stockholder. *Bell's Appeal*, (Pa.) 8 Atl. Rep. 177. But it is not a fatal defect that not all creditors are joined as plaintiffs, nor all stockholders as defendants. *Cornell's Appeal*, *supra*. The creditor may sue for himself and such others as may join. *Holmes v. Sherwood*, *supra*; *Brundage v. Mining Co.*, *supra*. Where there are stockholders beyond the jurisdiction, the stockholders sued must look to them for contribution. *Holmes v. Sherwood*, *supra*. And it is said that, as the obligation of a subscriber to stock of a corporation is several, and not joint, he may be sued by a creditor of the corporation for the amount of his unpaid subscription, and, if he holds himself aggrieved thereby, he must seek his remedy as against the other stockholders in default like himself. *Brundage v. Mining Co.*, *supra*; *Thompson v. Bank*, *supra*. A party who is at once a creditor and a subscriber to the stock of a cor-

poration, must, upon failure of the company, pay up the amount of his unpaid subscription. He can then participate in the fund ratably with the other creditors. *Thompson v. Bank*, (Nev.) 7 Pac. Rep. 68; and where it is his judgment which is sought to be enforced, he must contribute *pari passu* with the defendant stockholders towards the liquidation of the demand against the corporation. *Bissitt v. Navigation Co.*, 15 Fed. Rep. 358.

But it has also been said that such unpaid subscriptions may be reached by garnishment or attachment. In *re Iron Works*, 20 Fed. Rep. 674, 17 Fed. Rep. 324; *Faull v. Mining Co.*, 14 Fed. Rep. 657; *McKelvey v. Crockett*, (Nev.) 2 Pac. Rep. 386. But until due by the terms of the charter or by-laws, or called in by assessment, or until the insolvency of the corporation, they are only equitable assets, and cannot be reached by an action at law. *McKelvey v. Crockett*, *supra*.

Respecting when the statute of limitations begins to run against the liability of stockholders, see *Bank v. Bridges*, (Pa.) 8 Atl. Rep. 611; *Glenn v. Priest*, 28 Fed. Rep. 907, 24 Fed. Rep. 536, 23 Fed. Rep. 606; *Glenn v. Saxton*, (Cal.) 9 Pac. Rep. 420; *Bank v. Greene*, (Iowa,) 17 N. W. Rep. 86, 20 N. W. Rep. 754.

See, also, *Glenn v. Clabaugh*, (Md.) 3 Atl. Rep. 902; *Glenn v. Howard*, Id. 895; *State v. Timken*, (N. J.) 2 Atl. Rep. 783; *Glenn v. Walker*, 27 Fed. Rep. 577.

(38 Kan. 732)

DEATHERAGE *et al.* v. BURKDALL *et al.*

(Supreme Court of Kansas. March 10, 1888.)

1. APPEAL—REVIEW OF EVIDENCE.

Before the supreme court can consider the question as to whether the verdict of a jury or the findings of a court are against the evidence or not, it must be shown affirmatively in some manner that the record contains all the evidence.

2. SAME—EVIDENCE NOT ALL IN RECORD.

Where the record, with respect to the evidence, states as follows: "The plaintiffs offered evidence tending to prove the following facts," then a statement of certain facts follows, and then the statement concludes as follows: "and thereupon, the same being submitted to the court, the court found," etc.,—*held*, that it is not shown that the record contains all the evidence.

(*Syllabus by the Court.*)

Error to district court, Osage county; R. B. SPILMAN, Judge.

*Botsford & Williams*, for plaintiffs in error. *Hazen & Isenhardt*, for defendants in error.

VALENTINE, J. The judgment of the court below in this case must be affirmed. Whether the court below erred or not in any of its rulings depends entirely upon whether it erred or not in its general findings of fact, and that question, as we think, is not fairly presented to this court, for the reason that it does not appear that the record brought to this court contains all the evidence upon which such findings were made, or all the evidence introduced on the trial in the court below. In any case, before the supreme court can consider the question as to whether the verdict of a jury or the findings of a court are against the evidence or not, it must be shown affirmatively in some manner that the record contains all the evidence. *Cooper v. Armstrong*, 4 Kan. 30; *Turner v. Hale*, 8 Kan. 38; *Moody v. Arthur*, 16 Kan. 419; *Greenwood v. Bean*, 20 Kan. 240; *Winstead v. Standeford*, 21 Kan. 270; *Murray v. Kelley*, 23 Kan. 666; *Pritchard v. Madren*, 31 Kan. 38, 2 Pac. Rep. 691; *Walker v. Braden*, 34 Kan. 661, 9 Pac. Rep. 613. The case of *Dewey v. Linscott*, 20 Kan. 684, is not in conflict with the cases above cited, nor does it aid the plaintiffs in error in this case. The record in the present case, with respect to the evidence, states as follows: "The plaintiffs offered evidence tending to prove the following facts;" then a statement of certain facts follows, and then the statement concludes as follows: "And thereupon, the same being submitted to the court, the court found," etc. This certainly does not show that the record contains all the evidence in the case. Indeed, it does not show that it contains any of the evidence. It is simply a recital that the plaintiffs offered evidence tending to prove certain facts. But how much other evidence was introduced, or how little, is not shown, and the evidence itself is not given. Neither is it shown how many other facts, or how few were proved.

From anything appearing in the record there may have been other evidence introduced of an overwhelming character and amount tending to disprove all the facts which the plaintiffs' evidence tended to prove; and many other facts than those mentioned in the record may have been incontestably proved. The court below found generally only, making no special findings of either fact or law, and hence we cannot tell what particular facts were either approved or disapproved. From the record as it is brought to this court we cannot say that the court below committed any error, and therefore its judgment will be affirmed.

All the justices concurring.

(38 Kan. 714)

STATE v. TILNEY.

(*Supreme Court of Kansas. March 10, 1888.*)

LARCENY—INFORMATION—DESCRIPTION OF PROPERTY STOLEN.

An information for larceny, where the only description of the property stolen is "national bank notes, United States treasury notes, and United States silver certificates, money, of the amount and value of one thousand dollars," without any allegation of the inability of the prosecutor to give a more specific description, is insufficient, and will be held bad on an objection seasonably made.

(*Syllabus by the Court.*)

Appeal from Marshall county.

*S. B. Bradford*, Atty. Gen., and *Edward A. Berry*, for appellee. *J. G. Lowe*, *Cal. T. Mann*, and *J. A. Broughten*, for appellant.

JOHNSTON, J. In August, 1887, Robert Tilney was convicted on a charge of larceny, and sentenced to confinement at hard labor in the state penitentiary for a term of four years. The information on which the conviction rests, charges that he "did then and there unlawfully and feloniously steal, take, and carry away national bank notes, United States treasury notes, and United States silver certificates, money, of the amount and value of one thousand dollars." It was contended in the trial court, and the same point is here made, that the information is fatally defective, in not describing the money alleged to have been stolen with sufficient certainty. This point was raised at different stages of the prosecution: *First*, by a motion to quash the information; *second*, by an objection to the introduction of testimony; and, *finally*, by motion in arrest of judgment,—each of which was overruled, and exceptions taken. It will be observed that three kinds of money are charged to have been stolen; but the number, denomination, or amount of each kind, or of any of the notes or certificates, is not stated. No reason is stated for the meager and indefinite description given; nor is there any statement of inability on the part of the prosecution to give a more particular description of the money claimed to have been stolen. We cannot hold the information to be sufficient. While the Criminal Code of our state has relaxed somewhat the common-law rules respecting matters of form in criminal pleading, still in matters of substance there has been practically no change. The constitution ordains that in all prosecutions the accused is entitled to demand the nature and cause of the accusation against him; and section 104 of the Criminal Code enacts that "the indictment or information must be direct and certain, as it regards the party, and the offense charged." In a prosecution for larceny a definite description of the property stolen is important and necessary, in order that the court may determine whether that which is imputed against the defendant amounts to a crime, and whether it has jurisdiction of the same; and also to inform the defendant of the precise charge, and enable him to prepare for his defense; and, further, to enable the court to properly pronounce judgment, and to make that judgment available as a bar to any subsequent prosecution or conviction of the defendant for the stealing of the same property. These requirements are not satisfied by the general description that

was given in the present case. The rules of law and fairness to the accused require that as definite a description as the nature of the property stolen will admit of should be given; and, where the grand jury or prosecutor is unable to give a definite description, the fact should be stated.

In *People v. Ball*, 14 Cal. 101, an indictment for larceny, describing the money as "\$3,000 lawful money of the United States," was held to be insufficient. The court remarked that "in an indictment for larceny money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, according to the facts." In a prosecution for larceny in Michigan the information described the property as "\$135 of the property, goods, and chattels of John C. Connell," and gave no excuse for the want of greater particularity. The court held that, by the well-settled principles of common-law pleading, the defendant was entitled in fairness to either a statement of the kind, denomination, and number of the pieces, notes, or bills claimed to have been stolen, or to an allegation of some excuse for the omission, and held the information to be fatally defective. *Mervin v. People*, 26 Mich. 298. The supreme court of Kentucky held an indictment to be insufficient which charged that the defendants took and carried away "one lot of treasury notes called 'Greenbacks,' the issue of the treasury of the United States of America, and one lot of Kentucky bank notes, and fifteen dollars in gold coin." In deciding the case, the court stated that "a minute description of all the treasury and bank notes might be impossible, and therefore is not required; but a nearer approach to it than this indictment makes may be presumed to have been easy, and ought to have been required." *Rhodus v. Com.*, 2 Duv. 159. An indictment which described the property as "sundry pieces of silver coin made current by law, usage, and custom within the state of Alabama, amounting together to the sum of \$530.15," was held not to describe the money with sufficient precision, and it was said that the number and denomination of the coin should have been stated. *State v. Murphy*, 6 Ala. 845. In *Stewart v. Com.*, 4 Serg. & R. 194, the indictment charged the larceny of sundry promissory notes, amounting to the sum of \$80, and the judgment of conviction was reversed because of an insufficient description. In *State v. Longbottoms*, 11 Humph. 39, the indictment for larceny charged the defendant with having stolen "ten dollars in good and lawful money of the state of Tennessee." It was held that this was an insufficient description of the thing stolen, and that the money should be described as so many pieces of current gold or silver coin, and the appropriate name of the coin given. Under a statute which declares that a person who obtains by false pretenses money or property which may be the subject of larceny shall be deemed guilty of larceny, an indictment framed, which describes the property as "\$90 in United States currency," was held to be insufficient to sustain a conviction. *Leftwich v. Com.*, 20 Grat. 716. Mr. Bishop, in treating of this subject, referred to a case where the money stolen was described as "sixty dollars of the current gold coin of the United States," and the description was upheld by interpreting it to mean 60 one-dollar gold pieces; but that eminent author remarked that "this is pushing the rule to construe ambiguities in a way sustaining the indictment quite as far as, in reason, it will bear. On the other hand, simply to describe the subject of the larceny as so many dollars, or so many dollars in money, without further particularization, is, by all, deemed ill." 2 Bish. Crim. Proc. § 703. See, also, *Barton v. State*, 29 Ark. 68; *Merrill v. State*, 45 Miss. 651; *Crocker v. State*, 47 Ala. 53; *Brown v. People*, 29 Mich. 232; *State v. Hinckley*, 4 Minn. 345. (Gil. 261.) The same doctrine is recognized in *State v. Henry*, 24 Kan. 457. There the defendant was charged by information with stealing "national bank currency and United States treasury notes of the amount and value of \$164." No question was raised about the sufficiency of the charge until after a trial, when a motion in arrest of judgment was made. The charge was considered to be very in-

definite and defective; but it was held that the defendant was too late with his objection, and that he could not take chances of an acquittal upon the merits of the action, and then object to the information for not stating the offense in as definite terms as it might have done. In *State v. McNulty*, 26 Kan. 533, the sufficiency of a description of coin alleged to have been stolen was challenged. The information alleged the larceny of sundry silver coins, current as money in the state of Kansas, of the aggregate value of \$50, and gave the denomination of most of the coins stolen; ending with an averment that "a more particular description of any and all of such money cannot be given, as informant has no means of obtaining such knowledge." With this description, coupled with the allegation of inability to give a better description, it was held that the information was not fatally defective. The court remarked that "where the indictment or information states the collective value of coins stolen, and the denomination of a portion thereof, and states that a more particular description cannot be given for want of sufficient knowledge, we are of the opinion that upon a verdict of guilty, stating the value of the property stolen, a verdict may be legally rendered." It is true that there are cases holding indefinite descriptions to be adequate; but those to which our attention has been called were decided under statutes which dispensed with greater particularity in describing the money stolen, or where the best description available to the prosecution was given, coupled with an averment that a more particular description could not be given. In order to prevent a failure of justice, considerable latitude should be allowed in charging the larceny of money; because where a parcel of money, consisting of a great number of notes or coins, is stolen, and has not been recovered, the owner will generally be unable to specify the bills and coins taken with legal certainty. In such cases, however, the charge should contain as particular a description as the prosecutor can give; and, if it is then indefinite, he should allege his inability to give a more particular one as an excuse for the omission. *People v. Taylor*, 3 Denio, 91; 2 Bish. Crim. Proc. § 705. It cannot be said of this case that the objection of the defendant came too late, for he questioned the sufficiency of the charge at the first opportunity, and on every proper occasion. Nor was there any averment here that a more particular description of the money could not be stated; and, indeed, under the theory of the prosecution, such an averment could not have been truthfully made. It is claimed by the state, and testimony was offered to prove, that certain money found on the person of the defendant when arrested was that which was stolen; and one witness testified that three or four of the notes so found, amounting to \$70 or \$80, are the very ones which were feloniously taken. All of the money so found and identified has been under the control of the prosecution since the arrest of the defendant, and before the filing of the information. It would seem, therefore, that an accurate description of the money so found and identified might have been alleged; and hence no good reason appears for the failure to give a specific description of the property stolen, or at least a portion of the same; and, if the description of a part was unknown, an allegation of that fact would be a sufficient excuse for the omission.

In view of all these considerations, the information must be held insufficient, and therefore there must be a reversal of the judgment.

All the justices concurring.

(4 N. M. [Gild.] 649)

POTTER v. RIO ARRIBA L. & C. Co. *et al.*

(Supreme Court of New Mexico. January Term, 1888.)

## SPECIFIC PERFORMANCE — AGAINST ALIEN — CONTRACT ENTERED INTO PRIOR TO PROHIBITORY ACT.

Act of congress approved March 3, 1887, passed for the purpose of restricting the ownership of lands in the territories to American citizens, providing for the forfeiture of lands thereafter acquired by aliens, is not a defense to an action brought for the specific performance of a contract for the sale of land to an alien corporation entered into prior to the passage of such act, the corporation not subjecting its lands to forfeiture by perfecting its equitable title. REEVES, J., dissenting.

Error to the district court, Rio Arriba county.

J. G. Potter filed a petition against the Rio Arriba Land & Cattle Company, and another to compel the specific performance of a contract. On hearing the petition was dismissed for want of equity, and plaintiff assigns error.

*Catron, Knaeble & Clancy*, for plaintiff in error.

Specific performance cannot be claimed if the effect would be that the defendant would forfeit the property. *Hepburn v. Dunlop*, 1 Wheat. 198; *Orr v. Hodgson*, 4 Wheat. 465. Act of congress approved March 3, 1887, does not act retrospectively. Courts will never give a law a retrospective operation unless the legislative intent that the law shall be retroactive clearly appears. *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. Rep. 255; *Twenty Per Cent. Cases*, 20 Wall. 187; *U. S. v. Heth*, 3 Cranch, 399; *Sohn v. Waterson*, 17 Wall. 596; *Murray v. Gibson*, 15 How. 421; *U. S. v. Kirby*, 7 Wall. 482; *Couch v. McKee*, 6 Ark. 493. The act of congress merely puts aliens on a footing with aliens at common law. *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603; *Leazure v. Hillegas*, 7 Serg. & R. 319; *Goundie v. Water Co.*, 7 Pa. St. 239; *Bank v. Matthews*, 98 U. S. 628; *Trust Co. v. McKinney*, 6 McLean, 5; *Runyan v. Lessees of Carter*, 14 Pet. 131; *Gouverneur's Heirs v. Robertson*, 11 Wheat. 332. Courts of equity have never shown a disposition to extend the disabilities of alienage, and hence aliens owning debts secured by mortgages on real estate have been protected, and corporations have the same rights as natural persons. *Taylor v. Carpenter*, 2 Woodb. & M. 14; *Hughes v. Edwards*, 9 Wheat. 489, 497; *Neilson v. Lagow*, 12 How. 107; *Taylor v. Benham*, 5 How. 233; *Antice v. Brown*, 6 Paige, 448; *Marx v. McGlynn*, 88 N. Y. 357. In a contract for the sale of land the vendee is at once, in equity, treated as the owner of the land. 2 Story, Eq. Jur. § 1212; *Craig v. Leslie*, 3 Wheat. 577; *Peter v. Beverly*, 10 Pet. 532; *Lewis v. Hawkins*, 23 Wall. 125; *Boone v. Chiles*, 10 Pet. 180; *Hepburn v. Dunlop*, 1 Wheat. 179. Courts will regard fractions of a day, where the several acts were done on the same day. *Burgess v. Salmon*, 97 U. S. 381; *Louisville v. Bank*, 104 U. S. 469. If the alien act is to be construed so as to prevent the present lawful and safe vesting of estates previously contracted to be conveyed, it must be deemed to operate as a repeal of existing covenants. 1 Add. Cont. § 327; *Touteng v. Hubbard*, 3 Bos. & P. 291; *Odlin v. Insurance Co.*, 2 Wash. C. C. 312, 321. The same spirit which inspired the clause in the constitution prohibiting the states from passing acts impairing the obligation of contracts should prevail in construing this act. *Fletcher v. Peck*, 6 Cranch, 137; *Thruston v. Peay*, 21 Ark. 90; *Parcel v. Barnes*, 25 Ark. 265; *Jacoway v. Denton*, Id. 625.

*Henry S. Waldo and Geo. W. Knaeble*, for defendants in error.

HENDERSON, J. The plaintiff in error, John Gerald Potter, an alien, having been for many years the owner in fee of certain lands in the county of Rio Arriba, N. M., entered into negotiations for their sale, which were pending prior to March 3, 1887, which resulted in the formation of an English joint-

stock company called the "Rio Arriba Land & Cattle Company, Limited," and the execution and delivery of a contract dated March 3, 1887, between the said John Gerald Potter of the first part, the said company of the second part, and Valentine Walbran Chapman of the third part, providing for the acquisition by the said company from the said John Gerald Potter of the said lands, as well as of certain personal property and his beneficial interest in a certain leasehold, whereof the legal title was vested in the said Valentine Walbran Chapman, and providing for a relinquishment of said leasehold interest by the said Valentine Walbran Chapman to the said company, and containing the covenant of the said company to pay to the said John Gerald Potter the consideration of £110,000 in its corporate shares of stock, or in cash in the manner set forth in the contract recited at large in the bill of complaint. This contract was duly executed several hours before the alien act became a law by the approval of the president, although on the same day. All the parties, as appears by the pleadings in the case, are satisfied with the bargain and contract as the same stood under the laws in force when the contract was solemnized; but the company alleges that the alien act is an obstacle to the performance of the contract on its part, and although the plaintiff in error has performed, or tendered performance, on his part, and demanded the purchase money or consideration, the company refuses to perform on the pretense that, if it should acquire the legal title to the land in question, it could not hold the property without danger of its forfeiture at the suit or by the act of the United States. The bill is for specific performance of the contract against the other parties. The defendant, Valentine Walbran Chapman, by his answer, disclaims any adverse interest, and submitted himself to the will of the court. The defendant company, by its answer, admitted all the facts set up in the bill, but set up the alien act and its provisions as ground for resisting in equity the assertion of any claim against it for specific performance. The cause was submitted to the district court for the county of Rio Arriba, on the bill and the answers, the only issue being whether the provisions of the alien act would, upon the facts alleged in the pleadings, subject the real estate so contracted to be conveyed to forfeiture in the hands of the defendant company in case it should accept the legal title in performance of the contract. The district court dismissed the bill for want of equity, and to reverse its decree the complainant below sued out the present writ of error. Plaintiff in error assigns the following errors: (1) The district court erred in dismissing the said bill of complaint. (2) The district court erred in its opinion that the complainant below was not entitled to the relief prayed in and by his said bill. (3) The district court erred in its opinion and decision that the act of congress certified in the pleadings restricted and prohibited the performance of the contract in the said bill set forth. (4) The district court erred in refusing to grant the relief prayed in and by the said bill. Defendant admits that the plaintiff in error is entitled to a specific performance of the contract in question, unless the defendant corporation by accepting the legal title would be exposed thereby to forfeiture of the estate thus purchased, by force and effect of the act of congress approved March 3, 1887, entitled "An act to restrict the ownership of real estate in the territories to American citizens, etc." The plaintiff in error, in like manner, admits that upon equitable principles, he cannot demand specific performance if the result would be so disastrous to the corporation. The only question, therefore, presented by this record is the true construction of the alien act as applied to the case made by the pleadings. That act is as follows:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled:

"Section 1. That it shall be unlawful for any person or persons, not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws



of the United States, or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States, or in the District of Columbia, except such as may be acquired by inheritance, or in good faith, in the ordinary course of justice in the collection of debts heretofore created: provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer.

"Sec. 2. That no corporation or association, more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the territories of the United States, or of the District of Columbia.

"Sec. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes, shall acquire, hold, or own more than 5,000 acres of land in any of the territories of the United States; and no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any territory other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of congress. But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

"Sec. 4. That all property acquired, held, or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the attorney general to enforce every such forfeiture by bill in equity, or other proper process. And, in any suit or proceeding that may be commenced to enforce the provisions of this act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States, or of the parties concerned in any such proceeding, arising out of the matters in this act mentioned."

The defendant corporation is an alien company, and within the prohibitions contained in the act of congress, and complainant, Potter, and defendant Chapman are alien subjects of Great Britain. It is conceded on both sides that the defendant corporation is not within any of the expressed provisos or exceptions contained in the statute. The naked question, therefore, for our consideration is, does the act of congress above recited, when construed with reference to the true intent and purpose of that body in its enactment, apply to executory contracts under which equitable titles acquired in good faith, prior to the passage of the act, in such manner as to prevent the parties from converting equitable into legal estates, and to deny to the courts the right to compel the performance of contract obligations by specific performance? It is not denied that congress has power to impair even vested rights, where the purpose and intention clearly expressed is to that effect. Whatever, therefore, that intention was, if clearly expressed, must be carried out. By the first section of the act it is declared to be unlawful for any person or persons, not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States, or in the District of Columbia, except such as may be acquired by inheritance, or in good faith in the ordinary course of justice in the collection of debts heretofore created, provided that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the Union is secured by existing

treaties. The second section denies to corporations the right to hold or hereafter acquire any real estate within the territories or the District of Columbia where more than 20 per centum of the stock of such corporation shall be owned by aliens. The third section limits purchases by corporations other than such as are organized for the operation or construction of railways, canals, and turnpikes, to 5,000 acres, except grants heretofore made to such corporations by congress; but the prohibition of the section does not affect the title to any land lawfully held by any such corporation at the date of the passage of the act. The fourth section declares that all property acquired, held, or owned in violation of the provisions of the act shall be forfeited to the United States, and it shall be the duty of the attorney general to enforce every such forfeiture by bill in equity, or other proper process. It is conceded by counsel for defendant in error that, under the laws of congress and this territory, at the date of the execution of the contract an alien had a right to acquire, hold, and own real estate in New Mexico. It is further admitted that the contract between the parties was duly made and executed prior to the approval of the alien act by the president. Defendant does not resist a specific performance of the contract except upon the ground of an apprehended forfeiture should it accept a title. The contract was executed several hours before the president approved the act, and in a case like this fractions of a day will be considered. *In re Richardson*, 2 Story, 571; *Burgess v. Salmon*, 97 U. S. 381; *Louisville v. Bank*, 104 U. S. 469.

It is our duty to examine the act in question, and ascertain therefrom the objects and purposes had in view by congress in its enactment, and to give it effect as intended, regardless of consequences, provided such intention is clearly manifested by the language employed, or follows as a necessary implication from the language and the purposes intended to be accomplished by the act. The real intention of the law-making power must govern in the interpretation of an act. The duty of a court is performed by exploring an act of legislation, and gathering from all of its provisions the real purpose in the mind of the enacting body, and, if within its power to pass, to carry out such purpose. Keeping this well-understood principle of interpretation in mind, let us inquire into the real object and purpose of this alien act. Its purpose, as expressed in the title, was and is to restrict the ownership of lands in the territories of the United States to American citizens. The principal motive inducing the enactment was the prevention of citizens and subjects of other countries from hereafter acquiring real estate in the territories. It was the policy of the act to preserve the land within its control for the use of American citizens. To accomplish this purpose an inhibition was placed upon alien acquisition in the future, and in order to insure the enforcement of this policy, the attorney general was commanded to institute legal proceedings, by bill in equity or other process, to enforce a forfeiture of such estates conveyed in violation of its terms. It is declared to be unlawful for aliens "to hereafter acquire, hold, or own real estate so hereafter acquired." There is nothing in the act that even suggests the idea that congress intended to destroy, or even impair, either legal or equitable titles acquired prior to the passage of the act. The act does not in express terms apply to existing titles to lands, nor is there any reason deducible from the terms employed to justify the conclusion that congress intended to impair or render valueless executory contracts under which equitable estates had matured or vested. This much is in effect admitted by counsel for defendant in error, but they contend that it was the clearly expressed purpose of the law-making power to arrest and suspend the execution of further titles, or the acquisition of further interests in lands, in the territories. To convert an equitable estate into a legal one is, in fact, to acquire an additional or different quality of estate, it is true, but it has none of the elements of an entirely new estate. The language used to designate the estates upon which the forfeiture would take effect shows that the estate

must be acquired after the passage of the act. If A. holds an equitable estate in possession, and has paid the purchase price, neither the vendor nor the United States can disturb his possession, or impeach his title. His right to the possession came from a valid and lawful contract of purchase, and his payment of the purchase money discharged all his covenants with the grantor. The grantor could never recall the possession. The United States could not insist upon a forfeiture, and yet, if the intention of congress was to cut off alien rights, or prevent executory contracts of purchase, valid when made, from ripening into legal estates, by the operation of the statutes of limitation, some remedy should have been provided by which a forfeiture could have been enforced. Can we fairly and reasonably conclude that congress meant to say that one may enjoy forever his estate if it be legal in quality, but an equitable one, although protected so long as it remains purely of that class? Yet the identical estate, the instant it is merged in a legal title, comes within the mischief of the statute, and under the condemnation of the law? This would be, as we think, against the spirit and reason of the act itself, without invoking the aid of equitable fictions to protect the legal estate from forfeiture. The act forbids future purchases. To "acquire" means to gain something, and that something, within the true intent and meaning of the act of congress, is a new estate or interest in lands, not the addition of a legal, to an already existing equitable, title. It could not aid the policy of the act, or further the interests of American citizens, by refusing the right to make perfect and absolute in form a title protected against interference or invasion from either the vendor or the government. The estate would continue in the hands of the alien whether he held under the legal or equitable title. By doing what is demanded by the bill in this case the court would only execute a valid and perfectly lawful contract by its decree. It would not violate the policy of the law, because that policy is to take effect and operate only on future purchases or holdings. Congress clearly intended to guard and protect existing contract rights.

In *Chew Heong v. U. S.*, 112 U. S. 559, 5 Sup. Ct. Rep. 255, in construing an act of congress prescribing the certificate which shall be produced by Chinese laborers as the only evidence permitting them to establish a right of re-entry into the United States, it was held that its provisions in this respect were not applicable to a certain class of Chinese laborers, although the statutory phraseology was literally sufficient to apply to that class, as well as others. The class in question was held under the protection of a prior treaty, and, notwithstanding the conceded powers of congress to enact laws in contravention of a treaty, the court refused to imply such an intent, and in effect disregarded the literal wording of the statute, under the presumption—*First*, that the treaty provision was not designed to be abrogated; and, *second*, that retrospective legislation was not intended. The court said: "We have stated the main reasons which, in our opinion, forbid that interpretation of the act of congress. To these may be added the further one that the courts uniformly refuse to give to statutes retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *U. S. v. Heth*, 3 Cranch, 398, 413, this court said that 'words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied, and is the settled doctrine of this court.' *Murray v. Gibson*, 15 How. 421, 423; *McEwen v. Den*, 24 How. 242, 244; *Harvey v. Tyler*, 2 Wall. 328, 347; *Sohn v. Waterson*, 17 Wall. 596, 599; *Twenty Per Cent. Cases*, 20 Wall. 179, 187." In adopting the language of the court in *Chew Heong v. U. S.*, *supra*, in construing that act, we say of this, so far from the court being compelled by the language of the act of congress to give it a retrospective operation, the

plain, natural, and obvious meaning of the words, interpreted with reference to the general scope and the declared purpose of the statute, utterly forbids the conclusion that there was any intention to impair or destroy rights previously granted. In *Twenty Per Cent. Cases*, 20 Wall. 187, Mr. Justice CLIFFORD, in delivering the opinion of the court, said: "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared, or is to be necessarily implied, and pursuant to that rule courts will apply this statute only to future cases, unless there is something in the nature of the case, or in the language of the new provision which shows that they were to have a retroactive operation. Even though words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." Citing *Potter*, 1 Dwar. St. 161; *Wood v. Oakley*, 11 Paige, 403; *Butler v. Palmer*, 1 Hill. 325; *Jarvis v. Jarvis*, 3 Edw. Ch. 466; *McEwen v. Den*, 24 How. 242; *Harvey v. Tyler*, 2 Wall. 329; *Blanchard v. Sprague*, 3 Sum. 535; *U. S. v. Heth*, 3 Cranch, 399. On the 3d day of March, 1887, when the alien act became a law, the statute of this territory gave the unrestricted right to acquire real estate to aliens. See Comp. Laws, §§ 1851, 2614, 2746, 2748. Also *Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 352. On principle we see no reason for imputing to congress a greater degree of reluctance to impair rights derived under a treaty than for imputing to that body a like reason in favor of rights vested under contract or upon the faith of a prior statute. The principle of interpretation announced by the supreme court, as seen by the cases cited, has been adopted by state courts almost universally. In *Couch v. McKee*, 6 Ark. 493, Judge OLDFHAM said: "The great injustice of retrospective legislation has been frequently exposed by courts of justice, and their disapprobation of such laws has been expressed in the strongest language. We think it cannot be denied that the contract for the conveyance of the lands described in the bill was an existing contract, and conferred upon complainant a right of action in the courts, when the alien act became a law, and applying the language of the supreme court of the United States in the *Twenty Per Cent. Cases*, *supra*: "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with such existing contract, rights of actions, or with vested rights, unless the intention that it shall so co-operate, is expressly declared or is necessarily implied, and pursuant to that rule will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. And even though the words of the statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases which may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." There is nothing in the alien act nor in the nature of the case before us to show that the act was intended to have a retroactive operation, so as to cut off or in any way impair the right of complainant to have his equitable estate perfected into a legal one. This new statute was expressly designed to apply to future cases only and to alleged rights springing out of contracts of purchase made subsequent to the date of passage of the alien act. Should the alien act be construed so as to prevent the present lawful and safe vesting of estates previously contracted to be conveyed, it must be deemed to operate as a repeal of existing covenants. 1 Add. Cont. § 227; *Touteng v. Hubbard*, 3 Bos. & P. 291; *Odlin v. Insurance Co.*, 2 Wash. C. C. 312, 321, and in this view of the case the covenant must be deemed annulled by operation of law. As we have seen, no such intention can be gathered from the lan-

guage employed in the act. The facts in this case do not call for nor demand the application of the doctrine obtaining in equity in some cases to the effect that where a contract has been entered into for the purchase of real estate equity will convert the real estate into personalty for the purpose of avoiding either an escheat or forfeiture. As we think no forfeiture will be incurred by the acceptance of the deed by the grantee it is not necessary to invent a fiction or adopt a subtle line of reasoning to save the estate in the hands of the grantee.

We think the court below erred in dismissing complainant's bill. The decree of the court below will be reversed and a decree entered here awarding specific performance as prayed in and by complainant's bill, and it is so ordered.

LONG, C. J., and BRINKER, J., concurred.

REEVES, J., (*dissenting*.) The complainant, John Gerald Potter, a subject of Victoria, Queen of Great Britain and Ireland, etc., and a resident of the county of Middlesex, England, brings his bill of complaint against the Rio Arriba Land & Cattle Company, Limited, a corporation created and organized under the laws of the united kingdom of Great Britain and Ireland, having, as the bill alleges, a designated agent and place of business in the county of Rio Arriba and territory of New Mexico, and against Valentine Walbran Chapman, a resident of the county of Middlesex, England, defendants. The complainant avers ownership in certain lands in Rio Arriba county and territory of New Mexico, known as the "Rio Arriba Ranches," embracing about 270,000 acres of land, part of the San Joaquin del Rio de Chama grant; also a leasehold estate in or of said grant for grazing and pastoral purposes for 10 years, and claiming under said Valentine Walbran Chapman as his lessor. The complainant alleges the formation of a corporation bearing the name of the Rio Arriba Land & Cattle Company, Limited, on March 3, 1887, for the purpose, among other things, to acquire by purchase or lease the land and premises known as the "Rio Arriba Ranches," and to carry on the business of cattle breeding, and generally to deal in cattle and live-stock, and for other purposes; that after the incorporation of the Rio Arriba Land & Cattle Company, and on the 3d day of March, 1887, the complainant, John Gerald Potter, and the defendant the Rio Arriba Land & Cattle Company entered into a contract in writing for the sale and purchase of the said Rio Arriba ranches and of said leasehold estate and the live-stock, horses, farming implements, etc., on said ranches, to be paid for by the company, in the shares of the company, or the equivalent in cash, on the execution and delivery of deeds of conveyance, of the premises, etc., by the complainant, Potter, to the company on the terms specified in the contract. The complainant alleges his offer to comply with the contract on his part upon payment to him of the purchase money according to the contract. The complainant further alleges that the defendant company is ready and willing to perform the contract on its part if the complainant can make it a good and marketable title to said land and premises, but that the defendant company alleges that complainant is not able to make such title because of the act of congress of the United States, approved March 3, 1887, entitled "An act to restrict the ownership of real estate in the territories to American citizens, and so forth," and that the defendant company, as it alleges, is rendered incompetent to acquire the legal title to the said lands and premises, and the same would be in its hands, if it should perform the contract subject to forfeiture at the suit of the United States; whereas the complainant charges that he can make a good title to said property. The complainant further alleges that the defendant Chapman has no longer any interest in said land and premises nor leasehold estate, but that by the terms of the contract it is his duty to make and deliver to the Rio Ar-

riba Land & Cattle Company such further releases and assurances as may be required in behalf of the company; prays that the defendant company and said Chapman may be compelled by the decree of the court specifically to perform the contract with complainant. The bill of complaint was filed with the clerk November 1, 1887. On the same day the defendant Chapman and the defendant company, by their respective solicitors, entered their appearance, and made separate answers to the bill of complaint. Chapman disclaimed any interest in the property, and, admitting the complainant's allegations to be true, he answered that he was willing to execute any further assurance of title to the leasehold premises to the defendant company as the court may direct. The defendant company, by its answer, fully admits the complainant's allegations, and states its willingness to perform the contract on its part if the complainant can make a good and marketable title to said land and premises, but charges that the complainant is not able to make such title for the reasons stated in the bill of complaint, and declines, without the direction and command of the court, to perform on its part the contract. The parties, complainant and defendants, by their respective solicitors, stipulate in writing for the hearing of the cause upon the bill of complaint and the answers of the defendants. The question in this case is: Can the court grant the prayer of the complainant for a decree directing or compelling the defendants specifically to perform their contract with the complainant on the allegations of the bill and the answers in the cause. The complainant contends that an equitable estate was vested in the defendant company by its contract with the complainant on March 3, 1887, and that the company is not precluded by the act of congress of March 3, 1887, restricting the ownership of real estate in the territories to American citizens, from converting their equitable estate into a legal estate. A court of equity is as much bound by the common or statute law commanding or prohibiting a thing to be done as a court of law. The maxim that equity follows the law means that equity adopts the analogies furnished by the rules of law. The maxim that equity regards that as done which ought to have been done finds its application in cases of the equitable conversion of property, and where the act is not illegal, as where money is directed to be invested in lands in which case the money is treated as real estate in equity; or where land is contracted to be sold, it is treated in some cases as money. But this has no application to the case before the court. There is no authority to compel specific performance of the agreement while the act of congress is in force. *Baylies v. Fettyplace*, 7 Mass. 325, 337; *Harrington v. Dennie*, 13 Mass. 93, 94; *Church v. Mayor, etc.*, 5 Cow. 538; 2 Pars. Cont. 184-186, 564, 576. The general rule authorizing a decree for the specific performance of a contract is that the matter in controversy has some special value not capable of being compensated in damages, or it is the breach of a contract for which the law affords no adequate relief. The complainant alleges that the contract between himself and the defendant company was executed, and that the company was incorporated on the same day, (March 3d,) that the president approved said act of congress, but before its approval. It is not clear, from the allegations of the bill, whether the want of notice of the act of congress refers to the time when the contract was executed, and when the defendant was incorporated, or refers to the time while the negotiation between the parties was going on. The defendant company, in its answer, after admitting that the act of congress was not approved by the president until after the expiration of five hours subsequent to the making of the contract, alleges that arrangements for the incorporation of the defendant, in view of said contract, had been the subject of negotiation between the parties before any information had reached England or had come to the parties of the bill which resulted in said act of congress. If the want of notice was available for any purpose, it should have been averred that the contract was executed before the defendant, as well as the complainant, had notice of the act of congress. But it is not applicable

to this case, according to the well-known maxim that ignorance of law is not an excuse, and this applies as well in equity as in law. The covenants of the contract are mutual. The complainant offers to perform the contract on his part upon payment of the purchase money, and the defendant company is willing to perform the contract on its part if the complainant can make the company a good marketable title to the premises. Where there is equal equity, the court will not interpose on either side, but will leave the parties *in statu quo*. The act of congress so often referred to is entitled "An act to restrict the ownership of real estate in the territories to American citizens, and so forth." Approved March 3, 1887. By the first section of this act, and the one applicable to this case, it is provided that it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the district of Columbia, except such as may be acquired by inheritance or in good faith, in the ordinary course of justice in the collection of debts heretofore created: provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer." St. 2d Sess. 49th Cong. 1886-87, p. 476.

The parties to the suit, complainant and defendants and corporation, come within the class of persons and corporations prohibited by the act from acquiring real estate in the territories, unless they are within the exceptions of the act. The complainant, John Gerald Potter, and the defendant Valentine Walbran Chapman are aliens and residents of the county of Middlesex, England, and the defendant the Rio Arriba Land & Cattle Company is an alien corporation, created and organized under the laws of the united kingdom of Great Britain and Ireland. Evidently they do not come within the exceptions allowing aliens and alien corporations to acquire real estate by inheritance or in good faith, in the ordinary course of justice, in the collection of debts created before the passage of the act, nor within the class of cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries so long as the treaties are in force. By the second section of the act no corporation having more than 20 per centum of its stock owned by alien persons or alien corporations "shall hereafter acquire or hold or own any real estate hereafter acquired in any of the territories of the United States or of the District of Columbia." By section third of this act "No corporation, except for the construction or operation of railroads, canals, or turnpikes, shall hereafter acquire, hold, or own more than five thousand acres of land in any of the territories of the United States." To decree a conveyance of the real estate, thereby converting an equitable estate into a legal one, by virtue of the agreement between the parties for a title, would make an exception not made by the act of congress, and violate the provisions prohibiting alien corporations from acquiring real estate in the territories of the United States. The exceptions mentioned in the act of congress must be held to exclude all exceptions not expressed or necessarily implied. Corporations and natural persons acquire and hold property under different tenures. Corporations derive their powers to acquire and hold property from charters and acts of incorporation under legislative authority. For some purposes not necessary to be considered in this case, corporations are deemed persons. When the alien act became a law, the Rio Arriba ranches were not lawfully acquired or held by said company and corporation, and not excepted out of said act as real estate acquired be-

fore the passage of the act. A territorial legislature may create corporations, and prescribe the terms upon which they may do business or acquire property in the territory, subject to the control of congress. *Williams v. Bank*, 7 Wend. 539; *Riddick v. Amelin*, 1 Mo. 5; *University v. State*, 14 How. 268. The agreement between the complainant, Potter, and the defendant corporation was not made under the sanction of the laws of the territory of New Mexico, but in disregard of its laws. Section 218, Comp. Laws N. M., provides that "every company incorporated under the laws of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this territory, and now or hereafter doing business in this territory, shall file in the office of the secretary of this territory and in the office of the recorder of deeds of the county in which the principal place of business of such corporation shall be, a copy of its charter of incorporation; or in case such company is incorporated under any general incorporation law, a copy of its articles of incorporation, and of such general incorporation law, all duly certified by the proper authority of such foreign state, kingdom, or territory. Such company shall also, before it is authorized or permitted to do business in this territory, make and file with the secretary of the territory and in the office of the recorder of deeds of the county in which its principal place of business shall be, a certificate, signed by the president and secretary of such company, duly acknowledged, designating the principal place where the business of such company shall be carried on in this territory, and an authorized agent or agents residing at such principal place of business, upon whom process may be served, and such corporations shall have the same powers, and shall be subject to all the liabilities and duties as corporations of a like character organized under the general laws of this territory. But they shall have no other or greater powers, and no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this territory except as provided for in this act and the laws of the territory now existing. \* \* \*" It is not averred in the bill of complaint or otherwise shown that the copies and certificates mentioned in the above section of the statute have been filed with the secretary of the territory and clerk of the proper county as prerequisites before the company was authorized or permitted to do business in the territory. This statute, in express terms, provides that foreign corporations shall have the same powers and be subject to all the liabilities and duties of corporations of a like character organized under the general laws of the territory; but that they shall have no other or greater powers, and that no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members shall purchase or hold real estate in this territory except as provided in this act and the laws of the territory now existing. But what are the purposes for which corporations may be organized under the laws of this territory, and what are their powers, liabilities, and duties? Section 192, Compiled Laws of the territory, specifies the different purposes for which corporations may be organized in the territory, some of them for pecuniary profit of the stockholders and members of the company, others for benevolent, charitable, and scientific purposes, and still others of a different kind. By the following section (section 193) provision is made for the organization of domestic corporations, requiring the parties to make, sign, acknowledge, and record, in the proper office, a statement in writing setting forth the full names of the persons; the corporate name of the company; the objects for which the company shall be formed; the amount of its capital stock; the time of its existence, not to exceed 50 years; the number of shares of which the stock shall consist; the number of directors and their names; the name of the city or town and county in which the principal place of business of the company is to be located. Section 195 of the statute defines the powers conferred on domestic corporations, and among other powers to have succession for the



period limited with power "to purchase, hold, sell, mortgage, and convey such real and personal estate as the purposes of the corporation shall require." There is no mistaking the purposes of the Rio Arriba Land & Cattle Company as being a corporation for the pecuniary profit of its stockholders or members, as shown by the bill of complaint. The court can have no legal evidence of the corporate character of the defendant company nor of its powers, duties, and liabilities, without having the copies of the certificates, charters, and statutes certified by the secretary of the territory, or the originals as required by section 220, Comp. Laws, N. M. The agreement between the parties recites that the complainant, Potter, shall sell, and the company shall purchase, the Rio Arriba ranches, estimated to contain about 270,000 acres of land, and the buildings thereon, and live-stock, horses, etc., and followed by an averment in the bill of complaint that the company had purchased a herd of cattle and placed the same on the land and premises known as the "Rio Arriba Ranches." for corporate enjoyment and purposes. Was not the purchase of the land and cattle a positive violation of the laws of the territory, inhibiting foreign corporations from doing business in the territory, and from acquiring or holding property in the territory without having first complied with the statutes? Will the court decree specific performance of the agreement, thereby compelling the defendant corporation to accept a deed of conveyance, when such decree and deed will violate the laws of the territory? The statute authorizing bodies politic to convey their real estate must be construed in connection with the statute authorizing corporations to acquire and hold real estate. Comp. Laws N. M. §§ 218, 2748. To say that the statute authorizing aliens to acquire, hold, and sell real estate in the territory includes alien corporations, without any restriction on their powers, would be to lose sight of all distinctions between natural persons and corporations. Comp. Laws N. M. §§ 218, 2746. Their charters and acts of incorporation must define their powers, and not the general provisions of statutes relating to real estate and conveyances. Under the general rules for the construction of statutes, all on the same subject are construed together, and no one statute is to be rejected for the purpose of supporting another. Comp. Laws N. M. §§ 218, 1851, 2614.

Evidently the purpose of the parties was that the defendant corporation should acquire property and do business in the territory of New Mexico by virtue of its foreign charter or act of incorporation, without regarding the laws of the territory. They stipulate that the agreement shall be filed with the registrar of joint-stock companies, pursuant to the company's act, 1867, alleging in the bill that the agreement had been so filed. The complainant, Potter, agrees to give such covenants and conveyances as shall be in compliance with the conveyancing and law of property act 1881. The purchase was to be completed, the money paid, and deeds executed in the city of London. The transcript contains an agreement between the parties that the cause and all matters in controversy therein should be heard and finally determined upon the bill of complaint, and answers filed in the cause as hereinbefore stated, and a further agreement to omit from the printed record the exhibit referred to in the pleadings, the tenor and purport of the same being set forth in the pleadings according to the agreement. The duties and liabilities of the corporation, and the legal evidence of its existence, are not matters of privilege that litigants may dispense with and waive by agreement. It is not giving the statute a retrospective operation to refuse a decree for specific performance of an executory contract. Specific performance cannot be claimed as a vested right or right of any kind, but depends on the circumstances of each particular case. 2 Story, Eq. Jur. § 742. The statutes of this territory make no discrimination between foreign and domestic corporations as respects the right to acquire, hold, and dispose of their property. These statutes have been in force more than 20 years. No objection can be made as to the treatment of alien or foreign corporations that will not apply to domestic corpora-

tions. The legislation of the territory has always been liberal towards foreign corporations and foreign and alien persons in conferring the right to acquire, enjoy, and dispose of their property in the territory. In the case of the *Singer Manuf'g Co. v. Hardin*, 16 Pac. Rep. 605, decided at the present term of the court, section 218 of the Compiled Laws of the territory was upheld in most if not all of its provisions. In that case the court refers to and quotes from the case of *Paul v. Virginia*, 8 Wall. 168, as follows: "It affirms the right of a state or territory to name the conditions upon which a foreign corporation may enter the state and there exercise the corporate franchise and receive the recognition and protection of the local sovereignty," where the conditions do not constitute a transaction of commerce within the meaning of the constitution. This is further explained in the case of *Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826. In that case the court said: "As to those subjects of commerce which are local or limited in their nature or sphere of operation, the state may prescribe regulations until congress assumes control of them." Clearly the regulations prescribed by the territorial statutes relate to subjects which are local and limited to the territory, and not inconsistent with the commercial clause of the constitution.

I find no authority to change by a decree of the court the *status* of the property as it existed at the time the alien act became a law by vesting a different title in the defendant company, an alien corporation and thereby conferring a right to acquire and hold real estate in this territory by a different tenure contrary to the act of congress and the laws of the territory. On these grounds I think the complainant's bill ought to be dismissed.

(20 Nev. 122)

#### STATE v. CAMPBELL.

(*Supreme Court of Nevada. March 20, 1888.*)

##### 1. RAPE—EVIDENCE—CHARACTER OF PROSECUTRIX.

On a trial for rape, the court properly excluded evidence as to particular instances of unchastity on the part of the prosecutrix, not connected with the case on trial.

##### 2. SAME—STATEMENTS OF PROSECUTRIX.

On a trial for rape, it is error to admit evidence of the statements made by prosecutrix at the time of making complaint, her testimony not being attacked.

##### 3. EXCEPTIONS, BILL OF—SETTLEMENT AND SIGNING—WHAT IS SUFFICIENT.

Where the record on appeal does not show a settlement of the bill of exceptions, such fact will be presumed from the signature of the trial judge thereto attached.

##### 4. SAME—NECESSARY CONTENTS—EVIDENCE.

An objection, on appeal from a conviction for rape, that the verdict was against the evidence, cannot be considered where the bill of exceptions does not purport to contain all of the evidence submitted.

Appeal from district court, Ormsby county; RICHARD RISING, Judge.

Indictment for rape. Defendant, Campbell, was convicted, and appeals from the judgment, and from an order overruling his motion for a new trial.

*H. F. Bartine, T. D. Edwards, and J. R. Judge, for appellant. The Attorney General, for the State.*

**BELKNAP, J.** Defendant was convicted of the crime of rape. He appeals from the judgment and an order overruling a motion for a new trial. Before the argument upon the merits, the attorney general moved to dismiss the appeal upon the ground that the bill of exceptions had not been settled by the district judge. The record contains no authentication of a settlement, unless the fact may be inferred from the signature of the judge attached to the bill of exceptions. The statute provides that "a bill containing the exceptions must be settled and signed by the judge, and filed with the clerk, within ten days after the trial of the cause, unless further time be granted by said judge, or by a judge of the supreme court." Gen. St. § 4303. The question presented is, must the settlement of the exceptions be proved as an independent

fact? The statute does not require such proof. Conceding a proper signification to the act of the judge in attaching his signature, which would otherwise be unmeaning, the legal intendment arises that he performed his duty, and settled the exceptions.

1. It is objected that the verdict is contrary to the evidence. This objection cannot be considered, because the bill of exceptions does not purport to contain all of the evidence submitted to the jury. *State v. Bonds*, 2 Nev. 265; *State v. Parsons*, 7 Nev. 57.

2. Evidence tending to prove particular instances of unchastity, not connected with the matter before the court, was excluded. The decisions are conflicting as to the correctness of this ruling, but it is upheld by the weight of authority. Mr. Greenleaf says: "The character of the prosecutrix for chastity may also be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible." 3 Greenl. Ev. § 214. The reason of the rule is thus stated in *Pefferling v. State*, 40 Tex. 491: "The inquiry is for the purpose of proving character, and it would operate a surprise if an inquiry as to particular instances of immorality or intercourse with particular persons was permitted to establish the character of the witness, who, as has been said, cannot be supposed to come prepared to defend her character, except against a general attack." See, also, *People v. Jackson*, 3 Parker, Crim. R. 391; *Com. v. Regan*, 105 Mass. 593; *Com. v. Harris*, 131 Mass. 336, and authorities cited by respondent. In this connection it must be understood that a witness testifying to the general reputation of the prosecutrix may, upon cross-examination, have his attention directed to particular acts of unchastity for the purpose of ascertaining the weight to be attached to his testimony.

3. The sheriff and his deputy were allowed to testify to the particular facts narrated to them by the prosecutrix at the time of making complaint of the injury. Such testimony is hearsay, and was inadmissible in evidence except in her cross-examination, or as confirmatory of her story if attacked. Her testimony was not attacked, and the testimony was erroneously received. This principle is too well settled to admit of discussion. It is thus stated by Mr. Greenleaf: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it had been impeached. On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple 'Yes' or 'No.' Indeed, the complaint constitutes no part of the *res gestæ*. It is only a fact corroborative of the testimony of the complainant; and, when she is not a witness in the case, it is wholly inadmissible." 3 Greenl. Ev. § 213.

Judgment reversed, and cause remanded.

(16 Or. 113)

OREGON & W. M. SAV. BANK v. JORDAN, Sheriff, et al.

(Supreme Court of Oregon. February 29, 1888.)

1. TAXATION—ASSESSMENT—VERIFIED LIST OF TAXABLE PROPERTY.

The verified list required, under Hill's Code, § 2769, to be furnished the assessor by a tax-payer, does not constitute an assessment when received by the assessor. It simply aids him in obtaining a true description of taxable property, and is evidence from which the assessment may be made.

2. **SAME—ASSESSMENT, WHAT CONSTITUTES.**

Property is not assessed, though on a verified list, until it is set down in the assessment roll, as required by Hill's Code, § 2770.

3. **SAME—BOARD OF EQUALIZATION—PROPERTY OMITTED—NOTICE.**

The board of equalization, in making the proper corrections under section 2779, Hill's Code, may place on the assessment roll property of a tax-payer which had been omitted by the assessor, or not assessed; and this, without the three-days notice to such tax-payer. Notice is requisite only when the valuation of property already assessed is raised.

4. **SAME—RELIEF AGAINST COLLECTION—EQUITY JURISDICTION.**

Before equity will interfere to enjoin the collection of a tax, the facts presented must disclose a case falling under some recognized head of equity jurisdiction; such as the preventing a multiplicity of suits, removing cloud from title, or the like, or, it seems, illegality of the tax.

5. **SAME—ASSESSORS ACT JUDICIALLY.**

Assessors act judicially in valuation of property; and their determinations are binding, in cases where they have jurisdiction, until reversed or set aside by some tribunal having authority to review their action.

6. **SAME—RELIEF AGAINST ASSESSMENT—REMEDY OF TAX-PAYER.**

The remedy of the tax-payer, in all ordinary cases for errors in his assessment, is to go before the board of equalization; and, failing to obtain redress, to seek it by writ of review. *Rhea v. Umatilla Co.*, 2 Or. 298, and *Poppleton v. Yamhill Co.*, 8 Or. 338, approved.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county.

Action by the Oregon & Washington Mortgage Savings Bank against Thomas A. Jordan, sheriff of Multnomah county, and against the county, to enjoin the collection of a tax.

*McDougall & Bower*, for appellant. *McGinn & Simon*, for respondents.

**STRAHAN, J.** The object of this suit is to enjoin the collection of a tax. The material part of the complaint is, in substance, as follows: That on or before August 25, 1884, plaintiff furnished, and filed with the assessor of Multnomah county, a full statement of the property of the plaintiff, and duly sworn to, as required by law. That said statement contained all personal property, except shares of stock in Portland National Bank, which plaintiff believed were assessed to said Portland National Bank. That the assessor of Multnomah county returned a list of assessable property as required, and the board of equalization examined the same, and made the following assessments: Money, notes, and accounts, \$118,210; real estate, \$24,000; mortgages, \$63,670; and allowed an indebtedness within the state of \$145,280, and leaving total taxable property of \$62,600. That on said sum of \$62,600 there was levied a tax of \$——, and a warrant for its collection placed in the hands of Thomas A. Jordan. That, at the time said assessment was made, the plaintiff had no property in the county of Multnomah subject to assessment and taxation, the whole thereof being offset by deduction of indebtedness. That nearly all of plaintiff's property consists of notes secured by mortgage, and that the same are taxable in the counties where the lands securing the same lie, and that said assessment of \$118,210 was arbitrarily made, and was erroneous as to all in excess of \$50,000. That said assessment is erroneous, excessive, and unjust, and the taxes levied thereon are an apparent lien and cloud on the title of the plaintiff's aforementioned real estate. That thereafter said assessment roll, with the warrant of the county court attached, was placed in the hands of defendant Thomas A. Jordan, sheriff of Multnomah county, for collection. That he returned said tax as delinquent, and the county clerk has, as by law directed, issued a writ under his hand, and with the seal of the county court attached thereto, directed to said sheriff, commanding him to levy on the goods and chattels of the plaintiff, and, if none be found, then upon the real property of the plaintiff, and that said Jordan will unless restrained, etc., and that plaintiff has no plain or adequate remedy at law; and pray that defendant be re-restrained. Upon the filing of the complaint, a re-

straining order was issued. The defendants demurred to the complaint, for the reasons—*First*, the same did not contain facts sufficient to constitute a cause of suit; and, *second*, there is a misjoinder of parties defendant, in that the county of Multnomah is joined as a party defendant. The demurrer was overruled; and the defendants refusing to answer, and electing to stand by their demurrer, a final decree was entered in favor of the plaintiff, enjoining the collection of the taxes assessed against the plaintiff in Multnomah county for the year 1884. This decree was entered on the 21st of September, 1887, from which this appeal is taken.

1. Section 2769, Hill's Code, makes it the duty of any person liable to be taxed in his county to furnish the assessor a list of his real estate situate in his county liable to taxation, and a list of all his personal property liable to taxation in this state. "This list is to be verified by such person, that to the best of his knowledge and belief such list contains a full and true account of all his property liable to be taxed in such county." The receiving of this list by the assessor is not an assessment of the property. It is simply a part of the means provided by law to aid the assessor in discovering and obtaining a true description of the property liable to taxation in his county. If satisfied of its truth and correctness, it is evidence upon which the assessor may act in making the assessment, or he may act on his own knowledge, or institute further inquiries, until all of the property of each tax-payer in his county is placed upon his tax-roll. The property is not assessed until it is set down in the assessment roll, as provided by section 2770, Hill's Code. Section 2778, Hill's Code, declares what officers in the county shall constitute the board of equalization, and section 2779 declares a part of the duties of such board as follows: "If it shall appear to such board of equalization that there are any lands or other property assessed twice, or in the name of a person or persons not the owner thereof, or assessed under or beyond its actual value, or any lands, lots, or other property not assessed, said board shall make the proper corrections." Waiving, for the present, the more important question of the jurisdiction of a court of equity to correct improper assessments by injunction under the facts disclosed, the complaint is open to serious criticism. What is meant by "a list of assessable property as required"? There is no such document known to the assessment laws of this state. The official record of the assessor's work is the assessment roll, which he is required to return, and it may be inferred that that is the document which was before the board of equalization. By the terms of section 2779, *supra*, said board has power to make the proper corrections, among other cases, when any land, lots, or other property has not been assessed. This language was evidently designed to confer upon the board power to make the necessary corrections by assessing the property where it has not been assessed, and this power has been constantly exercised by boards of equalization throughout the state. The power conferred by this section is clearly distinguishable from that conferred by section 2780, which gives the board power to "increase the value of any property so assessed" upon three days' notice. In the one case, if property is omitted from the roll, it may be placed there, and a proper valuation placed upon it; and this, without notice. In the other, the property being found upon the roll, and valued by the assessor, that valuation cannot be changed or disturbed without the requisite notice. The board may have erred; but, so far as appears from the record before us, it had the power to place on the assessment roll property other than that returned thereon by the assessor; and, so far as appears, that is the action complained of here.

2. As a general rule, equity has nothing to do with the correction of erroneous assessments. Aside from the requirements of the statute, public policy requires that the revenues should be promptly assessed and collected by those officers and through those agencies which the law has specially provided for that purpose. Unless, therefore, a case can be brought, by its par-

ticular and peculiar facts, under some one of the heads of equity jurisdiction, such as the preventing a multiplicity of suits, removing cloud from title, or the like, equity will not ordinarily interfere, unless the tax be illegal. The remedy prescribed by statute in most cases will be found ample and expeditious, and in such cases it ought to be exclusive. Burroughs on Taxation, § 102, states the rule thus: "*Errors, what tribunal corrects.* Where the assessors have jurisdiction of the persons or property assessed, they act judicially; and, like the judgment of any other tribunal, their acts are conclusive until reversed in the mode prescribed by law. Whether the error be in the valuation of property at too high a rate, or upon a wrong principle, or of property which is claimed as exempt, the decision of the assessor cannot be attacked collaterally. The remedy is by appeal to that tribunal provided by statute; and, if there be none provided, then it is by *certiorari*." And this principle seems to be supported by many authorities. *Stewart v. Maple*, 70 Pa. St. 221; 1 High. Inj. §§ 488, 492, 493; *Hughes v. Kline*, 30 Pa. St. 227; *Macklot v. City of Davenport*, 17 Iowa, 379; *Merrill v. Gorham*, 6 Cal. 41; *Porter v. Railroad Co.*, 76 Ill. 561; 2 Desty, Tax'n, 661; *Bank v. Lawler*, 46 Conn. 243; *Seeley v. Town of Westport*, 47 Conn. 294; *Glass Co. v. McCaleb*, 81 Ill. 556; *Mayor, etc., v. Meserole*, 26 Wend. 132; *State Railroad Tax Cases*, 92 U. S. 575; *Cooley, Tax'n*, 542.

3. This court held in *Rhea v. Umatilla Co.*, 2 Or. 298, that the assessor and clerk constituted a tribunal whose decision might be reviewed, by proceedings taken for that purpose, under section 573 of the Code as it then stood. In that case the court further said: "The clerk and assessor sit as a tribunal after public notice has been given that they will then make an adjustment of valuations, and any aggrieved property holders ought to appear and seek redress for wrongful or improper assessments. When they do so seek a correction, and are not satisfied with the decision, the law provides no other remedy but to avail themselves of the writ of review; and that, too, within six months after the decision." And *Poppleton v. Yamhill Co.*, 8 Or. 338, is to the same effect. The plaintiff could have appeared before the board of equalization of Multnomah county, then, and made such showing as would have induced that tribunal to make all necessary and proper corrections in its assessment; and, upon its refusal to do so, it could have sued out a writ of review, and brought the questions finally before the court. This was the plaintiff's remedy, and the only remedy under the facts disclosed by the complaint, if such facts, under any circumstances, furnished grounds for relief. No authorities have been cited showing that a party is entitled to relief by injunction under the facts disclosed by the plaintiff, and it is believed that none have gone so far. In reaching the conclusion indicated, we have not overlooked *Dalton v. East Portland*, 11 Or. 426, 5 Pac. Rep. 193; *Stingle v. Nevel*, 9 Or. 62; or *Brown v. School-District*, 12 Or. 345, 7 Pac. Rep. 357. These cases, in all their essential conditions, are clearly distinguishable from the one now before the court; nor is it intended, by anything that is here said, to impair the force of those cases under the particular facts disclosed by each.

We are satisfied, for the reasons above given, that the complaint furnishes no ground for equitable interference to enjoin the tax complained of. The decree must therefore be reversed, and the suit dismissed.

(3 Wash. T. 445)

#### TIMMERMAN v. TERRITORY.

(Supreme Court of Washington Territory. January 28, 1888.)

##### 1. HOMICIDE—INDICTMENT—SUFFICIENCY.

An indictment presented by the grand jury of the territory of Washington, county of K., charging defendant in said county with purposely and maliciously killing the deceased, by shooting and mortally wounding said deceased with a pistol, from which mortal wound deceased instantly died, is sufficient in form.

**2. SAME—EVIDENCE—CORPUS DELICTI.**

The *corpus delicti* in a trial for murder may be proved by any evidence which establishes that fact beyond a reasonable doubt.

**3. SAME—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.**

Where circumstantial evidence alone was relied upon for a conviction for murder, the court properly refused to charge that "each and every circumstance must be consistent with the other, and with the whole chain, and each and all must point to defendant exclusively as the guilty agent."

**4. SAME—TRIAL—FORM OF VERDICT.**

Under Code W. T. § 1108, providing that the verdict of a jury in a criminal case may be in the form "we, the jury, \* \* \* find the defendant guilty," a general verdict of guilty, under an indictment for murder in the first degree, is sufficient without setting out the particular degree of defendant's guilt.

Error to district court, Goldendale county.

Indictment against John Henry Timmerman for the murder of William Sterling. The jury found a verdict of guilty, and defendant sued out writ of error.

*Ballard & Covert*, for plaintiff in error. *H. Dustin*, Pros. Atty., and *Dunbar & Smith*, for defendant in error.

JONES, C. J. The defendant was indicted for murder in the first degree. The indictment was in these words: "District court for the Fourth judicial district of Washington Territory, holding terms at Goldendale for the county of Klickitat, W. T. *The Territory of Washington, Plaintiff, vs. Henry Timmerman, Defendant.* Henry Timmerman is accused by the grand jury of the territory of Washington for the county of Klickitat, by this indictment, of the crime of murder in the first degree, committed as follows: He (said Henry Timmerman) in the said county of Klickitat, on the 3d day of October, 1886, purposely, and of his deliberate and premeditated malice, killed William Sterling, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said William Sterling with a pistol which he (the said Henry Timmerman) then and there held in his hand, and from which mortal wound the said William Sterling instantly died." A plea of not guilty was entered, and, on calling a jury for trial, defendant challenged two jurors for cause. The challenges were overruled, and the defendant accepted. None of the evidence in the case is returned to this court, and therefore there is nothing here by which this court can ascertain whether the ruling complained of is correct or otherwise. For the same reason we are unable to say whether there was error in receiving a copy of a telegram, or whether it was received or not.

The jury returned a verdict in this form: "We, the jury, in the case of *The Territory of Washington* against *John Henry Timmerman*, find the defendant guilty,"—and sentence of death was pronounced. This verdict is claimed to be defective in this: that the defendant might have been found guilty of murder in the first or second degree, or of manslaughter, under this indictment; and therefore the verdict was uncertain, and the court could not pronounce sentence upon it. If the objection is sound, every motive exists for so declaring. In many states the form of verdict here used has been held bad for the reasons here assigned, but growing out of statutes peculiar to such states; and in others, where there is no statutory form, because of the reason of the matter itself. Our Code (section 1097) provides that, "upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto." The next section provides that "in all other cases the defendant may be found guilty of any offense the commission of which is necessarily included within that with which he is charged in the indictment." It would seem from these sections that, if the jury found the defendant guilty of an offense of inferior degree to that charged, the verdict must specify that degree, but, if the verdict was intended to be guilty of the degree charged,

there would be no necessity of so specifying it. If there is or may be a doubt as to this, under these sections, section 1103 seems to remove any possible room for criticism. That section is in these words: "When the defendant is found guilty, the court shall fix the punishment, and the verdict may be substantially in the following form: 'We, the jury, in the case of *The Territory of Washington, Plaintiff*, against ———, *Defendant*, find the defendant guilty.'" In this case the jury used this form, inserting the name of defendant in the blank, and one of the jurors signed it as foreman. We have no doubt of the power of the legislature to prescribe the form, and think there is no uncertainty as to the fact thus found. In this case there is no room for doubt left when we take into consideration the fact appearing in the record that the court instructed the jury that there could be no verdict, under the evidence, but one of acquittal, unless they found from the evidence, beyond all reasonable doubt, that defendant was guilty of murder in the first degree, in which case they should find him guilty.

The defendant requested that the following instructions be given to the jury. The request was refused, and he excepted. "There must be direct proof that William Sterling is dead, or else there must be direct proof that he has been murdered by defendant in such way and manner as to account for the disappearance of the body. (2) When circumstances alone are relied upon by the territory for conviction, each and every circumstance must be consistent with the other, and with the whole chain; and each and all must point to the defendant exclusively as the guilty agent; and every link of the chain of circumstances must be so complete and consistent with the guilt of defendant as to exclude every reasonable hypothesis of his innocence, and so perfect and complete as to establish his guilt to a moral certainty." The fact of death need not be proven by direct evidence. Like every other material fact, the *corpus delicti* must be proven beyond a reasonable doubt; and when so found by evidence, circumstantial or direct, the law is satisfied. The second instruction above quoted would be liable to mislead if given as asked, even if this was a case where circumstantial evidence alone was relied upon for conviction. The circumstances might point to two persons as the guilty parties; the defendant being one of the two. One or more of the circumstances proved might have no reference whatever to the defendant, or to the crime charged, or form no part of "the chain," or not point to any particular fact connected with the crime, and the jury be therefore justified in not considering it at all. The court instructed the jury rightly and fully upon the question of reasonable doubt, and no exception was taken thereto; and, having so done, there was no error in refusing that asked by defendant on the same subject, even if it were correct in law. In the language asked, however, it was liable to mislead, and was rightly refused.

The form of the indictment is objected to as insufficient in law, and the following points are made upon it: "The indictment at bar does not show (1) a felonious killing; (2) it does not show that the grand jury was sworn; (3) it does not show the killing to have been *vi et armis*; (4) it gives no description of the wounds, so that the court or jury could determine their fatality; (5) it does not allege that the pistol was loaded with powder and lead, or with anything; (6) it does not allege that defendant struck or hit deceased with any death-dealing missile; (7) it does not allege that the deceased was in Klickitat county at the time of the shooting or of the death; (8) it does not allege that death resulted from the 'mortal wounding' charged; (9) it has no indorsement thereon signed by the foreman of the grand jury. And in capital cases there is no waiver by going to trial. The indictment contains nothing but a mass of legal conclusions. Facts are not stated. It is not certain to a common intent; it is not certain to a general intent; it is not certain to an intent in every particular. These are required." This form of indictment has by this court (*Leonard v. Territory*, 2 Wash. T. 381, 7 Pac.



Rep. 872) been approved, and the whole subject fully considered, and we see no cause to change the rule.

The judgment made fixes a specific day for its execution. This is irregular, it is true, but it is mere surplusage, and cannot affect its validity. The time of execution should be fixed in the warrant, and not in the judgment.

We have carefully considered the whole case as shown by the record, even upon questions not raised by counsel, and find no material error. That portion of the judgment fixing a date for the execution will be vacated, and otherwise the judgment is affirmed, and the cause remanded, with instructions that a warrant issue to carry said judgment into effect according to law.

ALLYN and LANGFORD, JJ., concur in the result.

(7 Mont. 407)

TERRITORY v. SCOTT.

(*Supreme Court of Montana. January 21, 1888.*)

1. HOMICIDE—MURDER—THREATS AND DIFFICULTIES—INSTRUCTIONS.

In a trial for murder, an instruction that threats and previous difficulties are evidence tending to prove malice, does not invade the province of the jury and assume that threats and previous difficulties have been proved.

2. SAME—FIRST OR SECOND DEGREE—INSTRUCTIONS.

An instruction to the jury that if they find the defendant killed the deceased unlawfully, and with malice aforethought, they must find him guilty of murder, and then determine whether such murder is in the first or second degree, immediately followed by correct definitions of murder in the first and second degrees, is not erroneous as authorizing the jury to find the defendant guilty of murder in the first degree upon a definition of murder in the second degree.

Appeal from district court, Deer Lodge county.

J. R. Boorman, for appellant. W. E. Cullen, Atty. Gen., for the Territory.

MCCONNELL, C. J. The defendant has appealed from an order of the district court of Deer Lodge county overruling his motion for a new trial, and from the judgment of conviction rendered by said court against him on the 30th day of December, 1887. He was indicted for the murder of his wife, Matilda Scott, on the 16th day of November, 1887, in said county and territory of Montana. He was tried and convicted of murder in the first degree on the 24th day of the following December. He was, by the court, sentenced to be hanged on the 17th day of February next. The transcript does not contain the evidence, and no question is made as to its sufficiency to support the verdict. It contains a number of exceptions to the admissibility upon the trial of certain evidence, all of which have been abandoned and not insisted upon by the counsel of the prisoner; but on account of the great magnitude of this case, involving as it does the life of a human being, we have given these exceptions a careful consideration, and find none of them well taken.

The only grounds relied upon for a reversal are alleged errors in the charge of the court. Instruction No. 9 is the first one to which exception is taken. It is as follows, to-wit: "If the jury find from the evidence beyond a reasonable doubt that the defendant killed the deceased, Matilda Scott, and killed her unlawfully, then they should next determine whether or not such killing was murder. The second essential requisite to constitute the crime of murder is that the killing should have been done with malice aforethought. Malice is thus defined: 'Express malice is that deliberate intention unlawfully to take away the life of a fellow-being which is manifested by external circumstances capable of proof. Malice may be presumed to exist where no considerable provocation appears, or where all the circumstances show an abandoned and malignant heart. Threats and previous difficulties are evidence tending to prove malice.'" The only criticism made upon the instruction is upon the sentence, "Threats and previous difficulties are evidence tending to prove

malice," and it is insisted that this was clearly erroneous in that it assumed as a fact that threats and previous difficulties had been proven, thereby invading the province of the jury to the prejudice of the defendant. In the absence of the testimony the law presumes that the instruction was pertinent to the evidence before the jury. Indeed, we are not left entirely to this presumption of law, because the bills of exceptions in the transcript contain enough evidence to show that the prisoner and the deceased had had previous difficulties, and that he had committed upon her an assault and battery for which he had been arrested. This instruction does not assume that the evidence proved the existence of threats and previous difficulties. To charge that threats and previous difficulties are evidence tending to prove malice, is neither to assume that they had been proven, nor to tell the jury that such was the case; but it was equivalent to saying that if, in view of the evidence before them, threats and previous difficulties existed, they should look to it in determining the question whether there was malice. It is no invasion of the privileges of the jury for the court to present to them its views of the bearings and tendency of the evidence. The court had just defined in the same instruction what malice was, and the object of that part of the charge under consideration was to call their attention to the relevancy and bearing of this evidence as one of the proofs of the existence of malice. While the existence of malice, and the existence of threats and previous difficulties, are facts to be found by the jury, and while it would be error for the court to assume that they have been proven, it is a matter of law for the court to determine what relation as proofs the one bears to the other. In *Thompson on Charging the Jury*, p. 71, we find the following, to-wit: "It is not an invasion of the province of the jury for the judge to tell them that they may consider certain evidence as tending to prove a certain fact, without making any comment as to the weight of such evidence, or that testimony has been introduced to prove a certain matter, if such is the fact." *People v. Vasquez*, 49 Cal. 560. Mr. Wharton, in his work on Criminal Evidence, § 784, says: "It is also relevant to inquire whether the party charged was on bad terms with the party injured, or was inflamed to any special animosity to a cause with which the latter was identified. In connection with this, evidence is admissible of threats and declarations of hostile purposes, as well as of quarrels and alienations." Hence the law was correctly stated, and in doing so the province of the jury was not invaded. He did not tell them that such evidence proved the existence of malice, or that this was its bearing. We are referred to the cases of *Anderson v. State*, 2 Ga. 380, and *Stell v. Glass*, 1 Ga. 486-489, in support of the position that this instruction was an invasion of the province of jury. In the first of these cases the trial judge charged the jury that under the facts in this case they should allow interest to the plaintiff from the time of the receipt of the money by Anderson. In commenting upon this the supreme court of Georgia says: "Nothing is left to be inquired into or found by the jury touching the facts which relate to the interest; the court appears to assume the facts necessary to charge the defendant with interest as proven, and directs the jury to find interest against him." In *Stell's Case*, the judge delivered his opinion as a matter of direction of fact to the jury, and it was held to be error. It will be observed that there is a wide difference between these cases and the one at bar. They both directed the jury what conclusions to reach from certain facts which they assumed to have been proven; while in the case at bar the court merely called the attention of the jury to the relation of threats and previous difficulties as proofs of malice. He neither directed them to find that threats and previous difficulties nor malice existed, but left them free to determine that for themselves. They were free to say in the light of the evidence whether there were previous difficulties, and, if they so found them, to consider them as proofs of the existence of malice. In the case of *Anderson v. State*, the court quotes approvingly from the case of *U. S. v. Fourteen*

*Packages*, Gilp. 35, this language, to-wit: "That it is not an invasion of the privilege of the jury for the court to present to them its views of the nature, bearings, tendency, and weight of the evidence." We agree that the court should direct the attention of the jury to a hypothetical state of facts which they may or may not find from the evidence to be true. This is the ordinary rule. He should never so frame his instruction as to assume a disputed state of facts as proven. *Walters v. Railroad Co.*, 41 Iowa, 71; *Bond v. People*, 39 Ill. 26; *Insurance Co. v. Baker*, 94 U. S. 610.

Chief Justice PARKER, in the celebrated case of *Com. v. Selfridge*, Horr. & T. Cas. 19, correctly states the rule as follows, to-wit: "I hold the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of a judge into that of an advocate. All which I conceive necessary and proper for one to do in this part of the cause is to call your attention to the points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove these points, give you some rules by which you are to weigh the testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my opinion on the subject is."

While it is true that the judge cannot assume the existence of a disputed fact in issue, yet where the evidence is clear and conclusive as to the existence of the particular fact, and there is no evidence to the contrary, or where facts are admitted, an instruction assuming such facts as true will not work a reversal of the judgment; but if there is the least conflict in the evidence, or if the evidence is in anywise of a doubtful character, such ruling will be held erroneous. *Caldwell v. Stephens*, 57 Mo. 589-595; *Barr v. Armstrong*, 56 Mo. 577-588. In the absence of the testimony we are unable to say whether there was any controversy as to the existence of threats and previous difficulties or not. We will not presume that the charge is erroneous; but the party seeking to avail himself of errors in the charge must furnish in the record the proofs of such errors.

Instruction No. 11 is the next one to which exception is taken. It is as follows, to-wit: "If the jury find from the evidence beyond a reasonable doubt that the defendant killed Matilda Scott and killed her unlawfully, and also with malice aforethought, they must find him guilty of murder, and should then determine whether or not such murder is murder in the first degree or murder in the second degree." It is insisted that this is erroneous, for the reason that it authorizes the jury to find the defendant guilty of murder in the first degree upon the definition of murder alone in the second degree. It is difficult to understand how this instruction could mislead the jury into finding the prisoner guilty of murder in the first degree upon a definition of murder in the second degree. The court only says to them, in effect, that when the killing is done unlawfully, and with malice aforethought, it would be murder, and that they should then proceed to determine whether it is in the first or second degree. He immediately proceeds to give them a definition of murder in the first degree, and of murder in the second degree as follows, to-wit: "All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree, and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree. The unlawful killing must be accompanied with a clear and deliberate intent to take life in order to constitute

murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation; but there need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. \* \* \* 'Premeditated' is defined to mean thought of beforehand for a period of time however short. \* \* \* If, therefore, you find from the evidence beyond a reasonable doubt that the defendant murdered Matilda Scott willfully, deliberately, and with premeditation, you should find him guilty of murder in the first degree. If you find from the evidence beyond a reasonable doubt that the defendant did murder Matilda Scott, and you do not find him guilty of murder in the first degree, you should find him guilty of murder in the second degree. Murder in the second degree is the unlawfull killing of a human being without malice aforethought, either express or implied, where the killing is not done deliberately, and with some degree of coolness, or in one of the ways specified in the definition of murder in the first degree." When these instructions are all taken together it presents a clear and accurate definition of murder as it exists at common law, and draws the distinctions clearly between murder in the first degree and murder in the second degree. The jury are told that they must designate by their verdict whether it be murder in the first or second degree. They are also told that if the killing be done unlawfully and with malice aforethought it will be murder, and they are also told what murder in the first degree is, and what murder in the second degree is; and certainly no jury can be found that would fail to understand what their duty was when taking all these instructions together. They are instructed that all the elements of malice aforethought, willfulness, deliberation, and premeditation, must concur, in order to constitute murder in the first degree. They are further told that if they found that the killing was done unlawfully, and with malice aforethought, either express or implied, and the killing is not done deliberately and with some degree of coolness, or in one of the ways specified in the definition of murder in the first degree, that it would be murder in the second degree. With all this explicit instruction before them it could not be possible that they could be misled in finding the prisoner guilty of murder in the first degree, under the common-law definition of murder, or the definition of murder in the second degree. The failure to designate the kind of malice, (instruction 11,) whether it was express or implied, is immaterial. This had previously been done in instruction 3, and the definition correctly given in instruction 9, so that the jury had the whole law upon the subject of malice before them. If the killing was done unlawfully, and with malice aforethought, it would be murder at common law. And the purpose of the instruction criticised was to bring the minds of the jury to the point where they could understand that they had entered the domain of murder. First, the killing must be done unlawfully. This finding was to be the initial step; and they had been previously instructed as to what was excusable or justifiable homicide, and hence were prepared to determine whether it was unlawful or not. The next step was to find whether it was murder, distinguished from manslaughter; and their minds were, at this point, directed to the consideration of the question of malice aforethought, the great distinguishing landmark between murder and manslaughter. If they found malice aforethought to exist, then the killing must be murder, and this, too, without regard to whether the malice was express or implied. Having thus taken these two steps in the process of the analysis of the case, they were instructed that they should determine whether or not such murder was murder in the first degree, or murder in the second degree. They were not told to rest their verdict at this point, but to go on, and find which degree of murder it was. Having determined that the killing was murder, they must designate in their verdict which degree it was. The question of the deadly in-

tent, and the deliberate, cool purpose and premeditated design to take the life of the deceased would then come under their consideration. And these elements of murder in the first degree were next given to them. And thus we find, by a natural, easy, and logical process, the minds of the jury were led by the instructions of the court through the whole law on the subject of murder. Each instruction was a step in their progress, and, when taken together, embraced in a comprehensive unity the whole law on the subject. Mr. Thompson, in his work on Charging the Jury, very forcibly puts this rule as follows, to-wit: "In all these cases the rule applies that the judge is not bound in a single proposition to negative every exception, and include every possible condition. The charge is to be taken together; and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issue tried, the judgment will not be disturbed because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." *Thomp. Char. Jur.* 75; *People v. Doyell*, 48 Cal. 85.

The charge to the jury is remarkable for its clearness, fullness, and accuracy. The prisoner is carefully given the benefit of every possible legal right; and indeed, we agree with the counsel of the prisoner when he says in his brief: "The transcript in this case presents a record exceptionally free from errors, considering the gravity of the offense alleged against the defendant, and of which he stands convicted." The judgment of the court below is therefore affirmed.

McLEARY and BACH, JJ., concurring.

(5 Utah, 484)

#### TARPEY v. DESERET SALT CO.

(*Supreme Court of Utah*. February 18, 1888.)

##### 1. PUBLIC LANDS—RAILROAD GRANTS—TITLE CONVEYED.

Act Cong. July 1, 1863, (12 St. 489,) granting lands to the Central Pacific Railroad Company of California, no right of the government being reserved, grants the legal title *in present* to all the lands included in the grant, whether surveyed and selected or not.

##### 2. CORPORATIONS—CONSOLIDATION—SUCCESSION TO PROPERTY RIGHTS.

The articles of amalgamation and incorporation of certain railroad companies contained the following, viz.: "And the said several parties, each for itself, hereby transfers, grants, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns, forever, all its property, real, personal, and mixed, of every kind and description; \* \* \* contracts, agreements, claims, \* \* \* and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of first and second parts, in possession or in expectancy, either at law or in equity; \* \* \*." *Held*, that this was sufficient to transfer land granted the companies by the government by an act declaring the purposes for which it was granted.

##### 3. SAME—POWER TO HOLD REAL ESTATE—EVIDENCE OF CORPORATE EXISTENCE.

When the plaintiff traces his title by mesne conveyances through certain corporations not parties to the record, and the defendant is in no way in privity with them, the only proof of their corporate existence required is proof of the corporation *de facto*, which is abundantly shown by the articles of incorporation.

##### 4. SAME.

In an action of ejectment by a plaintiff tracing his title to certain lands in Utah by mesne conveyances, through a certain corporation organized under the laws of California, it was not necessary that he should show by the laws of California that said corporation was authorized to hold real estate; the rights of a corporation to hold and convey property not being determined under the laws of the state under which it is organized, but by the laws of the government in which it is doing business, and in which it acquires the property.

Appeal from district court, First district; before Justice BOREMAN.

Action of ejectment by D. P. Tarpey, appellee, against the Deseret Salt Company, appellant.

*P. S. Williams*, for appellant. *C. S. Varian*, for appellee.

HENDERSON, J. This is an action of ejectment for lands described in the complaint as "the north-west quarter of fractional section 9, in township 11 north, of range No. 9 west, Salt Lake base and meridian, and the N. E. quarter and the S. W. quarter of said section, in part covered with water; in all, 380 acres, more or less." The lands border on Great Salt lake, and at the time of commencing the action were in the possession of defendant, and were used by it in its process of manufacturing salt by solar evaporation. The plaintiff proved his title to the lands by showing (1) that the land is an odd-numbered section, lying within the limits of the grant made by congress to the Central Pacific Railroad Company of California by the act of July 1, 1862, (12 St. 489,) and the various acts amendatory thereof. (2) That the lands were not such as were included in the reservations and exceptions contained in the act; that they were not mineral, had not been pre-empted, or otherwise disposed of, etc. (3) That the map of definite location of the line of said railroad company was filed, as required by the act of congress, on the 20th day of October, 1868. (4) The amalgamation and consolidation of the said Central Pacific Railroad Company of California and the Western Pacific Railroad Company, by articles of association and incorporation, bearing date June 22, 1870, the new or consolidated company being the Central Pacific Railroad Company. (5) The amalgamation of the Central Pacific Railroad Company, the California & Oregon Railroad Company, the San Francisco, Oakland & Alameda Railroad Company, and the San Joaquin Valley Railroad Company, by articles of association and incorporation, dated August 20, 1870. This consolidated company was also called the "Central Pacific Railroad Company." (6) A selection by the Central Pacific Railroad Company for patent of a portion of the lands, viz., the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of said section, and filed in the land-office at Salt Lake City in 1885; they being the only lands in said section as to which the costs of surveying and conveying had been paid. (7) That the Central Pacific Railroad Company mortgaged the lands in controversy October 1, 1870. (8) A lease dated August 7, 1885, from the Central Pacific Railroad Company to the plaintiff, demising the lands to him for the term of five years from January 1, 1886. The question presented by the record is whether this showing proves title *prima facie* in the plaintiff upon which he might recover; the claim made against it by the appellant being (1) that the acts of congress above referred to do not convey the legal title *in presenti* to the railroad company; that in view of the provisions of the act for subsequent patents, and for payment of costs and expenses of survey and patent, the grant is in the nature of a promise to grant in the future; and that until the subsequent grant is made by patent, after payment of fees and expenses, it is but an equity, and is not such a legal title as is required to be shown in ejectment. (2) That the lands were not conveyed by the Central Pacific Railroad Company of California to the first amalgamated company, or by the first amalgamated company to the second; that the form and language of the articles of association put in evidence are insufficient for that purpose. (3) That no conveyances of the premises were proved from the Central Pacific Railroad Company of California to the amalgamated companies, and by the one to the other, and thence to the plaintiff, for the reason that the laws of the state of California were not shown or proved under which the amalgamated companies, and the constituent companies composing them, were organized, showing their legal right to organize, or hold and convey property. The record is made so as to present these questions, and we will notice them in the order above stated.

As to the first, the question as to whether the acts of congress are to be construed as granting a legal title *in presenti* has been much discussed by

the courts. The question has been presented in various ways and forms under acts, so far as this question is concerned, precisely like the acts in question. In the following cases: *Schulenberg v. Harriman*, 21 Wall. 44; *Railroad Co. v. U. S.*, 92 U. S. 738; *Railway Co. v. Railway Co.*, 97 U. S. 491; *Railroad Co. v. Baldwin*, 103 U. S. 426; *Grinnell v. Railroad Co.*, Id. 739; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; *Rutherford v. Greene's Heirs*, 2 Wheat. 196,—the supreme court of the United States have held that the title granted was a perfect legal title *in presenti*, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. The appellant relies upon *Railway Co. v. Prescott*, 16 Wall. 603; *Railway Co. v. McShane*, 22 Wall. 444; *Railroad Co. v. Traill Co.*, 115 U. S. 600, 6 Sup. Ct. Rep. 201. The latter case is in seeming conflict with the cases first cited. In an opinion recently rendered by Judge FIELD, sitting in the district court, (*Denny v. Dodson*, 82 Fed. Rep. 899,) in holding that the grant under an act like the one in question granted the legal title *in presenti*, and having his attention called to *Railroad Co. v. Traill Co.*, *supra*, and its apparent conflict with the cases first cited, reasons that the conflict is only seeming, and not real, by showing that the question in the latter case presented for judgment was different, and only presented a question between the government and its grantee. We deem it unnecessary to cite the statute at length, or enter into any extended review of the subject. In the cases cited the whole subject is fully and elaborately discussed. The language of that act is "that there be, and hereby is, granted." We think it is now beyond controversy that, when the question is presented as it is here, where no right of the government reserved in the act making the grant is involved, it grants the legal title *in presenti* to all the lands included in the grant, whether surveyed and selected or not.

The second point involves the construction of the language of the articles of amalgamation and incorporation. Do they contain apt and necessary words for the conveyance of the property in question? In each of the articles—in the first in article 7, and in the second in article 1—is found substantially the following provisions: "And the said several parties, each for itself, hereby sells, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns, forever, all its property, real, personal, and mixed, of every kind and description; all its capital stock; all its interest in the shares of its capital stock subscribed, but not fully paid for; all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description; and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity; subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims, and charges thereon, or in anywise affecting the same." We cannot conceive of language more apt to effectuate the transfer, and we think it sufficient in form for that purpose. The claim that the property was not conveyed, because it was not shown to be property required for the purposes for which the corporation was organized, is, we think, as will presently be seen, immaterial; but, if it was, the acts granting the land declared the purposes for which it was granted, and provided the uses to which it should be put, which are declared to be the corporate purposes and objects of the grantee. *Burke v. Smith*, 16 Wall. 395.

There was no proof of the laws of the state of California under which the various corporations claimed to be organized, and this gives rise to the third and last question. It will be observed that the plaintiff traces his title by mesne conveyances through the corporations. They are not parties to the record. Their existence and powers are not directly in issue, and the defendant is in no way in privity with them. Under such circumstances, the only proof

of corporate existence that is required is proof of the corporation *de facto*; and this was abundantly proved by the articles of incorporation. They were under the seals of the companies, respectively, and were duly signed, acknowledged, and proved. 2 Mor. Priv. Corp. 746, 750, 776-778. But it is said that there was no proof of the corporate existence *de facto* as to some of the constituent companies that entered into, and in part formed, the amalgamated companies. We are not prepared to say that the execution of the articles by them under their seals is not *prima facie* evidence of their existence *de facto*; but the fallacy of this claim will be seen by tracing this title in detail. The government conveyed this land to the Central Pacific Railroad Company of California. This conclusively proves the incorporation of this company, not only *de facto*, but *de jure*. The grant of real estate by the government to an association of individuals by any name denoting it as other than a natural person, thereby clothes it with corporate capacity to take, hold, and convey the same. Bing. Real Prop. 854. This company amalgamated with the "Western Pacific Railroad Company," and together they formed the Central Pacific Railroad Company, and the title was passed to the new company. Suppose, according to the contention of the appellant, that there is no proof of the existence of the Western Pacific Railroad Company, and that it is to be presumed that it did not exist, then the new company would be but a reincorporation of the Central Pacific Railroad Company of California, and would be its successor, with the title of the property transferred to it. The new incorporation thus formed again joined with various other companies in forming still another company. If it is to be presumed that the companies joining with it did not exist, then it is again but another reincorporation, with the title again transferred to the new company, and this company conveyed to the plaintiff. In other words, all the companies through which this title passed were shown to exist *de facto*, by articles of incorporation. The existence of these companies, their amalgamation and consolidation, is specially recognized by the act of congress of May 7, 1878, (20 St. 56,) and thereby, also, their existence is established *de facto*. But it is said that, without proof of the laws of California, there was no proof that the corporations were authorized by law to hold real estate at all, or to transfer it, or that it was within the purposes and objects for which they were incorporated. This it is not necessary to show. Transfers of property to, and transfers by, corporations that have no such right or authority by law, are not void; they are only voidable, at the instance of the government, in a direct proceeding for that purpose. 2 Mor. Priv. Corp. 648-653, inclusive, 709-711, 746; 1 Devl. Deeds, § 121; *Telegraph Co. v. Telegraph Co.*, 22 Cal. 398; *Water Co. v. Clarkin*, 14 Cal. 544; *Bank v. Matthews*, 98 U. S. 628; *Leazure v. Hillegas*, 7 Serg. & R. 313; *Banks v. Pottiaux*, 15 Amer. Dec. 706; *Oil Co. v. Railroad Co.*, 32 Fed. Rep. 22. As to whether transfers to and by corporations that are expressly prohibited therefrom by positive legislative enactments are absolutely void as between third parties, the authorities differ, but the burden of showing that there is such prohibition is upon the party attacking the transfer. *Burrill v. Bank*, 35 Amer. Dec. 395. The question of authority on the part of the corporations was purely a collateral one in this case. The defendant was in no situation to attack their passed and fully-executed contracts; at least, without showing that they were wholly and absolutely void. Devl. Deeds; *Water Co. v. Clarkin*, *Banks v. Pottiaux*, *supra*. The rules are the same as to foreign corporations. The power and the right of a foreign corporation to hold and convey property is not to be determined under the laws of the home government under which they are organized, but it is to be determined by the laws of the government in which they are doing business, and in which they acquire the property. *Runyan v. Coster's Lessees*, 14 Pet. 122; *Bank v. North*, 4 Johns. Ch. 370; *Lumbard v. Aldrich*, 28 Amer. Dec. 381. This must be true, as the result of the rule that it is a question only between the



corporation and the government. If lands acquired by a foreign corporation are liable thereby to be forfeited to the government under which it is organized, a foreign government might, in this indirect way, acquire lands within the domain and jurisdiction of other governments, which might not be permitted. By the general comity which exists throughout the United States and territories, in the absence of positive prohibitions, corporations created in one state or territory are permitted to carry on any lawful business in any other state or territory, and to acquire, hold, and transfer property there, equally as individuals. If the policy of a state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way by the state or territory where the property is acquired. *Cowell v. Springs Co.*, 100 U. S. 55. The deeds or transfers of these corporations, under their seals, properly affixed, and duly executed and proved, produced by the party claiming under them, is sufficient *prima facie* proof of title. *Burrill v. Bank*, *supra*. In *Water Co. v. Clarkin*, *supra*, the supreme court of California say: "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." In that case the corporation was a party. Here, where the transaction is fully passed and executed, the reasoning applies with greater force. If the title to every piece of land which happened to be traced to and from a corporation was made to depend upon whether the corporation was duly and legally organized, strictly according to the laws of the government under which it claims existence, and as to whether the taking, holding, and conveying of the property was strictly within their corporate powers, and for their corporate purposes, it would tend to lessen the value of corporate franchises, and to impair the marketable value of lands thus situated by reason of the difficulties in determining the title.

Our attention is not directed to any error in the record, and the judgment should be affirmed.

ZANE, C. J., and BOREMAN, J., concur.

(2 Idaho [Hasb.] 393)

**M'GINNIS et al. v. FRIEDMAN.**

(*Supreme Court of Idaho*. February 20, 1888.)

**1. INJUNCTION—GROUNDS—APPREHENSIONS OF IMMEDIATE INJURY.**

Where a party seeks relief by interlocutory injunction, he should show some clear legal or equitable right, and an apprehension of immediate injury to those rights. Where none such are shown, the injunction will be denied.

**2. SAME—PROPERTY RIGHTS NOT INVADED.**

Courts of equity will not interfere by injunction to prevent the commission of a crime where no property rights are invaded.

**3. PUBLIC LANDS—PASTURAGE WITHOUT CLAIM OF TITLE—RIGHTS ACQUIRED.**

The fact that a party has pastured the public lands of the United States without claim of title, or connecting himself therewith under some of the possessory acts, will not give a legal or equitable right to the pasture grown thereon.

(*Syllabus by the Court*.)

Appeal from district court, Alturas county.

Action brought by Daniel McGinnis and others to restrain S. H. Friedman from pasturing sheep upon certain public lands of the United States used by the plaintiffs as a cattle range. The temporary injunction previously granted was dissolved by the district court, and from this order the plaintiffs appeal.

*Geo. H. Roberts* and *Vic Bierbower*, for appellants. *Bruner, Parsons & Bruner*, for respondent.

HAYS, C. J. This action was brought to restrain the respondent from herding, grazing, and pasturing his sheep upon certain public lands, the property of the United States. A temporary injunction was granted, and, the case coming on to be heard upon an agreed state of facts, the injunction formerly entered was dissolved, and from this order the appeal is taken to this court. It appears that the premises to which the injunction applied consists of a large tract of the public lands of the United States, only a part of which has been surveyed; one of the ranges being about fifteen miles long and five miles wide, as stated in appellants' brief. We are not informed as to the size of the other. These appellants have used said ranges for several years for the purpose of pasturing their cattle and horses on the same during the winter seasons; said ranges being very valuable for that purpose. The stock thus wintered upon said ranges is driven to other parts in the summer season. It is admitted that sheep, cattle, and horses will not thrive and prosper when on the same range; that sheep will thrive where cattle will not. Shortly before bringing this action, the respondent brought a large flock of sheep to this section of the country, and proposed to graze, pasture, and winter them on the ranges in controversy; whereupon this action was brought. It is claimed by appellants that they have a right to hold and use said grounds for winter pasture, and to exclude the respondent from pasturing his sheep thereon for two reasons: *First*, because of their priority of possession, they having enjoyed that privilege for several years past; *second*, because of the provision of the Revised Statutes of this territory, which is as follows: Sec. 6872. "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed, or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle-grower, either as a spring, summer, or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

Although the case was ably presented at the bar, and marked industry and ability have been shown by appellants in the preparation of their briefs, they fail to cite us to any case directly in point, and we presume none could be found sustaining their position. As a general rule, it is incumbent upon the party seeking relief by interlocutory injunction to show some clear legal or equitable right, and a well-grounded apprehension of immediate injury to those rights. This position is announced and abundantly sustained by 1 High, Inj. §§ 7, 9, 651, 652-698, and the cases there cited; Hil. Inj. 319. The appellants in this case do not pretend to connect themselves with the land by color of title, or to hold the same under any possessory claim or right, with a view of entering said lands under any of the general laws of the United States; hence we are unable to see that they have shown in themselves any clear legal or equitable right to the pastures grown upon the said lands. Such being the case, they would not be entitled to the equitable intercession of the court, and the injunction theretofore granted was rightfully dissolved.

The appellants claim, however, that they have held these ranges for several years, and therefore they hold the same now under an adverse possession, as to this respondent, from entering thereon with his sheep. We think a court of equity should not interfere to enforce such a claim by injunction, in view of the act of congress of February 25, 1885, (volume 23, U. S. St. at Large, p. 321,) which provides, in substance, among other things, that the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States without claim, color of title, or asserted right, as therein specified, is declared to be unlawful, and thereby prohibited. When we take into consideration the object, purpose, and spirit of that law, and the fact that appellants do not claim to hold by virtue of any of the possessory acts, but only by their right of prior possession, we think that said act of con-

gress is a complete answer to all authorities cited and arguments urged upon that point. If, therefore, the action cannot be maintained because appellants have no legal or equitable title to the pasture in dispute, we think that the second ground urged, that the threatened act will be a violation of the Revised Statutes before quoted, is equally untenable; for it is a general rule that a court of equity has no jurisdiction to restrain or prevent crime, or to enforce a moral duty, except so far as the same is connected with the rights of property. The appellants having failed to show any property rights to the pasture, the exception to this general rule cannot be invoked by them.

Many reasons might be given in support of the correctness of the judgment in this case, but we think a further discussion of the subject unnecessary. Judgment of the court below is therefore affirmed.

BUCK and BRODERICK, JJ., concurring.

(11 Colo. 213)

# ROBERTS v. PEOPLE.

(Supreme Court of Colorado. April 8, 1888.)

## 1. DISTRICT AND PROSECUTING ATTORNEYS—DISQUALIFICATION—APPOINTMENT OF SUBSTITUTE—GEN. ST. COLO. § 1058.

Gen. St. Colo. 1883, § 1058, provides that if the district attorney be interested or employed as counsel in a case which it was his duty to prosecute or defend, the court may appoint some other person in his place; and section 1059 provides that, if he be sick or absent, the court shall appoint some one in his stead. The district attorney asked to be excused from a case, as he had been "retained in another cause, the facts of which were somewhat interwoven with the facts said to be involved in this case," and that he had a good deal of state business in another court. *Held*, that a statutory ground existed for the appointment of a substitute.

## 2. CRIMINAL LAW—ELECTION OF COUNT—DISCRETION OF TRIAL COURT.

A motion to compel a prosecutor to elect upon which count of an indictment he will proceed, where the separate counts each charge a felony, is a matter within the discretion of the trial court; and, there being no abuse of this discretion, the appellate court will not interfere.<sup>1</sup>

## 3. SAME—EVIDENCE—EXTRAJUDICIAL CONFESSIONS.

An extrajudicial confession of crime is not sufficient to convict unless corroborated by other and independent evidence.<sup>2</sup>

## 4. LARCENY—EVIDENCE—IDENTIFICATION OF STOLEN GOODS.

On a trial for larceny of certain ores, the testimony of witnesses, who are familiar with the ores, as to their identification, is admissible, notwithstanding the absence of marked characteristics by which to identify them.

## 5. SAME—CIRCUMSTANTIAL EVIDENCE—PROOF OF GUILT.

Under an indictment for larceny, the evidence showed that defendant was employed in a silver mine; that he secretly agreed to supply ores to an assayer, who was to extract the silver, and divide the profits with him; that defendant delivered ores to the assayer at night; that defendant, when indicted, advised the assayer to leave the country. Samples of these ores were identified as coming from said mine, by witnesses familiar with ores of the mine. Defendant admitted that the ores came from the mine in question, but claimed that they were given him by a co-employee, whom also the evidence tended to implicate. *Held*, that the evidence was sufficient to warrant a conviction.

Error to district court, Lake county.

The indictment in this case contains two counts; charging Roberts, in the first, with the larceny of mineral ore of the value of \$120, and in the second with breaking and severing ore, with intent to steal in the Forest City mine,

<sup>1</sup>As to when an election will be required, see *Corley v. State*, (Ark.) 7 S. W. Rep. 255, and note.

<sup>2</sup>That the simple confession or admission of the accused, without other proof of the *corpus delicti*, will not justify a conviction, and concerning the sufficiency of such corroborating testimony, see *McClain v. Com.*, (Pa.) 1 Atl. Rep. 45, and note; *People v. Jaehne*, (N. Y.) 8 N. E. Rep. 374, and note; *U. S. v. Bassett*, (Utah,) 13 Pac. Rep. 237, and note; *State v. Penny*, (Iowa,) 30 N. W. Rep. 561, and note; *Floyd v. State*, (Ala.) 2 South. Rep. 683, and note. On the general subject as to when the *corpus delicti* is established, see *People v. Palmer*, (N. Y.) 16 N. E. Rep. —.

while an employe therein; each of said offenses being a felony. The ownership of both the ore and the mine was alleged to be in the Small Hopes Consolidated Mining Company, a corporation. Upon this indictment, Roberts was tried and convicted; the jury rendering a general verdict of guilty in manner and form as charged in the indictment, and finding the value of the property stolen to be \$120. A motion for a new trial was interposed and denied, and Roberts was sentenced to confinement in the penitentiary for the term of two years. C. C. Parsons and S. P. Rose appeared as attorneys to aid the prosecution. While the jury was being impaneled, Philip O'Farrel, the district attorney, asked to be excused from further service in the case, stating as the reason therefor that he had been "retained in another cause, the facts of which were somewhat interwoven with the facts said to be involved in this case, and that he had a good deal of state business to attend to in Judge KELLOGG's court." The court granted this application, and appointed C. C. Parsons special district attorney to prosecute the case under consideration. Section 1058, Gen. St. 1883, referring to district attorneys, provides as follows: "If the district attorney be interested, or shall have been employed as counsel, in any case which it shall be his duty to prosecute or defend, the court having criminal jurisdiction may appoint some other person to prosecute or defend the cause." And section 1059 provides that, "if he be sick or absent, such court shall appoint some person to discharge the duties of the office until the proper officer resume the discharge of his duties."

*Taylor & Ashton* and *Bissell & Gunnell*, for plaintiff in error. *Alvin Marsh*, Atty. Gen., for defendant in error.

PER CURIAM. 1. While the grounds upon which the district attorney asked to be excused from prosecuting this case are not very fully stated, there is sufficient, we think, to indicate that a statutory ground existed. It is evident that he regarded, and that the court below regarded, his retainer in another case as a disqualifying fact. So far as the grounds for the action of the court in this respect are disclosed, they do not contradict, but strengthen, the presumption that is always indulged in favor of the action of the trial court. Even if this were not the case, we are not prepared to say that a *nisi prius* court may not make such an appointment for good and sufficient reasons other than those specified in the statute.

2. A motion to compel a prosecutor to elect upon which count of an indictment he will proceed, when such indictment contains more than one count, each charging a felony, is a matter addressed to the discretion of the trial court. A court of review will not interfere, except, perhaps, where such discretion has been abused. 1 Bish. Crim. Proc. § 454; 1 Whart. Crim. Law, § 423.

3. We see no good reason why witnesses, who have handled and become familiar with the ore taken from a certain mine, may not testify in reference to the same, for the purpose of identifying it, in the same manner and to the same extent as they are allowed to testify as to the identity of other personal property. The extent to which such evidence would be satisfactory and reliable would depend upon the existence of marked characteristics, rendering it easy of identification. Absence of such characteristics would go to the value of the testimony, not to its admissibility.

4. The evidence in the record before us relates chiefly to the charge of larceny contained in the first count of the indictment. It is upon this count the conviction of the prisoner must be sustained, if at all. The chief contention by counsel for the defendant in error is that the evidence does not show the *corpus delicti*. While direct evidence of the *corpus delicti* is always desirable, it should not be held indispensable. To so hold, would, in many cases, give immunity to crime, especially in the class of cases to which this belongs. There is some conflict of authority; but we regard this as the better doctrine.

If, however, circumstantial evidence is relied upon for this purpose, it should be such as to exclude all reasonable doubt. 1 Bish. Crim. Proc. § 1071, and cases cited. In the case at bar, we have to deal with the admission of the prisoner. The general rule is that extrajudicial confessions of a prisoner are not sufficient to warrant a conviction, without proof *aliunde* of the *corpus delicti*; or, as it is sometimes stated, the prisoner's confession of the crime must be corroborated by other and independent evidence. *Id.*; Whart. Crim. Ev. § 632. We are of the opinion that there is sufficient evidence to show a larceny of ores from the Forest City mine. Whether the larceny was committed by the prisoner is an entirely distinct question for independent consideration. It is in evidence that the defendant, Roberts, was in the employ of the owners of the Forest City mine as shift boss; that one Barnes, Burnett, and Charles Roberts, a brother of the prisoner, were also in the employ of the same company, working under the prisoner in the mine; that Barnes introduced the prisoner to the assayer, Purce, as one who had ores to sell, about whom he had theretofore spoken to Purce; that an arrangement was then and there entered into between the prisoner and the assayer, by which the one was to supply certain ores, and the other was to extract the silver, and market the same, for a percentage agreed upon; that these arrangements were made secretly, at night, with pledges of square dealing, and with precautions against their conversation being overheard; that the ores were, a few days afterwards, delivered by the prisoner in a gunny sack at the office of the assayer at night, with precautions and admissions showing that it was a felonious transaction; that the ores were reduced during the night by Purce and the witness Seyler; that they proved very rich; that, when reduced to a bar, they were marketed by Purce, and the proceeds divided with the prisoner, according to agreement; that the prisoner, when he learned that he and Barnes and others had been indicted, advised Purce to leave the country; that samples of these ores were subsequently identified as ores from the Forest City mine by a number of witnesses familiar with and long accustomed to handle ores from that mine. This is but a summary of the evidence. There is much detail, which goes to show that the prisoner, together with Barnes, Burnett, and his brother, Charles Roberts, were engaged in the execution of a common design and plan to steal and sell ores from the Forest City mine, in the working of which they were employed. There can be no reasonable doubt that the ores delivered by the prisoner were stolen. There is equally no reasonable doubt that they came from the Forest City mine. The prisoner said they came from that mine, and he is corroborated by the identification of the ores as from that mine, and, the ores being stolen, by the inherent probabilities of the case, arising from his connection with and access to the mine. Whether the larceny was committed by the prisoner or not, as we have said, is a distinct question. There is no direct evidence that the prisoner committed the larceny. No one saw him take the ores. Being small in bulk, and capable of easy concealment as soon as mined, in the nature of the case they would not be missed. The admission of the prisoner was to the effect that the ores had been given to him by Barnes, Burnett, and others employed in the Forest City mine. While the entire confession of a prisoner must be received, it is for the jury to say whether exculpatory facts contained in his confession are true. Whart. Crim. Ev. § 688. The admission of which we are speaking was made after the prisoner and his alleged conspirators were indicted, when he was expecting to be arrested, and the claim that the ores were given him by Barnes and others was well open to suspicion. The jury were at liberty to reject it, if, upon all the evidence, they believed beyond a reasonable doubt that the prisoner was guilty of the larceny. There was evidence tending strongly to show that the prisoner, Barnes, and others were engaged in the execution of a common plan to steal and sell from the ores they were engaged in mining. If so, there was co-responsibility, the act of the one was the act of the other, and each was equally guilty of the lar-

ceny. 1 Whart. Crim. Law, § 702. In this view, if the credibility of the witness be conceded, the perusal of the evidence leaves no reasonable doubt of the prisoner's guilt. If circumstantial evidence is to be relied upon at all in criminal cases, the finding of the jury in this case is not to be set aside as unwarranted. This proceeds upon the proposition that the witnesses for the prosecution, especially the witness Purce, are to be believed. The jury are the judges of the credibility of the witnesses, and, for obvious reasons, the best judges. The witness Purce was an accomplice. As a matter of theory, one charged with crime may be convicted upon the evidence of an accomplice alone. As a matter of practice, courts caution juries against reliance upon the testimony of accomplices, unless corroborated by independent evidence. Whart. Crim. Ev. § 441. The witness Purce is corroborated as to the prisoner visiting his assay office in the evening, at different times, once in company with Barnes, when they were in the back office, where the furnace was; as to his going along the street with a bundle under his arm, wrapped up in a newspaper, on the evening of the 10th of September; as to the contemporaneous reduction of Forest City ores in his shop at night, and their subsequent shipment to Denver; and as to the several meetings he had with the prisoner and others. The jury were the judges of his credibility. The court instructed them fully as to the caution they should exercise before relying upon the testimony of an accomplice. They evidently gave credit to his story, as detailed upon the witness stand, and we see no ground for saying they should not have done so.

5. We do not notice the instructions in detail. We have carefully examined them, and find nothing of which the prisoner is entitled to complain. In our opinion, they inform the jury fairly and fully as to the law applicable to the facts. These are all the errors regarded as demanding notice.

The judgment of the court below must be affirmed.

(75 Cal. 523)

*In re FISHER'S ESTATE*, (two cases. Nos. 11,732, 11,869.)

(*Supreme Court of California*. April 19, 1888.)

1. **APPEAL—FAILURE TO TAKE, WITHIN STATUTORY PERIOD—JURISDICTION OF APPELLATE COURT.**

The fact that an appeal was too late under the statute goes to the jurisdiction of the appellate court, and the validity of a motion to dismiss such appeal will not be considered.

2. **SAME—REVIEW—RULINGS ON EVIDENCE.**

On an appeal from an order refusing to change the record so as to show that a decree was in fact entered at a later date than appears from its face, where the affidavits of appellants' attorney and the clerk, as to the time of entering such decree, are directly in conflict, the conclusions of fact by the court below will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Marin county; E. B. MAHON, Judge.

S. L. Francis and E. A. Neale filed a petition for a partial distribution under the will of Catherine Fisher, deceased. The decree of the superior court was favorable to the executor, who was the husband of the testatrix. Notice of appeal was filed by the petitioners more than 60 days after the date of the decree; the statutory limit being 60 days. The petitioners claim that the minutes of the court below are erroneous, and the decree was actually entered later than such minutes show, and moved the court to change the record to that effect, which the court refused to do. The affidavits of appellants' attorney and the clerk of the superior court, as to the time of entering the decree, are directly in conflict. The petitioners appeal from the original decree, and from the refusal of the court to change the record.

*Vincent Neale*, for appellants. *Hepburn Wilkins*, for respondent.

HAYNE, C. The first appeal is from a decree of partial distribution. It was taken 62 days after the entry of the decree. This was too late. Code Civil Proc. § 1715; *Estate of Burns*, 54 Cal. 226; *Estate of Harland*, 64 Cal. 379, 1 Pac. Rep. 159; *Estate of Burton*, 64 Cal. 428, 1 Pac. Rep. 702. The argument as to the construction and constitutionality of the statute does not require refutation. The fact that the appeal was too late goes to the jurisdiction, and hence it is unimportant whether the motion to dismiss has lapsed or not.

The second appeal is from an order refusing to change the records so as to show that the decree above mentioned was in fact entered at a later date than it shows on its face. We shall assume, without expressing any opinion on the point, that this order is appealable. In our view, however, the affidavit of the clerk is directly in conflict with that of the attorney for the appellant; and we cannot say that the court below came to a wrong conclusion as to the facts.

We therefore advise that the appeal from the decree of partial distribution be dismissed, and that the order refusing to change the record be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the decree of partial distribution is dismissed, and the order refusing to change the record is affirmed.

(75 Cal. 539)

MILLIKEN v. HOUGHTON *et al.* (No. 11,334.)

(*Supreme Court of California.* April 20, 1888.)

APPEAL—REQUISITES—NOTICE—CODE CIVIL PROC. CAL. § 940.

A judgment against several defendants was reversed, as to one of them, upon appeal of that one alone; and, on motion of such defendant and one of those not appealing, an execution theretofore issued on such judgment was quashed, and from the order quashing the execution plaintiff appealed. *Held*, under Code Civil Proc. Cal. § 940, providing that notice of appeal must be served upon the adverse party or his attorney, that, unless notice of appeal was served on all the defendants, the appellate court cannot take jurisdiction of the appeal.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

The plaintiff, J. M. Milliken, had obtained judgment against defendants, S. O. Houghton, the Hibernia Savings & Loan Society, F. H. Burke, R. P. Kelly, John Higgins, and P. Hannigan, which ordered the premises described in complaint to be sold to satisfy a street assessment. The judgment was appealed from by one defendant only, the Hibernia Savings & Loan Society, and as to said defendant was reversed. This appeal is from an order, made after final judgment, granting the motion of the defendants Houghton and the Hibernia Savings & Loan Society to quash the execution of the judgment, on the ground that the reversal of the judgment on the appeal of one defendant reversed it as to all. The notice of the appeal was served only upon the Hibernia Savings & Loan Society, and Houghton.

J. M. Wood, (J. C. Bates, of counsel,) for appellant. *Tobin & Tobin* and *F. Thos. Barry*, for respondents.

SEARLS, C. J. This is an appeal from an order of the court below quashing a writ of execution on motion of two of the defendants, viz., S. O. Houghton and the Hibernia Savings & Loan Society. Respondents the Hibernia Savings & Loan Society and S. O. Houghton moved to dismiss the appeal, upon the grounds that the other defendants in the cause, viz., F. H. Burke, R. P. Kelly, John Higgins, and P. Hannigan, were not mentioned in the notice of appeal, and were not served therewith. Turning to the decree, we find that  
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it is against all of the defendants above named. The Hibernia Savings & Loan Society alone appealed to this court, and the judgment, as against it, was reversed. Upon the return of the case to the court below, plaintiff dismissed the action as to said last-named defendant, and thereupon procured an execution, with a copy of the decree attached, which was and is in all respects such as might have issued upon the decree as originally entered, except that it recites the appeal, reversal, and dismissal as to the defendant the Hibernia Savings & Loan Society. This writ was quashed by the court, on motion of the defendants as hereinbefore mentioned, and the notice of appeal therefrom is addressed to and served upon them only.

The notice of appeal must be served upon the *adverse party* or his attorney. Code Civil Proc. § 940. The term "adverse party" has been held to include all the parties to the action having an interest to be affected by a reversal, and in *O'Kane v. Daly*, 63 Cal. 317, it was held that the notice of appeal by one of several co-defendants should be served, not only on the plaintiff, but also on the non-appealing co-defendants; they having an interest in the judgment to be affected by the reversal, (*Senter v. De Bernal*, 38 Cal. 640; *Hiscock v. Phelps*, 2 Lans. 118; *Cotes v. Carroll*, 28 How. Pr. 446; *Thompson v. Ellsworth*, 1 Barb. Ch. 627.) In *Williams v. Mining Ass'n*, 66 Cal. 194, 5 Pac. Rep. 85, it was said: "This court has not jurisdiction to hear an appeal from a judgment, unless the appellant shall have served a notice of appeal on all the adverse parties; that is to say, upon all whose rights may be affected by a reversal of the judgment," etc. The defendants not served with the notice of appeal in this case are as directly interested in the affirmance or reversal of the order appealed from as are the two defendants who were served. It may be said the objection cannot come from the moving respondents here, as they can suffer no injury by appellant's failure to notify the other defendants. The answer is, the objection goes to the jurisdiction of the court to hear and determine the appeal; and the right to make the objection by any respondent before the court has been often recognized. Indeed, they are interested in having such judgment as may be rendered by this court binding upon all the parties whom after notice it can affect. It may well be that as the motion in the court below was by only two defendants, and one of them a party as to whom the action had been dismissed, it should have been denied, except as to the moving parties; or, if one only of them was interested, then only as to him. But, however this may be, the execution ran against all the defendants except the Hibernia Savings & Loan Society. It was quashed as to all of them, and the appeal is from the whole order. They are therefore all interested, and should have been served as respondents in the appeal.

The appeal is dismissed.

We concur: MCKINSTRY, J.; PATERSON, J.

(75 Cal. 509)

ZEIMER v. ANTISELL. (No. 9,824.)

(Supreme Court of California. April 17, 1888.)

FACTORS AND BROKERS—REAL-ESTATE AGENTS—COMMISSIONS.

A broker authorized to sell a tract of real estate called the attention of the purchaser to the same, and received an offer from him, which was less than he was authorized to accept. After the expiration of the broker's authority, such purchaser bought said tract of real estate from the owner, paying a price greater than he had originally offered. Held, that the broker was not entitled to commissions on such sale.<sup>1</sup>

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

<sup>1</sup> Respecting the rights of real estate brokers, and when their commissions are earned, see *Jarvis v. Schaefer*, (N. Y.) 11 N. E. Rep. 634; *Robinson v. Kindley*, (Kan.) 12 Pac. Rep. 587; *Ratts v. Shepherd*, (Kan.) 14 Pac. Rep. 496.



Action by Leo Zeimer, assignee of David Levitzky, against T. M. Antisell, to recover commissions for effecting the sale of certain real estate. Judgment for defendant. Plaintiff appeals.

*Ladd & Allen and Raphael Citron*, for appellant. *York & Whitworth*, for respondent.

BELCHER, C. C. On the 28th day of June, 1883, the defendant in writing authorized David Levitzky, a real-estate broker, to offer for sale certain real property which defendant owned in the city of Oakland, and agreed, if Levitzky should find a purchaser of the property for the sum of \$125,000, to pay him a commission of 2½ per cent. for his services. By express provision, the agreement, and Levitzky's authority under it, were to terminate at the end of 30 days from its date. Within the 30 days allowed, Levitzky found and introduced to the defendant one Hooker, who offered to purchase the property for the sum of \$110,000, and defendant thereupon agreed to accept his offer, and to sell to him for the sum named. Subsequently, about the 15th or 20th of July, Hooker refused to take the property, and thereafter, on the 31st day of that month, defendant and Levitzky entered into another agreement in writing, to the effect that if Hooker should take the property, and pay therefor the sum of \$110,000, the defendant would pay Levitzky, as and for his commission, the sum of \$1,000, and a style 7 upright piano; but, if Hooker should not take the property, then the defendant should be in no way liable to Levitzky for his services. At the time of entering into this last agreement, defendant refused to extend Levitzky's authority under the former agreement, and expressly took the property out of his hands and forbade him thereafter to offer it for sale to any person. Hooker refused absolutely to purchase or take the property, and on August 10, 1883, defendant contracted to sell it to one B. H. Levy for \$110,000, and on the 2d day of October following consummated the sale to him for that sum. Levitzky claimed that he was entitled to a commission of 2½ per cent. on the \$110,000, for which the property was sold to Levy, and on 13th day of October, 1883, he assigned his claim to the plaintiff, who thereupon commenced this action to recover the same. The court below found the facts to be substantially as above stated, and gave judgment for the defendant, from which, and from an order denying him a new trial, the plaintiff has appealed.

To entitle a broker to recover commissions for effecting a sale of real property, he must show that he was employed by or on behalf of the owner to make the sale, and that his authority, or some note or memorandum thereof, was in writing, subscribed by the party to be charged, or by his authorized agent. Civil Code, § 1624; *McCarthy v. Loupe*, 62 Cal. 299. And, before a broker can be said to have earned his commission, it must also be shown that he produced a purchaser, who was ready and willing to make the purchase on terms satisfactory to his employer, and that he was the efficient agent or procuring cause of the sale. *McGavock v. Woodlief*, 20 How. 221; *Wylie v. Bank*, 61 N. Y. 415. "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue." *Sibbald v. Iron Co.*, 83 N. Y. 382. It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner. *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. Rep. 316; *Wilson v. Sturys*, 71 Cal. 226, 16 Pac. Rep. 772.

In the light of the foregoing well-settled rules of law, was the plaintiff entitled to recover? We think not. There was no proof that Levitzky, while

acting as defendant's agent, was the "efficient agent or procuring cause" of the sale to Levy. He did not bring the minds of the buyer and seller to an agreement for a sale; nor, so far as appears, accomplish anything which even foreshadowed the sale that was subsequently made. It is true that, before the arrangement was made with Hooker, he took Levy to see the property, and received from him an offer for it of \$90,000, but he rejected the offer at once, without even informing defendant that it had been made. Nothing more was done by him to effect a sale of the property to Levy until after his contract had expired and his authority had ceased. What, if anything, he did after that it is not necessary to consider, for it cannot constitute a cause of action for the plaintiff here.

In our opinion, the findings were justified by the evidence, and the judgment and order should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(75 Cal. 544)

MARSHALL v. BEYSSER *et al.* (No. 11,797.)

(*Supreme Court of California.* April 26, 1888.)

LIMITATION OF ACTIONS—ADVERSE POSSESSION—COLOR OF TITLE.

In ejectment it appeared that defendant and her grantor, by themselves, their lessees and agents, had been in possession of the land in controversy from 1876 to 1884, and had paid all the taxes thereon; and that defendant's grantor claimed under a deed from one B., whose title did not appear. *Held*, that under the statute of limitations, which requires possession under color of title for five years, such possession is sufficient.<sup>1</sup>

Commissioners' decision. Department 1. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Action of ejectment by Marshall against Catherine Beysser and others. Judgment for defendants, and plaintiff appeals.

*Reddick & Solinsky*, (*Eugene N. Deuprey*, of counsel,) for appellant. *J. A. Louttit*, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for respondents.

HAYNE, C. Action of ejectment. The plaintiff relies upon a patent from the state of California, issued March 12, 1870. He never had any possession of the land until he forcibly dispossessed the defendants, on March 23, 1884. The defendants rely upon the statute of limitations. Special issues were submitted to the jury, which answered all the questions in favor of the defendants. The court adopted the findings of the jury, and made certain additional findings of its own, and ordered judgment thereon in favor of the defendants. The plaintiff appeals from the judgment, and an order denying his motion for a new trial.

The point mainly relied on is that the evidence is insufficient to show a five-years possession of the kind required by the statute. We think there is ample evidence to sustain the findings. It appears that in 1873 one T. N. Beatty, the nature of whose title does not clearly appear, conveyed the land in controversy to one John Urquilux, who was one of three partners commonly known as the "Bascos," probably from their nationality. The Bascos were in pos-

<sup>1</sup>Color of title is not every pretense or claim of title, but consists in a writing or conveyance of some kind purporting to convey the land under which the claim of title is asserted. *Armijo v. Armijo*, (N. M.) 13 Pac. Rep. 92. Any instrument purporting upon its face to convey title to the grantee is sufficient to constitute color of title. *Swift v. Mulkey*, (Or.) 12 Pac. Rep. 76, and note; *Webber v. Clarke*, (Cal.) 15 Pac. Rep. 431; *Hill v. Weir*, 33 Fed. Rep. 100; *Weinig v. Holcomb*, (Iowa,) 34 N. W. Rep. 787; *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12.

session under this deed. According to the witness Carnduff: "Along in 1870, '71, '72, '73, the Bascos had somewhere near one thousand head of cattle. \* \* \* The Bascos had possession in 1874. They had cattle then." It is not necessary, however, to trace the possession so far back. Five years prior to March 23, 1884, will be sufficient. And there is sufficient testimony of this. The witness Leon Chapin testifies that he went to the ranch in January, 1877, and worked there until February or April, 1880; that he had charge of the ranch for the Bascos; that in 1876 the land was rented to one Walker, who kept possession until 1878, and had sheep pastured on the land, and was then "out for ten months;" that witness had charge of the ranch during this ten months, being paid by the Bascos, and living on the premises; that in 1879-80 the land was rented to Walker and Willis. Walker testifies as follows: "I rented the whole Basco ranch, commencing in 1877 and succeeding through the year 1878. \* \* \* I used all the Basco ranch for grazing purposes for sheep. The sheep were in charge of a herder. No other sheep or cattle were allowed to pasture on the land. \* \* \* I leased the Basco ranch and land in controversy in March or April, 1879, the lease to commence September 15, 1879. Mr. Willis was in partnership with me. \* \* \* Chapin was living on the Basco ranch as keeper in that house on section 19, defendant's extension 1, during the intervening space between 1878 and 1879. We held possession of the Basco ranch for three years. \* \* \* We didn't have the land all of 1879; rented it in April, the lease to commence in September, 1879. We had it during 1880, '81, '82. Mr. Willis had it in 1883. Willis, I know, used part of the Basco ranch for grazing." These tenants sublet portions of the land to tenants who cultivated portions of it, and pastured other portions, paying their rents to the original tenants, who in turn paid to the Bascos. Willis testifies as follows: "We leased the entire Basco ranch from Beysser (who was then the agent) from September, 1879. I mean Mr. George W. Walker and myself. We were partners. In 1879, we occupied the 1,280 acres, and sublet this 640 acres to Piper. Our sheep were in charge of a herder. Piper farmed part of the land along Rock creek. He sublet the balance to Shields for grazing sheep. Shields had them in charge of a herder. In 1880, we rented to Piper again, and he sublet to Shields. I saw Shields' sheep pasturing on the land. Piper cultivated a part of the creek. In 1881, we sublet to Piper again. He farmed a part of the creek, and sublet to Shields. In 1882, we kept the land in controversy ourselves; used it for grazing sheep. Had a herder, and didn't allow other cattle or sheep to feed on the land. In 1883, I had the land in controversy, and sublet to Piper. He farmed part, and sublet to Shields. He farmed along the creek." On July 16, 1883, John Urquillux, who held the title as aforesaid, conveyed the premises in controversy to the defendant Catherine Beysser; and she entered under the deed. Her husband testifies as follows: "The deed was made in July, 1883, but it was subject to a lease which ended only on the 25th day of November, and it is then that we got possession of the land. We at once drove our cattle on it, between sixty and seventy head. We used the land for pasturage until the 23d of March, 1884. We had a herder to drive the cattle in charge on the land and watch them." This was corroborated by the testimony of Mrs. Beysser, and the herder, Fairbanks. Part of the land was fit for cultivation, and part for pasturage only.

There is no evidence substantially conflicting with the foregoing. And there is nothing to show that during all this time there was any attempt at adverse possession by any one else, until the forcible dispossession by plaintiff in March, 1884. The defendant and her predecessors paid all the taxes. We think the evidence shows a case of possession under color of title within the rule of *Webber v. Clarke*, 15 Pac. Rep. 431.

It is claimed that there was error in the admission of evidence. We are inclined to think that the declarations of Mrs. Beysser, while in possession, were

admissible as part of the *res gestæ* upon the question of the openness and notoriety of the possession. See, generally, *Draper v. Douglass*, 23 Cal. 348. But, however this may be, we think that the answers were so vague that no injury could have resulted.

We see no error in the instructions, and therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(75 Cal. 627)

PEOPLE v. BURNS. (No. 20,382.)

(Supreme Court of California. April 26, 1888.)

1. ELECTIONS AND VOTERS—OFFENSES AGAINST ELECTION LAWS—INDICTMENT—SUFFICIENCY.

An indictment against an election inspector, under Pen. Code Cal. § 41, prescribing certain punishments for willful neglect or refusal of election officials to perform duties incumbent on them in their official capacity, and for knowingly and fraudulently acting in contravention of existing election laws, alleged that the prosecutor, a duly-qualified elector, on offering to vote at defendant's polling station, was challenged as having voted before; that he then and there demanded the defendant to administer to him the oath prescribed by Pol. Code Cal. § 1234; and that defendant, well knowing the law relating to elections, and his duties as inspector, knowingly, willfully, fraudulently, and feloniously refused to administer the oath. Held, that the indictment related clearly and fully facts constituting the offense, and informed defendant of the charge he had to meet, as required by Pen. Code Cal. § 959, and that it need not aver that the prosecutor was registered as required by St. Cal. 1877-78, p. 303, § 15, providing that "no person shall vote at any election except he be legally registered upon the precinct register of the precinct in which he is a qualified voter."

2. SAME—VIOLATION OF ELECTION LAWS—REFUSAL TO ADMINISTER OATH.

On the prosecution of an election inspector for violation of Pen. Code Cal. § 41, prescribing certain punishments for willfully neglecting or refusing to perform duties required of him in his official capacity, and for knowingly and fraudulently acting in contravention of existing election laws, in that he refused, when demanded, to put the oath to a *bona fide* elector, as provided by Pol. Code Cal. § 1234, on the latter being challenged as to previous voting, the court properly charged that "defendant is presumed, as inspector, to know at his peril what the law was, and it would furnish him no excuse that he may have supposed that the law was different from what it was. But, in order that you may find him guilty, it must appear that he acted knowingly and fraudulently."

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

The defendant, Burns, was convicted on indictment for neglect of duty in his official capacity as an election inspector. The indictment conformed with the provisions of Pen. Code Cal. § 959, subsecs. 6, 7, requiring that the offense be clearly and distinctly set out in ordinary and concise language, such as a person of common understanding would know what was intended, and that the offense be stated with such a degree of certainty as to enable the court to pronounce judgment, upon conviction, according to the rights of the case. Defendant appeals.

*Robert Ferral and Gabriel W. McEnerney*, for appellant. *George A. Johnson*, Atty. Gen., for respondent.

THORNTON, J. The defendant was convicted of a violation of section 41 of the Penal Code. That section is as follows: "Every person charged with the performance of any duty, under the provision of any law of this state relating to elections, who willfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment

for such acts or omissions is prescribed by this Code, punishable by fine not exceeding \$1,000, or by imprisonment in the state prison not exceeding five years, or by both." The defendant did not demur to the indictment, but makes the objection here that the facts stated in it do not constitute a public offense. The indictment set forth that on the 12th day of April, 1887, at the city and county of San Francisco, at a special election called by the board of election commissioners for the purpose of voting for or against the new charter proposed by the board of freeholders elected, etc., that defendant was the duly appointed, qualified, and acting inspector of election of the First precinct of the Twenty-Ninth assembly district, in the said city and county, and while defendant was acting as such inspector at the said election, for the district and precinct aforesaid, one Charles Myron Emerson, "a duly-qualified elector of the said city and county, offered to vote at the polling place of said precinct;" that said Emerson was thereupon challenged that he had before voted that day; that Emerson then and there demanded that defendant administer to him the oath prescribed by section 1234 of the Political Code, (reciting the oath;) and that defendant, well knowing the provisions of the laws of the state of California relating to elections, and the duties with which he was charged thereunder as inspector aforesaid, knowingly, willfully, fraudulently, and feloniously refused to administer to said Emerson the oath aforesaid. It is prescribed by the act of the legislature in regard to the registration of voters in the city and county of San Francisco, (see St. 1877-78, p. 303, § 15,) which provides, *inter alia*, for the registration of electors on precinct registers, "that no person shall vote at any election except he be legally registered upon the precinct register of the precinct in which he is a qualified voter."

It is contended that, to constitute a person a duly-qualified elector of the city and county of San Francisco, he must be registered on the register of the precinct where he offers to vote, and that the allegation that Emerson was a duly-qualified elector of the city and county of San Francisco, without making it appear by averment that he was registered on the precinct register, is insufficient; and that, as the indictment is wanting in this latter averment, it does not state facts constituting a public offense. The offense to which the indictment is directed is the refusal of the defendant, in his official capacity as inspector, to administer the oath to Emerson when he was challenged on the ground stated in it. These facts constitute the offense, and they are clearly and fully stated in the indictment. The averment objected to as insufficient is matter merely introductory to the offense charged,—matter of inducement. Such matter need not be stated with the same minuteness as the main charge. *State v. Mayberry*, 48 Me. 218. The allegation as made in the indictment necessarily includes the fact that Emerson's name was on the precinct register. The general form of averment adopted in the indictment includes the particular fact that the voter's name was on the register of the precinct where he offered to vote. Therefore, when it is averred that Emerson was a duly-qualified elector of the city and county of San Francisco, all the facts, by an implication as strong as an express allegation, are averred which are necessary to make him a qualified elector. We are of opinion that the indictment apprised the defendant of what he had to meet on the trial, and that it complies with the requirements of section 959 of the Penal Code, which sets forth in detail the requisites of a sufficient indictment, and is sufficient.

At the request of the prosecution, the court instructed the jury as follows: "Defendant is presumed by law, as inspector, to know at his peril what the law was, and it would furnish no excuse to him that he may have supposed that the law was different from what it was. But, in order that you may find him guilty, it must appear that he acted knowingly and fraudulently." Defendant contends that by this instruction the jury was directed that they

might find defendant guilty of a penal offense for an error of judgment. As a general rule, a person who has done an act which is criminal cannot defend himself by reason of his ignorance of the law. See Broom, *Leg. Max.* (6th Amer. and 4th London Ed.) pp. 249, 250, and 264, on maxim, "*Ignorantia facti excusat*," etc. Ignorance of fact excuses, but ignorance of law does not. "The law," says TINDAL, C. J., in *McNaghten's Case*, 10 Clark & F. 210, "is administered upon the principle that every one must be conclusively taken to know it, without proof that he does know it." The signification of the word "knowingly," when used in the Penal Code, is defined by its seventh section (fifth subdivision) as importing only a knowledge that the facts exist which bring the act or omission within its provisions. It does not require any knowledge of the unlawfulness of such act or omission. The word "knowingly," when used in the Penal Code, must be construed to import only a knowledge of facts. It has no reference to a knowledge of the law. So construed, the fifth subdivision of section 7 of the Penal Code accords with the maxim referred to and the rule above stated, that ignorance of fact does, and ignorance of law does not, excuse. In accordance with the above, the defendant must be held to have known the penal law which he was charged with violating in refusing, in his official capacity, to administer the oath to Emerson, and that the court did not err in charging the jury. The remainder of the instruction is substantially in the language of the statute. Pen. Code, § 41.

We find no error in the record, and the judgment is affirmed. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.

(39 Kan. 35)

BECKER v. LANGFORD.

(*Supreme Court of Kansas. March 10, 1888.*)

ATTACHMENT—MOTION TO DISSOLVE—BURDEN OF PROOF.

On the hearing of a motion to dissolve an attachment in a case wherein the defendant has filed an affidavit denying the grounds for the attachment, the burden of proof is on the plaintiff, who procured the attachment to issue. The case of *McPike v. Atwell*, 34 Kan. 142, 8 Pac. Rep. 118, cited and approved. (*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Brown county; R. C. BASSETT, Judge.

Plaintiff in error, G. Becker, brought an action against defendant in error, H. Langford, in the district court of Brown county, Kan., and at the commencement of said action filed an affidavit for attachment containing the following grounds, viz.: (1) That the defendant has absconded with intent to defraud his creditors; (2) that the defendant has left the county of his residence, to avoid the service of summons; (3) that the defendant so conceals himself that a summons cannot be served upon him; (4) that the defendant is about to remove his property, or a part thereof, out of the jurisdiction of the court, with intent to defraud his creditors; (5) that the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; (6) that the defendant has property and rights in action which he conceals; (7) that the defendant is about to assign, remove, and dispose of his property, or a part thereof, with intent to defraud, hinder, and delay his creditors; (8) that defendant has assigned, removed, and disposed of his property, or a part thereof, with the intent to defraud, hinder, and delay his creditors; (9) that defendant fraudulently contracted the debt, and incurred the liability and obligations for which the above-named suit has been brought. On October 12, 1886, defendant filed his motion to dissolve the attachment, as follows: "Because the grounds alleged in plaintiff's affidavit for attachment are each and every one untrue." On the

same day defendant filed his affidavit denying the grounds for attachment alleged in the plaintiff's affidavit for attachment. Hearing was had on the affidavits, and the judge sustained the motion, and dissolved the attachment. The plaintiff excepts, and brings the case here.

*J. T. Allensworth*, for plaintiff in error. *Jackson & Royse*, for defendant in error.

SIMPSON, C., (*after stating the facts as above.*) The error alleged in this case is the order of the district judge at chambers dissolving an attachment. The affidavit to procure the order of attachment alleged nine grounds for its issue, but as to many of them there is no evidence. The defendant filed a motion to dissolve, because the grounds alleged in the plaintiff's affidavit for attachment are each and every one untrue. On the same day the defendant filed his affidavit, denying the grounds for attachment. The motion to dissolve was heard at chambers, and sustained. The first complaint made is that the judge ruled that the burden of proof was on the plaintiff on the motion to dissolve. The latest case in this court that we can now call to mind on this question is that of *McPike v. Atwell*, 34 Kan. 142, 8 Pac. Rep. 118. As the ruling of the judge was in accordance with the declaration of this court, it seems the ruling must be sustained. The second is as to whether the title to the team, harness, and buggy passed to Mrs. Langford at a sale of this property under a chattel mortgage or not. There is some conflict of evidence respecting this question of fact, but the judge rendered it in favor of a sale, and we cannot say that this was done erroneously. The third is that the defendant claimed not to be the owner of the property attached, and hence cannot move to discharge. He did not move to discharge certain property from the lien of the attachment, because he was not the owner thereof. His motion was to dissolve the attachment because the grounds stated were not true. If the attachment is dissolved, the property bound by its levy is released by operation of law. The ruling of the judge was responsive to the motion, and in accord with the showing made by the affidavit. We see no reversible error, and recommend an affirmance of the order.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 670)

#### IN RE HALL.

(*Supreme Court of Kansas. March 10, 1883.*)

#### 1. STATUTES—CONTEMPORANEOUS ACTS—CONSTRUCTION.

Laws enacted by the same legislature, about the same time, and concerning the same subject-matter, being *in part materia*, are to be taken and considered together, in order to determine the legislative purpose, and arrive at the true result.

#### 2. COUNTIES—ATTACHMENT FOR JUDICIAL PURPOSES.

Construing the provisions of the legislation relating to Garfield county, found in chapters 81, 132, 142, Laws 1887, by this rule they provide that Garfield county should be attached to Hodgeman county for judicial purposes until organized, and no longer; after which time, regular terms of the district court should be held in Garfield county at the prescribed times.

(*Syllabus by the Court.*)

Original proceedings in *habeas corpus*.

*F. A. Hutto*, for petitioner. *Fred C. Thomas*, for respondent.

JOHNSTON, J. Charles Hall was apprehended on a charge of having committed the offense of burglary in Garfield county, and, upon a preliminary examination before a justice of the peace of the same county, he was held for trial at the next term of the district court of Garfield county. Failing to offer sufficient bail for his appearance, he was committed, and from this imprisonment he seeks relief by the writ of *habeas corpus*. He alleges that his restraint is illegal, because he was held to answer in the district court of Gar-

field county, whereas he claims he should have been committed for trial in the district court of Hodgeman county.

The question in the case arises from the legislation of 1887 respecting Garfield county. By chapter 81, Laws 1887, Garfield county was created, and its boundaries defined. In chapter 132 of the same volume, provision was made for attaching, for judicial purposes, certain unorganized counties to others that were organized; and among the number Garfield was attached to Hodgeman. In chapter 142 of the same Session Laws, the legislature provided that regular terms of the district court should be held in the county of Garfield on the first Tuesday of June and the fourth Tuesday of September of each year. These acts were approved by the governor on the same day, namely, March 5, 1887. The act attaching Garfield county to Hodgeman for judicial purposes provided for the repeal of all conflicting provisions, and was published March 11th, while the one fixing terms of court in Garfield county was published one day earlier. The petitioner insists that the attaching act (chapter 132) is the latest legislative expression, and repeals chapter 142, which fixed the terms of court; and therefore that no term of court can be held in Garfield county until the legislature specifically detaches that county from Hodgeman. We cannot accede to this claim. The mere publication in the official state paper of one act a day later than the other act was published, will not work a repeal of the former; nor is the existence or operation of any of the acts dependent on the will of the publisher of such paper. These acts were enacted by the same legislature; the final action thereon was taken at the same time; they all relate to the same subject-matter; and, being *in pari materia*, they should be read and examined together, and treated as one law. When so construed, no repugnancy exists among them, and the legislative intent is not left in doubt. The legislature created the county by one act, and in another provided the method for its organization. Considerable time is required to effect the organization of a county, and while it was in an unorganized state it was necessary that the people resident in the county should be brought within the protection of the law; and hence it was provided that the county should be attached to Hodgeman for judicial purposes. It was evidently contemplated that organization would be effected before the convening of the next legislature, when it would be entitled to a court of its own; and therefore provision was made for holding regular terms of the district court in the county. It is the theory of our law that a district court shall be held in each and every organized county of the state. In the constitution it is provided that a clerk of the district court shall be elected in each organized county; and in the general provisions concerning courts it is enacted that there shall be a district court in each organized county. The legislature of 1887 proceeded upon the same theory in regard to Garfield county, by making provision for its judicial *status* in both an unorganized and organized state. The population and wealth of the county, and the existing sentiment respecting organization, at the time legislation was had, doubtless indicated that organization would be early accomplished; and it was the right and duty of the legislature to make provision for this contingency. The county was organized in July, 1887, and the operation of the act respecting the holding of courts in the county was simply made dependent upon the contingency of organization. Even if no such act had been passed, the general provisions relating to district courts afford sufficient authority for the holding of courts in the county after it was organized. *In re Wells*, 36 Kan. 341, 13 Pac. Rep. 548. There is no express repeal of either, nor any irreconcilable conflict between the acts; and, construed together, they form a consistent law, and disclose the manifest intention of the legislature to provide that Garfield county should be attached to Hodgeman for judicial purposes until organized; and after which regular terms of the district court should be held within its limits at the prescribed time.



Our judgment must be a denial of the writ, and that the petitioner be remanded.

All the justices concurring.

(38 Kan. 737)

STATE v. BUNKER.

(*Supreme Court of Kansas. March 10, 1888.*)

CRIMINAL LAW—VENUE—UNORGANIZED COUNTY.

It is alleged that on July 15, 1885, one B. committed willful and corrupt perjury in Lane county, in making oath to an affidavit which was afterwards filed and used by him in a divorce proceeding pending in Ness county between him and his wife. At the time of subscribing and making oath to the affidavit, Lane county was unorganized, and attached to Ness county for judicial purposes; and was thereby a municipal township of Ness county. Subsequently, and before any criminal proceedings were commenced against B., Lane county was properly organized, and entitled to a district court. *Held*, that the district court of Lane county had jurisdiction of the offense; and, *further held*, that the defendant could not be legally tried and convicted of the offense in the district court of Ness county, without his consent, and over his objection.

(*Syllabus by the Court.*)

Appeal from district court, Ness county; S. J. OSBORNE, Judge.

On May 18, 1887, there was filed in the district court of Ness county the following information, omitting caption and verification:

"I, Silas W. Porter, the undersigned, county attorney of said county, in the name, by the authority, and on behalf of the state of Kansas, come now here and give the court to understand and be informed that on the 15th day of July, A. D. 1885, in said county of Ness and state of Kansas, one James M. Bunker did then and there unlawfully, feloniously, in a certain action then pending in the district court, in and for said Ness county, wherein said James M. Bunker was plaintiff, and Cecilia Bunker was defendant, brought for the purpose of obtaining a divorce in behalf of said James M. Bunker, come in his own proper person before one Fred H. Kurtz, a notary public, duly and legally commissioned to act as such, in and for said county of Ness, and to administer oaths as provided by law, and to the said Fred H. Kurtz, as notary public, did then and there present an affidavit in writing, in words and figures, and to the tenor, as follows, to-wit:

"*'State of Kansas, County of Ness—ss.:* I, James M. Bunker, first being duly sworn, do on my oath depose and say that I am the plaintiff in the foregoing action of *James M. Bunker versus Cecilia Bunker*; that this is an action for divorce, and that I am unable to get personal service upon said defendant, as she is not a resident of the state of Kansas; that this affiant has made diligent search for the whereabouts of said defendant, and has not been able to find the same; that this affiant asks to be permitted to serve notice by publication upon said defendant, as by law made and provided.

"*'JAMES M. BUNKER.*

"Subscribed and sworn to before me this 15th day of July, 1885.

[Seal.] "*'FRED H. KURTZ, Notary Public.*

"*'Com. expires April 9, 1889.'*

"That said James M. Bunker read the said affidavit in the words and figures and to the tenor as aforesaid, and, well knowing the contents thereof, before the said Fred H. Kurtz, notary public, signed the same, as aforesaid, with his own name, and then and there took a solemn oath administered then and there to him by the said Fred H. Kurtz, as notary public, as provided by law, that the matters and allegations therein contained were the truth, the whole truth, and nothing but the truth; he, the said Fred H. Kurtz, notary public, as aforesaid, then and there having full power to administer said oath, and the said James M. Bunker then and there intending and designing to file said affidavit as aforesaid in said action for divorce, said affidavit being the usual affidavit provided by law where an action is brought in said state of Kansas

by a resident thereof against a non-resident of the state, to obtain a divorce, and where personal service of summons cannot be made upon the defendant within said state of Kansas; and afterwards, to-wit, on the same day, the said James M. Bunker, filed in said cause, in said district court, said affidavit with his petition in said cause, praying for a divorce from said Cecilia Bunker, and that said affidavit was then and there, and by virtue of the statute in such case made and provided became, material to the issues and matters to be tried in said district court in said action for divorce as aforesaid; and summons by publication was upon said affidavit made as provided by law in said action; and that afterwards, upon the trial of said action at the September term of said district court, in the year 1885, the said James M. Bunker obtained from said court, upon said service made upon said affidavit, a decree of divorce from the said Cecilia Bunker, the said Cecilia Bunker being then and there his lawfully wedded wife; whereas, said defendant, Cecilia Bunker, in truth and in fact did then, on said 15th day of July, 1885, and at all times theretofore, and ever since has, resided and did reside in Sumner county, in said state of Kansas, and within about four miles of said James M. Bunker's place of residence; the said Cecilia Bunker residing all of the time aforesaid at her father's house, where said James M. Bunker had a short time before lived with her as her husband, and where said James M. Bunker had frequently seen her and left her, all of which the said James M. Bunker, then and there on the 15th day of July, 1885, and all time thereafter, well knew; and that he, the said James M. Bunker, then and there, on the said 15th day of July, 1885, falsely, willfully, maliciously, and corruptly swore to said affidavit as aforesaid; he, the said James M. Bunker, then and there and at the time of obtaining said divorce as aforesaid well knowing that said affidavit was false, and by him, the said James M. Bunker, falsely, willfully, maliciously, and corruptly sworn to as aforesaid, and that the said James M. Bunker, in the manner and form aforesaid, did then and there unlawfully, feloniously, falsely, willfully, maliciously, and corruptly commit the crime of perjury, as aforesaid; contrary to the statute in such case made and provided, and against the peace and dignity of the state of Kansas."

Subsequently the defendant was arrested, arraigned, convicted, and sentenced to the penitentiary of the state at hard labor for the term of three years. He appeals to this court.

*S. B. Bradford*, Atty. Gen., and *Silas Porter*, for appellee. *Stidger & Reed* and *O. J. Wood*, for appellant.

HORTON, C. J., (*after stating the facts as above.*) James M. Bunker, aged 37, seduced Cecilia Montoe, aged 15, in Sumner county, in this state, in 1883. At the time they were engaged to be married; but soon after Bunker went to North Carolina, where he remained six months. While he was absent, Cecilia was delivered of a child. Upon Bunker's return to the state, in the spring of 1884, the father of Cecilia brought an action against Bunker for the seduction of his daughter. Bunker married Cecilia at Wellington, on May 27, 1884, and the civil proceedings brought against him were dismissed. All the parties lived near Milan, in Sumner county. After the marriage, Bunker and his wife lived about six months at the house of Mr. Monroe, the father of his wife. He had a farm in the neighborhood. Late in the fall of 1884, Bunker and his wife ceased to live together, Bunker remaining at his farm until the spring of 1885. Mrs. Bunker continued to live at her father's house. In the spring of 1885, Bunker went to Lane county, in this state, to reside. On the 23d day of September, 1885, he obtained a decree of divorce from Cecilia, his wife, in the district court of Ness county. In the action no personal service was made upon the wife. On July 15, 1885, Bunker made an affidavit before Fred H. Kurtz, a notary public of Ness county, that he was unable to obtain personal service upon his wife, as she was not a resident of the state; and that

he had made diligent search to ascertain her whereabouts, but had not been able to find her. On the date of the affidavit he filed the same in the district court of Ness county, with his petition for the divorce. At the date of the affidavit his wife was living in Sumner county, where he had left her. On May 13, 1887, an information was filed by the county attorney of Ness county against Bunker, charging him with perjury, in willfully, falsely, and corruptly making oath to the affidavit of July 15, 1885. Section 148, "Crimes and Punishments," Comp. Laws 1885. Fred H. Kurtz, before whom Bunker made the affidavit, was commissioned a notary for Ness county on April 9, 1885. He resided in Lane county and the affidavit was subscribed and sworn to in that county. At that time Lane county, being unorganized, was attached to the county of Ness for judicial purposes. Section 5, c. 99, Sess. Laws 1881. By the provisions of section 134, c. 25, Comp. Laws 1885, when an unorganized county is attached to an organized county for judicial purposes, it constitutes and forms one of the municipal townships thereof, and is subject to the same regulations and liabilities as other townships of the county. Its electors are deemed legal electors of the county to which it is attached. The officers of the county to which it is attached have the same powers and perform the same duties in reference to the attached county as they have over the municipal townships of their own county. The trial of this case was commenced in Ness county on November 7, 1887. At that time Lane county had been properly organized; the date of its organization being July 15, 1886,—one year after the making of the affidavit. The jury returned a verdict of guilty against Bunker as charged in the information, and he was sentenced to be imprisoned in the penitentiary of the state, at hard labor, for the term of three years. Judgment was also rendered against him for the costs. From the judgment he appeals.

Bunker should have been prosecuted in Lane county, where his offense was committed, not in Ness county. By the common law the trial of all crimes was required to be in the county where they were committed. It originally carried its jealousy further, and required that the jury itself should come from the vicinage where the crime was alleged to have been committed. The constitution of the state ordains that the accused shall be entitled to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The design of this constitutional provision seems to be to secure to the accused a trial by a jury from the vicinage where the crime is supposed to have been committed, so that he may have the benefit of his own good character and standing with his neighbors,—if these he has preserved,—and also of such knowledge as the jury may possess of the witnesses who give evidence before them. The word "district," like the word "county," is here used in a restrictive sense, and is intended to designate the precise portion of territory or division of the state over which a court at any particular sitting may exercise power in criminal matters. *Olive v. State*, 11 Neb. 1, 7 N. W. Rep. 444. There were no proceedings pending against Bunker in Ness county at the time of the organization of Lane county, on July 15, 1886. After that date Lane county was no part or portion of Ness county, as a township or otherwise. By the general provisions relating to counties there must be a district court in each organized county. *In re Wells*, 36 Kan. 341, 13 Pac. Rep. 548. Bishop on Criminal Procedure says: "Where a county is divided, a criminal act done before the division is to be prosecuted in the particular new county in which is the place of the offense. The offense is against the state; the trial, in the new county." Volume 1, § 49. In Arkansas it has been held that "if a new county is formed of territory formerly included in an old county, an indictment for an offense antecedently committed within the territory embraced in the new county may be maintained in the new, under the usual allegation setting out the offense as committed in the new. *McElroy v. State*, 13 Ark. 708. The same doctrine was declared in a

New Jersey case, except that while it was held that the trial should be in the new county, it was also held that the indictment should not allege that the offense was committed in the new county. for the reason stated, that "it is seen that at the time mentioned there was no such place as that at which the offense is alleged to have been committed." *State v. Jones*, 8 N. J. Law, 307. In Georgia, also, it has been held that the offender should be tried in the new county, and that the offense might be, or should be, charged as having been perpetrated in the old county. *Jordan v. State*, 22 Ga. 545-555.

It is claimed, however, that the filing of the affidavit in the district court of Ness county was "an act constituting or requisite to the consummation of the offense;" therefore, that the jurisdiction of the offense would be in either Lane or Ness county, as having been committed partly in one and partly in another county. Sections 20, 23, c. 82, Code Crim. Proc. Affidavits in judicial proceedings, though touching matters incident or collateral, may be instruments of perjury. Section 148, "Crimes and Punishments," Comp. Laws 1885. Upon the trial of a party on an information for perjury alleged to have been committed in swearing to an affidavit, it is proper to show that the affidavit was made to be used, or that it was actually used, in a judicial proceeding; and therefore, if this case had been tried in a district court having jurisdiction thereof, it would have been competent, and perhaps necessary, to have shown that the affidavit was filed and used in the divorce case of *Bunker v. Bunker*, pending in Ness county; but this evidence would have been competent only for the purpose of showing that the facts sworn to were material. To convict a party of perjury it must be shown that there was an oath authorized by law, an issue or case to which facts were material, and a false statement regarding such facts upon such issue, or in such cause. *People v. Fox*, 25 Mich. 492. Where the oath to an affidavit is required or authorized by the statute, this is made to appear when the purpose for which the affidavit was made is shown. The materiality of an affidavit is sometimes directly averred in an information or indictment. It must, of course, in some way appear. We think the offense was fully completed in the territory now embraced in Lane county, if perjury was committed by Bunker; and therefore the filing of the affidavit in Ness county did not confer upon the district court of that county jurisdiction of the accused. The judgment of the district court will be reversed, and Bunker will be returned to the county jail of Lane county, by the warden of the penitentiary, for such further proceedings against him as may be proper.

All the justices concurring.

(38 Kan. 664)

#### STATE v. MCFARLAND.

(Supreme Court of Kansas. March 10, 1888.)

##### 1. CRIMINAL LAW—APPEAL—TIME OF TAKING.

An appeal from a judgment in a criminal action must be taken within two years after the judgment is rendered; and, although the appeal is taken within proper time, yet, if it is dismissed for the want of prosecution, and is never reinstated, the new or subsequent appeal must also be taken within two years, or it is filed too late.

##### 2. SAME—TRANSCRIPT ON APPEAL.

Where an appeal from a judgment in a criminal action is filed in this court, it must contain a transcript of the proceedings of the trial court, certified to by the clerk thereof; and where the clerk certifies that the record is a copy of the journal entries only, no question relative to alleged errors is presented in the appeal for review.

(Syllabus by the Court.)

Appeal from district court, Cherokee county; GEORGE CHANDLER, Judge. S. B. Bradford, Atty. Gen., for appellee. *Cowley & Wiswell* and H. C. Webb, for appellant.

HORTON, C. J. Jesse McFarland was prosecuted upon an information, under section 35 of the crimes act, charging him with taking away Joanna Green, a female under the age of 18 years, without the consent of her mother, for the purpose of concubinage. He was convicted and sentenced October 10, 1885, to the penitentiary at hard labor for the term of five years. He filed his appeal in this court on December 8, 1886. It was assigned for hearing at the March term of the court for 1887; then continued to the May sitting, and again to the July sitting. On July 7, 1887, the appeal was dismissed, upon motion of the attorney general, for want of prosecution. Subsequently new notices of appeal were served, and the appeal was again filed in this court on October 11, 1887. We cannot, however, consider the alleged errors, because the only certificate attached to the record is as follows: "*State of Kansas, Cherokee County—ss.: I, J. A. Whitcraft, clerk of the district court within and for the county and state aforesaid, in the Eleventh judicial district of said state, hereby certify that the foregoing and annexed pages contain true, correct, full, and complete copy of all journal entries in the case of The State of Kansas, Plaintiff, against Jesse McFarland, Defendant, No. 828, as the same appears on file and of record in my office. In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Columbus, in said county and state, this 3d day of November, 1885. J. A. WHITCRAFT, Clerk District Court. [Seal District Court.]*" By L. A. VINCENT, Deputy."

The certificate of the judge to the bill of exceptions is as follows: "*State of Kansas, Cherokee County—ss.: I, George Chandler, judge of the Eleventh judicial district of the State of Kansas, do hereby certify that the foregoing and attached copy of the testimony is all the testimony introduced upon the trial of said cause, and that the same contains all the objections, together with the ruling of the court, and the exceptions thereto. I do further certify that the foregoing and attached copy of the instructions given by this court upon the trial of the case of The State of Kansas v. Jesse McFarland is true and correct; that such instructions were given by the court upon such trial, and each and every one of the same was excepted to by the defendant at the trial; that the instructions hereto attached, and forming a part of this bill of exceptions, are the instructions asked for by the defendant and refused by the court, and to which ruling of the court the defendant at the time excepted and excepts. And inasmuch as the above and foregoing does not otherwise appear of record, the same is by the court allowed, and directed to be made a part of the record herein. GEO. CHANDLER, Judge. Filed October 13, 1885. J. A. WHITCRAFT, Clerk District Court. Attest: J. A. WHITCRAFT, Clerk District Court. [Seal District Court.]*"

There is no certificate of either judge or clerk that a full transcript of the case is in this court; and, by the most liberal construction, there is no reference in the certificate of the clerk or of the judge to any copy of the information, or of the motion for a new trial. *Shumaker v. O'Brien*, 19 Kan. 476; *Whitney v. Harris*, 21 Kan. 96; *State v. Lund*, 28 Kan. 280; *State v. Nickerson*, 30 Kan. 545, 2 Pac. Rep. 654; *State v. Cash*, 36 Kan. 623, 14 Pac. Rep. 283. As there is no certified transcript of all the record filed in this court, no question relative to the errors alleged is presented for review. Again, as the case was dismissed July 7, 1887, and never reinstated, and as the case, under the new notice of appeal, was not filed within two years after the judgment was rendered, the appeal was not taken within the time prescribed by the statute. Crim. Code, §§ 282-284.

As the judge has certified that all of the testimony introduced upon the trial of the case is preserved in the bill of exceptions, we have taken the trouble to read the same. Under the authority of *State v. Hughes*, 35 Kan. 626, 12 Pac. Rep. 28, and *State v. Walker*, 36 Kan. 297, 13 Pac. Rep. 279, there was a "consensual" marriage between McFarland and Joanna Green,

in October, 1884, and at the date of McFarland's conviction, Joanna McFarland, *nee* Green, was his lawful wife, with all the term implies. McFarland could not, on December 10, 1884, or at any time after the marriage ceremony at Carthage, Missouri, sell or deed away his homestead without the consent of his wife, Joanna. If he has sold or deeded away any other of his real estate in Kansas, since his marriage with Joanna, then, if she shall survive him, one-half in value of all such real estate will descend to her. This, however, is mere *dictum*. We cannot, upon the record as it is presented to us, interfere with the verdict of the jury or the judgment of the trial court, and therefore the judgment of the district court will be affirmed.

All the justices concurring.

(38 Kan. 726)

CARLETON *et al.* v. CITY OF WASHINGTON.

(*Supreme Court of Kansas. March 10, 1888.*)

MUNICIPAL CORPORATIONS—POWERS—CONTRACT FOR FIRE APPARATUS.

Cities of the third class have power, under section 56, c. 19, Comp. Laws 1885, to contract for the purchase of hook and ladder trucks and fixtures; and such contract is not void for the reason that it provides for the payment for such apparatus in the future; and it can make no difference that no taxes have been levied or money appropriated for such payment.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Washington county; E. HUTCHINSON, Judge.

This was an action brought by the plaintiffs in error, C. G. Carleton & Co., against the city of Washington, a city of the third class, to recover the sum of \$275, alleged to be due upon a contract made between plaintiffs and defendant for the purchase of a hook and ladder truck and fixtures. The petition alleges that on the 26th day of January, 1884, defendant entered into the following contract with the plaintiffs:

"This agreement, made and entered into this 26th day of January, A. D. 1884, by and between C. G. Carleton & Co., of Chicago, Ill., party of the first part, and the city of Washington, county of Washington, state of Kansas, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements of the said party of the second part hereinafter contained, do hereby agree to sell and deliver in good shipping order, within 90 days from date hereof, on board cars at Seneca Falls, N. Y., the following, to-wit: A hook and ladder truck mentioned and described in their respective catalogues of fire-department supplies as figures 332, No. 1, made by Ramsey & Co., of Seneca Falls, N. Y., and to be equipped as follows: twenty-six rubber buckets, instead of eight, to be inscribed. 'Washington H. & L. No.' The said party of the second part hereby agrees and binds itself to take and receive the above-described hook and ladder truck if delivered in accordance with the above specifications, and to pay for the same as follows, to-wit: the sum of four hundred and twenty-five (\$425) dollars, payable and divided with city warrants drawing 7 per cent. interest from delivery of truck at Washington, Kansas, as follows: \$125 payable March 1, 1885; \$150, March 1, 1886; \$150, March 1, 1887.

"In witness whereof the parties have hereunto set their hands and seals.

"C. G. CARLETON & Co.

"Per L. M. SUMMERFIELD.

"For the City: THOMAS GROODY, Mayor.

"JAS. S. VEDDER, City Clerk."

[Seal.]

The petition further alleges that said Thomas Groody, mayor, and James S. Vedder, city clerk, were duly authorized and empowered by the city council of said city to enter into and make said contract; that, under said contract, they furnished the truck and other appliances, which were accepted by the city, and that there is now due on said first two installments the sum of \$275.

To this petition the defendant filed a demurrer for the reason that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and said demurrer was sustained by the court. The plaintiffs bring the case here for review.

*Omar Powell*, for plaintiffs in error. *J. W. Rector and Lowe & Smith*, for defendant in error.

CLOGSTON, C., (*after stating the facts as above.*) The only question presented by this record is, can a city of the third class contract for a hook and ladder wagon and fixtures to be paid for in the future? The defendant contends that the authorities of a city have no right or power to contract for appliances, and to pledge the credit of the city for the same, except where said payment is to be made out of the funds appropriated or levied for that current year; while it is claimed by the plaintiffs that if the city had authority to contract and purchase such appliances, that it has the right to use, in payment thereof, the money on hand, or to execute orders, notes, or other evidences of indebtedness, to be paid at a future time. We think the claim of the plaintiffs is correct. Section 56, c. 19, Comp. Laws 1885, provides: "The council may procure fire-engines, hooks, ladders, buckets, and other apparatus, and organize fire-engine, hook and ladder, and bucket companies, and prescribe rules of duty for the government thereof, with such penalties as they may deem proper, not exceeding \$100, and make all necessary appropriations therefor." In that section ample authority is given to the city to purchase the property contracted for in this case, and we have found no statute that anywhere or in any manner conflicts with this section. If the city has the authority to purchase, unless restricted by some other statute, the power to purchase incidentally carries with it the power to pay for the same. Defendant insists that the restriction is found in section 44 of said chapter 19, which is as follows: "Sec. 44. The mayor and council of any city governed by this act shall have no power to appropriate or issue any scrip, or draw any order on the treasurer for any money, unless the same has been appropriated or ordered by ordinance in pursuance of some object provided for in this act," etc. We think this section places no inhibition upon the city council that will prohibit them from purchasing or paying for the property authorized to be purchased by section 56. It is true that section 44 provides that, before any money can be drawn from the treasury or appropriated, an ordinance must have been passed authorizing the payment; and, before this claim of the plaintiffs can be paid, there must be an ordinance of the city authorizing its payment, or authorizing the warrant to be drawn upon the treasurer for that amount, in the same manner as all other sums of money are drawn from the treasury, such as salaries of the city officers, and other claims against the city. In *City of Wyandotte v. Zeitz*, 21 Kan. 649, which was an action brought against the city to recover for the building of sidewalks, the court said: "We think that the city of Wyandotte had the power to contract for the making of the improvements mentioned; that authority to contract for the making of such improvements necessarily implies the authority to pay for the same, and, in the absence of a statute specifying or restricting the manner of such payment, the authority to give a suitable acknowledgment of the debt, by bond, note, or other contract." Also, *Ketchum v. City of Buffalo*, 14 N. Y. 356. In *City of Burrton v. Bank*, 28 Kan. 390, it was said: "It has been laid down very generally that a municipal corporation has the power, in the absence of any statutory inhibition, to issue any ordinary evidence of indebtedness, and payable either instantly or at any time in the future." See 1 Dill. Mun. Corp. § 407, with note, and cases there cited. Also see *Bluffton v. Studabaker*, 106 Ind. 129, 6 N. E. Rep. 1. We are therefore of the opinion that this contract is valid, although no tax had been levied, and no ordinance appropriating the money had been passed. The power to contract does not depend upon the question of

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whether the money has been raised or taxes levied to meet the indebtedness. If appropriations have been made or taxes levied for that purpose, out of that fund, the debt can be paid; but, if none has been provided, then it becomes the duty of the city to make such provision and such payment, and for lack of such appropriations the city cannot avoid her contracts and liabilities. We therefore recommend that the judgment of the court below be reversed, and the cause remanded, with an order that the demurrer be overruled.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 760)

WOODWARD *et al.* v. WITASCHECK *et al.*

(Supreme Court of Kansas. March 10, 1888.)

1. ATTACHMENT—DISCHARGE OF—UNDERTAKING AFTER JUDGMENT.

Section 52 of the Justices' Code provides that the defendant may, at any time before judgment, procure the discharge of an attachment by the execution of an undertaking; but it furnishes no authority for the giving or acceptance of such undertaking after the attachment action has culminated in a final judgment.

2. SAME—UNDERTAKING BY INTERPLEADER AFTER JUDGMENT.

In an attachment action, the plaintiffs procured the seizure of property as that of the defendant, but which was claimed by a third party, who was permitted to interplead, and contest the validity of the attachment and the ownership of the property. Judgment was taken by default against the defendant debtor for the amount claimed, which judgment has never been paid, and in a subsequent trial the interpleader was adjudged to be the owner of the property, and the attachment was discharged. The justice of the peace ordered that the latter judgment be suspended for 30 days, to enable plaintiffs to prosecute a proceeding in error to reverse the same. No proceeding in error or appeal was prosecuted, and at the end of the 30 days the suspension was abrogated. During the period of suspension the interpleader gave an undertaking under section 52 of the Justices' Code, and thereupon the property attached was released. *Held*, in an action by the plaintiffs on the undertaking, that there was no consideration for its execution, and that no liability arose thereon.

(Syllabus by the Court.)

Error to district court, Miami county; J. P. HINDMAN, Judge.

Action in the district court of Miami county to recover upon an undertaking given in an attachment proceeding. On April 25, 1884, Woodward, Faxon & Co. commenced an action against Charles Witascheck, before WILLIAM H. MAXWELL, a justice of the peace of the city of Paola, in Miami county, to recover \$275.71. An order of attachment was issued at the same time, and levied upon a certain stock of drugs formerly owned and controlled by Charles S. Witascheck. These goods had been transferred by Charles S. Witascheck to one Emil Ciboula, who sold them to Ferdinand Goebel, and who in turn transferred the stock to Albert Witascheck. Albert was in the possession of the stock of goods when it was attached. Upon the application of Albert Witascheck, he was made a party defendant, and contested the validity of the attachment. On June 5th, judgment was entered against the defendant Charles S. Witascheck for the amount claimed; and the hearing of the issue formed between the plaintiffs and Albert Witascheck, in regard to the validity of the attachment, was continued until June 6, 1884, when the justice found that the grounds laid for the attachment were not sustained by the evidence, and were untrue, and that Albert Witascheck was a *bona fide* purchaser of the stock of drugs; and thereupon he discharged the attachment. The justice allowed the plaintiffs 30 days in which to file their petition in error in the district court, and also suspended the operation of the order discharging the attachment during that time. On June 23, 1885, Albert Witascheck and three sureties executed the following undertaking:

"[Title of cause.] Whereas, an order of attachment for two hundred and seventy-five dollars was issued in the above-entitled action, and certain goods and chattels, consisting of a stock of drugs, fixtures, and other chattels, have



been seized thereunder, said order of attachment, now, we, the undersigned, residents of said county, for the discharge of said attachment and restitution of said property, or the proceeds thereof, do hereby bind ourselves to the said plaintiffs, in the sum of five hundred and fifty dollars, (\$550,) that said defendant shall perform the judgment of said justice in the above-entitled action.

"Witness our hands this 23d day of June, A. D. 1884.

"ALBERT WITASCHECK.

JOSEPH SIMMONS.

"P. H. McGUIRK.

S. L. RUNNER."

At the same time, and in connection with the bond, a contract in writing was executed by the parties, as follows:

"It is hereby agreed between the plaintiffs in the above-entitled action and the sureties on said foregoing bond that the foregoing bond shall be treated and considered, in all respects and for all purposes, as if the same had been given and executed within the time and in the manner and in all respects in conformity with section 52 of chapter 81 of the Compiled Laws of Kansas for the year 1879.

WOODWARD, FAXON & Co.

"By BUSON & BAKER, Attorneys.

"ALBERT WITASCHECK.

JOSEPH SIMMONS.

"P. H. McGUIRK.

S. L. RUNNER."

And thereupon the bond, with the contract written thereunder, was submitted to the justice of the peace, who indorsed the following approval thereon: "This bond approved by me, this 23d day of June, A. D. 1884. WILLIAM H. MAXWELL, Justice of the Peace."

The bond, so approved, was filed with the justice of the peace, and the goods attached were delivered to S. L. Runner, who subsequently purchased the same from Albert Witascheck. No proceedings to reverse the judgment of the justice of the peace discharging the attachment was instituted in the district court within 30 days, nor at any other time; and on July 8, 1884, upon the application of the defendants, the justice abrogated the order suspending the execution of the judgment discharging the attachment. On November 25, 1884, Woodward, Faxon & Co. instituted the present action upon the undertaking, alleging that the goods released were never restored to the possession of the officers, and that the judgment rendered against Charles Witascheck had not been paid. At the trial the execution of the bond and contract, in the manner stated, was shown, together with the fact that the judgment against Charles Witascheck remained unpaid and unsatisfied. A demurrer to the evidence of the plaintiffs was interposed and sustained, and judgment given in favor of the defendants. The plaintiffs excepted, and bring the case here for review.

*Beeson & Baker*, for plaintiffs in error. *W. T. Johnston, W. H. Brown*, and *Stevens & Stevens*, for defendants in error.

JOHNSTON, J., (*after stating the facts as above.*) The undertaking upon which a recovery is sought was not given by the defendant debtor, nor in his behalf. He did not own the property attached, had no interest in the attachment proceedings, and permitted judgment to be taken against him by default. Albert Witascheck interpleaded in the action, and claimed to be the owner of the goods which had been seized; and on this issue he obtained judgment in his favor. This judgment, and the one taken by default against Charles Witascheck, had both been rendered a considerable time before the undertaking sued on was executed. The agreement of the parties, executed at the same time with the undertaking, and appended to it, specifically states that the bond was executed under section 52 of the Justices' Code, and shall be so treated and considered. That section provides: "If the defendant, or other person in his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff, by one or more sureties, resident in the county,

to be approved by the justice, in double the amount of the plaintiff's claim, to be stated in his affidavit, to the effect that the defendant shall perform the judgment of the justice, the attachment in such action shall be discharged, and restitution made of the property taken under it, or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee, in such action, for any property of the defendant in his hands." Under this provision, the attached property may be released during the pendency of the action of attachment, and before judgment is given. There is no authority, however, in section 52 for the giving or acceptance of a bond after the attachment action has culminated in a judgment. It prescribes a method to be pursued during the pendency of the proceedings, and before judgment is rendered. The undertaking provided by that section is a substitute for the property attached; and in the event that the attachment is sustained, and judgment given in favor of the plaintiff, he looks to the undertaking, instead of to the property which was seized. The giving of the undertaking operates to discharge the attachment and the liability of any garnishee, and to restore the property to the defendant. After the attachment has been upheld and final judgment rendered, no necessity exists for the giving of such bond. It could be of no benefit to the defendant, or party contesting for the property; and, as we have seen, no authority exists for taking or approving it. The undertaking sued on could not have been taken with reference to the controversy between the plaintiff and Charles Witascheck, for that judgment was entered 17 days before the execution of the undertaking. If it was taken by plaintiffs with reference to the final result between themselves and the interpleader, they are in no better condition, for that judgment is against them. It is true, the justice of the peace suspended, or undertook to suspend, the operation of that judgment for 30 days, in order that the plaintiffs might prepare a bill of exceptions on which to review his rulings in the district court. The undertaking was manifestly given upon the theory that a proceeding in error would be prosecuted, and as a security that the obligor would perform the final judgment in case of a reversal. But no proceeding in error or appeal was ever prosecuted, and there has been no reversal. The order suspending the judgment, whatever may have been its effect, was abrogated by the justice, of July 8th, 32 days after he adjudged the attachment to be invalid, and that Albert Witascheck was the *bona fide* purchaser and owner of the property. That judgment stands as a final adjudication that the property belonged to Albert Witascheck at the time it was seized. The plaintiffs had, therefore, no right or interest in the property attached, and parted with nothing in exchange for the undertaking. Albert Witascheck received nothing, by reason of the undertaking, beyond what he was entitled to without it, and therefore there was no consideration for its execution. If we consider the attachment as continued by the order of suspension, and that the undertaking was given as a substituted security for the property attached to await the final judgment thereon, still no liability could arise, because no judgment adverse to the obligor has been rendered. In no view of the case as it is presented here can the defendants be held liable, and the judgment of the district court must therefore be affirmed.

All the justices concurring.

(39 Kan. 125)

*In re SIMMONS et al.*

(Supreme Court of Kansas. April 4, 1888.)

CRIMINAL LAW—APPEAL—SUSPENSION OF JUDGMENT.

*City of Miltonvale v. Lanoue*, 35 Kan. 603, 12 Pac. Rep. 12, followed.

Original proceedings in *habeas corpus*.

This was a petition by John W. and N. R. Simmons for the writ of *habeas corpus*.

*David Ritchie* and *W. W. Smith*, for petitioner. *Ed. F. Coad* and *Irwin Taylor*, Asst. Atty. Gen., for respondent.

**PER CURIAM.** The defendants will be discharged, upon the authority of *City of Miltonvale v. Lanoue*, 35 Kan. 603, 12 Pac. Rep. 12. In that case it was said, among other things: "Pending the appeal in the supreme court, [in a case for a fine and costs, and imprisonment therefor until paid,] we think the entire judgment is suspended,—that with regard to the imprisonment, as well as that with regard to the payment of a fine or costs."

All the justices concurring.

(39 Kan. 73)

**EVERETT v. DILLEY et al.**

(*Supreme Court of Kansas. April 7, 1888.*)

**1. SPECIFIC PERFORMANCE—PAROL CONTRACT—DEATH OF PARTY.**

Where a parol agreement to sell real estate is made, and the purchaser takes possession, makes lasting improvements, assumes the payment of a mortgage upon the land, and pays a large part of the purchase money in cash, but the grantor is suddenly killed before a deed is executed, the purchaser can maintain an action for specific performance of the contract against the widow and children of the grantor, although nothing is said in the contract about the interest on the deferred payments, or payment of the taxes upon the land, or the exact time of payment of the balance due is not fixed.<sup>1</sup>

**2. VENDOR AND VENDEE—APPORTIONMENT OF TAXES.**

The law determines the taxes to be paid by each party when real estate is sold, in the absence of any special agreement between the parties concerning them.

**3. INTEREST—RATE—DEFERRED PAYMENT.**

When nothing is said in an agreement concerning the interest a deferred payment shall bear, it will be presumed that the rate is the legal one.

**4. PAYMENT—TIME OF—ASCERTAINMENT.**

When an agreement specifies that the deferred payments shall be made in the autumn following the making of the contract, the time of payment is sufficiently definite and certain.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Reno county; *L. HOUK*, Judge.

Action by *A. B. Everett* against *Emma Dilley*, the widow, and the other heirs of *Zenas Dilley*, to enforce specific performance of a contract for the conveyance of land, made by said *Zenas Dilley* with plaintiff. Judgment for defendants, and plaintiff brings error.

*Whiteside & Gleason*, for plaintiff in error. *Zimmerman & Taylor* and *G. A. Vandever*, for defendants in error.

**HOLT, C.** On the 18th of March, 1884, *Zenas Dilley* sold *A. B. Everett* the S. W.  $\frac{1}{4}$  section 28, township 24 S., of range 7 W., in Reno county. The sale was by parol, and by its terms *Everett* agreed to assume the payment of a certain mortgage of \$1,000 on the land, with interest from March 18, 1884; to pay \$500 on June 1st, and what further sum he could when he sold certain hogs in his possession; the balance he was to pay out of his wheat crop of 1884, when he should sell it in the fall. *Dilley* gave possession of the land to *Everett* about the 1st of April of the same year, who made some improvements, namely, putting in a pump, inclosing a lot for hogs with lumber, and fencing a pasture, containing 10 or 15 acres, with wire. He also cultivated the farm. No payment was made thereon until the 3d of June following, when plaintiff paid *Dilley* \$500 at a bank in Hutchinson, Kansas. Upon the 8th day of June, *Zenas Dilley* was killed by lightning. The plaintiff made a tender of \$100, the proceeds of the sale of his hogs, to *Emma Dilley*, widow of *Zenas Dilley*, on July 31st, but she declined to receive it; stating as a rea-

<sup>1</sup> See, also, *Gallagher v. Gallagher*, (W. Va.) 5 S. E. Rep. 297, and note.

son for her refusal that she had not received the papers yet as administratrix of her husband's estate, and that she did not need the money. Upon the 2d of December following, Everett made a tender to Mrs. Dilley of the money due on the contract, but she declined to take it, stating that she intended to keep the place if she could. In September, Mrs. Dilley had received notice that the semi-annual interest upon the mortgage was due, and she paid that interest. Afterwards the plaintiff tendered her the amount paid, \$50, and the interest thereon from the time she paid it. The plaintiff brought his action against Mrs. Dilley and the heirs of Zenas Dilley, for a specific performance of the contract entered into between himself and Dilley in relation to this land. Testimony was introduced in the court tending to establish the facts about as above set forth. The court sustained the demurrer interposed by defendants, because no cause of action had been proven.

The objection made to the evidence is that the contract attempted to be established was not sufficiently definite and certain to authorize the relief asked for. The proof of the contract was given by parties who had heard the statements made by Dilley and his wife; and in the statements nothing had been said, and no proof was offered, in regard to the rate of interest upon the payments, no statement given in regard to the payment of taxes, and no definite time fixed for the payment of the balance of the money due upon the land. The defendants also claim that there was some uncertainty about the amount to be paid for the farm. We think, however, that the law fixed the rate of interest upon the payments, (*Schmeling v. Kriesel*, 45 Wis. 325,) and also governed in the matter of the payment of the taxes upon the land. There was no definite time fixed for the payment of the balance of the money. All that was said in regard to that was that, when plaintiff sold the hogs he had on hand, he would pay the proceeds as a part payment; and, when he should sell his wheat in the fall, he would pay the balance. While the exact day is not fixed upon which payment was to be made, yet there was a time fixed within which such payment should be made, and it was sufficiently definite for the purposes of this action. We know that it requires more certainty in regard to contracts in an action to compel specific performance than it would in ordinary actions to recover back the money upon such a contract; but we believe that when the time is fixed within a certain date, that the limit thereof is sufficiently definite and certain. The amount to be paid is found by the court to be \$1,925, although upon that he states that there was some conflict of evidence. The plaintiff claims he labored under some difficulty in not obtaining evidence of the contract, because one party thereto was dead, and the other party is prevented from testifying to its terms under section 322 of the Civil Code. It is claimed by the plaintiff in error that, because of this state of facts, the court should be more lenient in requiring proof of the contract itself. We do not care or deem it necessary to pass upon that question. We base this decision on the grounds that the contract has been sufficiently proven, under the evidence introduced, to make a *prima facie* case at least. The deceased, with the consent of his wife, had placed the plaintiff in possession of the land. There was no question about its description. He had made improvements thereon. He had cultivated the same. He had paid \$500 therefor, and had assumed the payment of a mortgage of \$1,000 thereon. He had at the earliest opportunity tendered \$100 in payment of the residue, and finally had made a tender of all the amount he promised to pay for the land. It is in evidence that Zenas Dilley and his wife had gone to Hutchinson, at one time, for the purpose of executing a deed, and owing to other business matters they had not done so, but had agreed to go before an officer in their immediate neighborhood to make one, and it would probably have been executed in a few days if Zenas Dilley had not been killed. We believe that there was error in sustaining the demurrer to the evidence, and we recommend that the judgment be reversed, and cause remanded.

PER CURIAM. It is so ordered.

HORTON, C. J., and VALENTINE, J., concurring.

JOHNSTON, J. With considerable doubt, I concur.

(39 Kan. 236)

FRANKS *et al.* v. JONES.

(*Supreme Court of Kansas. April 7, 1888.*)

1. CHATTEL MORTGAGES—BILL TO REDEEM—ACCOUNTING.

In an action in the nature of a bill to redeem property under a chattel mortgage, and for an accounting, and to recover for mortgaged property taken possession of by the mortgagee under a pretended sale, it is not necessary that such sale shall be formally set aside before an accounting is had. The court has the authority to adjust and settle the claims of both parties when their transactions are not numerous, and do not extend over a long period of time, without compelling the parties to resort to another action.

2. TRIAL—VERDICT—SPECIAL FINDINGS.

In such an action, where special questions were submitted to a jury, and one of the parties asked the court to make additional findings, such party cannot complain, though the subsequent findings of the court set aside a part of the special findings of the jury, when the judgment is based upon the findings of the court, and those of the jury approved by the court.

3. CONTRACTS—VALIDITY—MENTAL CAPACITY.

A finding of the court that, at the time of an alleged sale, the "plaintiff's mind was in an abnormal condition, superinduced by drunkenness," is sufficiently exact and certain to show that he was then mentally incapable of making a sale or contract.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

This action was brought by defendant in error against H. B. Franks, Hattie B. Franks, now Hattie B. Foster, and Mary E. Franks. H. B. Franks has since died, and Mary E. Franks is his executrix. It has been in this court before. *Jones v. Franks*, 33 Kan. 497, 6 Pac. Rep. 789. The petition is in the nature of a bill to redeem property under a chattel mortgage, for an accounting, and an injunction against the disposition of the mortgaged property, taken possession of by virtue of a sale by the mortgagor to the mortgagee, which is claimed to have been fraudulent. The answer admits such sale, but denies any fraud therein. It appears from the evidence that, in the fall of 1882, plaintiff borrowed a large sum of money of H. B. Franks, and gave his note, and a bill of sale, intended as a mortgage, to secure it. The note was subsequently renewed, with interest and usury added, and in January, 1883, a new one was given to Hattie B. Franks, now Hattie B. Foster, daughter of H. B. Franks, which was for the amount of the note held by H. B. Franks against plaintiff, with interest and usury added. At this time a chattel mortgage was given by plaintiff to Hattie B. Franks upon the property mentioned in plaintiff's petition. On the 19th of February following, Hattie B. Franks, by her agent, took possession of the mortgaged property under a bill of sale executed by plaintiff to her on that date. Shortly afterwards, Hattie B. Franks conveyed the property, by bill of sale, to her mother, Mary E. Franks. The plaintiff claims that the sale from himself to Hattie B. Franks was fraudulently obtained from him, and that the sale from Hattie B. Franks to Mary E. Franks was not made in good faith. Upon the trial at the April term of the Shawnee district court certain issues of fact were submitted to the jury. They, with their answers, are as follows: "(1) Did Jones pay to H. B. Franks, in October, 1882, the sum of \$1,400? Answer. Yes. (2) Were the two promissory notes and chattel mortgage made by the plaintiff, Jones, to Hattie B. Franks, in consideration of a full and fair settlement of the dealings between the plaintiff, Jones, and Hattie B.

Franks, and her father, H. B. Franks, on the 11th of January, 1883? A. No. (3) Did the defendant Hattie B. Franks, or her father, H. B. Franks, procure said notes and chattel mortgage dated January 11, 1883, from Jones by fraud or deceit? A. Yes. (4) Did Jones sell and deliver to the defendant Hattie B. Franks, or her father, H. B. Franks, as her agent, the property in question, on or about the 19th day of February, 1883, for the consideration of a debt due from Jones to Franks? A. No. (5) What was the value of the property taken away by Franks from Jones' farm, or elsewhere, including the Stilson & Bartholomew contract? A. \$3,800." The jury was discharged, and the case passed, and afterwards, at the request of the defendants, the court made these additional findings of fact: "(1) The property in controversy was sold and delivered by Jones to Franks, February 19, 1883; but the notes and mortgages held by Franks contained large sums of usury, and Jones' mind was in an abnormal condition, superinduced by drunkenness. (2) That the property delivered by the defendant Franks, February 19, 1883, was of the value of \$3,000. (3) That the first finding of the jury is not sustained by the evidence. (4) That there was due from Jones to Franks, for and on account of their various transactions, the sum of \$2,105. (5) That the fifth finding of the jury is not sustained by the evidence, and should be modified to conform to the second conclusion of fact here found. (6) That the defendants all contributed in the conversion of the plaintiff's property, and are alike liable in this action. (7) That there is due to the plaintiff from the said defendants the sum of \$895, and that the plaintiff is entitled to recover from the said defendants said sum of \$895, and costs of this action." A judgment was rendered for plaintiff for \$895. The defendants bring the case here.

*Foster & Hayward*, for plaintiffs in error. *G. C. Clemens* and *R. A. Fredrick*, for defendant in error.

HOLT, C., (*after stating the facts as above.*) The first complaint is that the court erred in the admission of evidence. The bill of sale given by plaintiff to H. B. Franks was recorded in the office of the register of deeds, and a duly-certified copy thereof was admitted, over the objection of the defendants. A certified copy of such an instrument is not ordinarily admissible in evidence, and we believe this should not have been admitted in this case; but the error is entirely immaterial in this instance. It is averred in the petition that this bill of sale was given to secure the first note given H. B. Franks, and that afterwards it was renewed with no additional consideration, except interest added; but the note given to Hattie B. Franks in January, 1883, and the chattel mortgage upon the property, which is the subject of this action, was intended as a settlement and payment of the note held by H. B. Franks, and therefore a release of whatever lien this bill of sale may have created upon any property for the plaintiff. These facts are established by the undisputed evidence introduced in the case, and are virtually admitted, inferentially at least, by the answer of the defendants.

The defendants further claim that finding No. 1 of the court is not sufficient to set aside the sale of the plaintiff to Hattie B. Franks, under date of February 19, 1883. The court there finds "that plaintiff's mind was in an abnormal condition, superinduced by drunkenness." Defendants claim that the finding was not supported by the evidence. We think it was. They argue that this finding is not sufficient in itself to show such a state of mind of the plaintiff, at the time, as would make the sale void. This transaction does not appear to have been a fair one. The bill of sale was signed after he had been on a prolonged drunk, and at a time when he was beginning to recover therefrom, and while he was still in bed, fevered and feeble in body. He was not in the stupor of drunkenness at the time, but his mind was clouded, dimmed, and unsettled. It was not normal, regular in its action, or natural. The finding

was not couched in language so exact and explicit as we might wish it to have been, but is sufficiently definite to sustain the judgment holding the sale to have been void. The court evidently intended it to have this effect, and we will not disturb it because the finding was not so apt in its phraseology as it might have been. See 2 Kent, Comm. 452; *Cummings v. Henry*, 10 Ind. 109.

It is further contended there should have been no accounting until the sale had been formally set aside by the court. We think the court, at the request of the plaintiff, had authority to make adjustment and settlement of the claims of both parties in this action at this time, without resorting to another action and without delay. All parties were before it, and a full investigation was being had of their transactions. They were not numerous, nor did they extend over a long period of time. Hattie B. Franks, through her agent, got possession of the plaintiff's property under a pretended sale, which the court found was no sale at all on account of the condition of the plaintiff's mind. It is proven that defendants obtained possession of the property and retained it, and therefore they should be compelled to account to plaintiff for its value. If they had taken it summarily under the chattel mortgage, they would have been compelled to account for its actual value. The sale from Hattie B. Franks to Mary E. Franks was simply a pretense, and is not to be considered in this case, except to hold Mary E. Franks responsible for the property she got in that way. With this view of the case, it was evidently the duty of the court to find the value of the property that came into the hands of the defendants in this manner; and, on the other hand, to ascertain the amount plaintiff was owing to defendants of borrowed money, and render judgment for the balance due, whatever it might be, subject to such conditions as the court might impose.

The court set aside some of the findings of the jury, and substituted in their place some of his own. We believe he had power to do so. The jury, in an action of this nature, are simply advisory to the court, and it is not necessarily bound by their findings. Those especially found by the court in this action were made, at the request of the defendants, at a time after the jury were discharged, and upon points suggested by them. They are so manifestly fair, and in accord with the evidence, that we believe substantial justice was done in the case, and are loath to disturb them. The plaintiff professes in his brief to be entirely willing to allow a reversal of this cause, and files an ingenious and able brief in support of his position; and, if he were seeking relief upon a cross-bill, we should feel constrained to give it consideration. We should have modified the judgment if we could have done it under the record, allowing interest upon the judgment at 7 per cent. from the date of the conversion of the property. We are unable to do so, and therefore recommend an affirmance of the judgment, without modification.

PER CURIAM. It is so ordered: all the justices concurring.

(39 Kan. 189)

SILL v. SILL.

(Supreme Court of Kansas. April 7, 1888.)

DESCENT AND DISTRIBUTION—ELECTION TO TAKE UNDER WILL—ACTION TO SET ASIDE—COSTS.

Where a will is admitted to probate, and one of the heirs at law is appointed executor thereunder, and it appears that several of the heirs at law of the deceased, by fraud, duress, and undue means, procured from the widow of the deceased a statement in writing, purporting to be an election by her to take under said will; and where it further appears that the widow did not appear in the probate court, and that no citation was issued to her, and no commission was appointed by the court to take her election, and her rights under the will and under the law were not explained to her; and afterwards in an action brought by her to set aside the pretended election and will as to her, and the action was defended by said executor and the heirs, and determined adversely to the executor and heirs; *held*, that the costs,

expenses, and attorney's fees incurred in the defense of the action by said executor and heirs cannot be paid or allowed out of said estate before the division of the property between the heirs and the widow.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Marion county; L. HOUK, Judge.

This was an appeal from the probate court to the district court, on behalf of an executor, plaintiff in error, on account of the refusal of the probate court to allow certain costs and expenses incurred in the defense of an action commenced by the defendant in error to set aside a will, under which plaintiff in error was appointed executor, being the will of Daniel Sill, deceased. Judgment in the district court confirming the proceedings of the probate court. Plaintiff brings the case here for review.

*Kellogg & Sedgwick*, for plaintiff in error. *Keller & Dean*, for defendant in error.

CLOGSTON, C., (*after stating the facts as above.*) Daniel Sill, a resident of Marion county, Kansas, died testate, in January, 1881, and thereafter his will was duly admitted to probate in the probate court of that county, in February, 1881. He left surviving him his wife, Rebecca Sill, the plaintiff in error, and several other children. By the terms of his will he devised and bequeathed to Rebecca Sill a half estate in the home farm, and certain other real and personal property, and a provision that upon her death the home farm, and the residue of the estate, after paying the debts and some specific legacies, should go to his children, share and share alike. Plaintiff in error was named as one of the executors of the will, and was so appointed and confirmed by the probate court. Afterwards, defendant in error caused to be filed in the probate court a written statement, purporting to be an election by her, as such widow, to accept the provisions of the will, and take thereunder. The record shows, however, that said widow did not appear in the probate court, and in open court elect to take under said will, and that no citation was issued by said court to so appear, and that the probate court issued no commission directing any person to take the election of said widow; and it further appears that her rights under the will and under the law were not explained to her. The case of *Sill v. Sill*, reported in 31 Kan. 248, 1 Pac. Rep. 556, which is made a part of the record, shows that this election, or what purported to be an election, to take under the will, by the widow, was procured and obtained by fraud, duress, and without a full knowledge or understanding of her rights and privileges under the law, and that said pretended election was so obtained from said widow by the children and heirs at law, who were interested in having the widow accept the provisions of the will. Afterwards the widow brought suit in the district court of Marion county against the plaintiff in error, as executor, and the other children and heirs at law, to set aside, vacate, and annul the will as to her, in which said action a judgment was rendered in her favor. This case was afterwards taken on error to the supreme court by the executor and the other heirs, and the judgment of the district court was affirmed. Afterwards the executor, plaintiff in error, in settlement with the probate court of Marion county, filed therein a claim for expenses, costs, and attorney's fees incurred in the defense of said action in the district and supreme courts, which claim was by the probate court disallowed. The issue now is, were the costs and expenses incurred by the executor in defending the suit of Rebecca Sill to set aside the will of Daniel Sill, so far as it interfered with her rights under the law as the widow of Daniel Sill, payable out of the estate of said Daniel Sill as a whole, and before the distribution of the widow's portion thereof? Or, in other words, can her share of the estate be made to contribute to the payment of the costs, expen-



ses, and attorney's fees incurred by the executor and other devisees in resisting the setting aside of her half of the estate?

It is contended by the plaintiff in error that the record shows that he, together with the other heirs, defended said action brought by the said widow, in good faith, and under advice of counsel; that they are thereby entitled to recover the expenses, costs, and attorney's fees incurred in defending said action, notwithstanding the said action was determined adversely to them. How it happened that this admission was included in this record we can hardly imagine. The record of *Sill v. Sill*, 31 Kan. 248, 1 Pac. Rep. 556, which is made a part of this case, conclusively shows that the pretended election by the widow was obtained from her without her knowledge of the facts, and against her wishes, and upon the solicitation and threats of the heirs of Daniel Sill. If this part of the record is true, then the admission that it was defended in good faith by the heirs cannot be true. It may, perhaps, be conceded that the plaintiff in error and the heirs acted in good faith when they induced the widow to make the election, and that they honestly believed that it would be better for her to accept the provisions of the will. But, let that be as it may, the fact remains that she was induced to do what she did by the heirs, who are now seeking to have these expenses paid out of the estate before a division is made between them and the widow. This we think cannot be done. The authorities cited by the plaintiff in error do not reach this case. *Compton v. Barnes*, 4 Gill, 55; *Wilson v. Bates*, 28 Vt. 765; *Wendell v. French*, 19 N. H. 205; *Ammon's Appeal*, 31 Pa. St. 311. Perhaps, if the executor had been a disinterested person, having no interest in the division of the estate, he might be allowed his costs from the estate; but that is not this case. To that extent it seems that the authorities go, as shown by the plaintiff in error; while, on the other hand, many authorities hold that in no case ought the executor to defend an action, when the will is attacked under which he is appointed, where there are devisees or heirs at law interested in said contest. In other words, the burden of the defense ought to be thrown upon those who will be benefited by the contest or its defeat. *Andrews v. Administrators*, 7 Ohio St. 143, and cases therein cited. All we care now to decide is that where an executor who is an heir of the estate, with other heirs or devisees procures an acceptance by the widow of the provisions of a will, where it is against her interest, and without a full knowledge by her of her rights thereunder, and afterwards suit is brought by her to set aside such election and will as to her, that the costs and expenses of a defense to such an action must be borne by the executor, devisees, or heirs, and cannot be taken out of the estate before a division between said heirs and devisees and the widow. It is therefore recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered. All the justices concurring.

(39 Kan. 220)

ALLEN v. DODSON, Sheriff.

(Supreme Court of Kansas. April 7, 1888.)

1. PRACTICE IN CIVIL CASES—DISMISSAL—HOW EFFECTED.

An action cannot be dismissed by the plaintiff by an entry to that effect on the appearance docket. It is in the nature of a judgment, and requires the order of the court.

2. TRIAL—BY COURT—REQUESTS FOR SEPARATE FINDINGS AFTER GENERAL FINDING.

A request to the court to state separately findings of fact and conclusions of law is too late, when made after the conclusion of the trial, and after a general finding has been announced.

3. HOMESTEAD—LOSS OF—CONVEYANCE OF RIGHT OF WAY TO RAILROAD COMPANY.

A homestead right to the whole 160 acres of land is not destroyed by the grant of a right of way through it to a railroad company, a part of which is an absolute grant

and part the creation of an easement. Such a conveyance of the right of way does not operate to so divide the tract as to make the land lying only on one side of the right of way subject to the homestead right.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Butler county; T. B. WALL, Judge.

On the 13th day of March, 1886, Emma A. Allen filed her petition in the district court of Butler county, against H. T. Dodson, the sheriff of that county, to restrain him from selling on execution a certain tract of land situated in said county, and an undivided half of a lot in the city of Augusta, in said county; claiming the land as her homestead, it having been the homestead of her husband before her marriage, and having been purchased by her from him subsequent to the marriage. She had also purchased from her husband the undivided half of the Augusta city lot. The sheriff had levied upon said real estate, and advertised it for sale on the 24th day of March, 1886, by virtue of an execution to him directed on a judgment in favor of one William McGarry against B. F. Allen, the husband of the said Emma A. Allen. This judgment was rendered at the January term, 1886, of the district court of Butler county; the term commencing on the 5th day of January, and the judgment probably rendered on the 19th day of that month. Emma A. Allen obtained a temporary injunction from the probate judge of Butler county, on the 13th of March. And this temporary restraining order was dissolved and vacated by the judge of the district court at chambers on the 22d day of March, 1886. On the 24th day of March the plaintiff in error dismissed the action by entering on the appearance docket an order of dismissal in these words: "[Title of cause.] This case is hereby dismissed, without prejudice. EMMA A. ALLEN, by her attorney." On the same day, but at a later hour, the defendant filed an answer, setting up three distinct defenses to the cause of action stated in her petition; claiming that, at the time of the rendition of the judgment in favor of McGarry, the real estate levied upon was owned by B. F. Allen, and was not his homestead, and was bound by the lien of said judgment; that on the 13th day of January, 1886, he conveyed the same to one T. A. Kramer, and on the 20th day of January Kramer conveyed the same to Mrs. Allen; and that the same conveyances were made for the purpose of avoiding the payment of the judgment, and were without consideration, and were fraudulent and void. At the May term of the court, and on the 12th day of that month, the case being upon the trial docket, the attorney of Mrs. Allen filed a written motion to strike the same from the trial docket, for the reason that it had been dismissed by the plaintiff on the 24th day of March, 1886, and was so dismissed before the answer of defendant was filed. This motion was overruled, and an exception taken. A motion to make the answer more definite and certain was filed, heard, and overruled, and exceptions noted to the ruling. A demurrer was then filed to the answer, and this was heard and overruled, and exceptions saved. A motion was then made to strike the case from the trial docket, and continue it until the next term of the court, for the reason that it was not at issue before the first day of the term, and this was overruled, and exceptions noted. Trial was had on the 15th day of May, and after the evidence was all in the court announced that the parties would be heard upon certain questions, and, these being argued, the court rendered an opinion, and was then requested to make special findings of facts and conclusions of law. This request was denied and refused, and exceptions saved to the ruling. There was a decree for the defendant, setting aside the conveyances from Allen to his wife as fraudulent as against McGarry, and subjecting all the real estate, excepting so much as lies west of the Florence, El Dorado & Walnut Valley Railroad, to sale on the judgment. The facts as disclosed on the trial are that B. F. Allen, an unmarried man, being a widower with one child, was the owner of an undivided half and was residing on the S.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  section 21, and

the N.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  section 28, township 18, of range 4 E., in Butler county, on the 17th day of June, 1881. On that day, he and his brother, who owned the other undivided half of said real estate, executed a right of way deed to the Florence, El Dorado & Walnut Valley Railroad Company, in the words and figures following, to-wit:

"RIGHT OF WAY DEED.

"Know all men by these presents, that B. F. Allen, unmarried, and C. C. Allen, unmarried, of the county of Butler, in the state of Kansas, in consideration of the sum of two hundred and fifty dollars in hand paid by the Florence, El Dorado & Walnut Valley Railroad Company, a corporation duly organized under the laws of the state of Kansas, have bargained and sold, and do hereby grant and convey, unto the said Florence, El Dorado & Walnut Valley Railroad Company, its successors and assigns, forever, the following premises, situate in the county of Butler, in the state of Kansas, and described as follows: Commencing at a point where the center line of said railroad, as now located, crosses the south line of the north half of the north-east quarter on said south line one hundred and fifty (150) feet; thence in a north-easterly course, parallel to and one hundred and fifty feet from said center line of railroad, to a point two hundred and seventy (270) feet south of north line of said quarter section line; thence west one hundred feet, (100;) thence north-easterly parallel to and fifty feet (50) from the center line of said railroad, to the north line of said quarter section; thence west, along said section line, one hundred feet, (100;) thence south-westerly, parallel to and fifty feet from the center line of said railroad, as now located, two hundred and seventy feet, (270;) thence west one hundred feet, (100) measured at right angles; thence south-westerly, parallel to and one hundred and fifty (150) feet from said center line of railroad, as now located, to the south line of said north half ( $\frac{1}{4}$ ) of said quarter section; thence east, along said line, to the place of beginning, —containing eight and 3-10 acres, more or less. This land is to be used for depot, stock-yards, and side tracks; and, when no longer used for railroad purposes, to revert back to grantor. Also a strip of land fifty feet (50) in width on each side of the center line of said railroad, as now located, across, over, and through the south-half ( $\frac{1}{2}$ ) of the south-east quarter ( $\frac{1}{4}$ ) section twenty-one, (21,) township twenty-eight, (28,) range four E., situated in Butler county, Kansas, containing three and 2-10 acres, more or less. To have and to hold said premises, with the appurtenances, unto the said Florence, El Dorado & Walnut Valley Railroad Company, its successors and assigns, forever. And the said B. F. Allen and C. C. Allen, for themselves and heirs, do hereby covenant with said railroad company, its successors or assigns, that they are lawfully seized of the premises aforesaid; that the premises are free and clear of all incumbrances whatsoever; and that they will forever warrant and defend the same, with the appurtenances, unto the said Florence, El Dorado & Walnut Valley Railroad Company, its successors and assigns, against the lawful claims of all persons whomsoever.

"In testimony whereof, the said B. F. Allen (unmarried) and C. C. Allen (unmarried) have hereunto set their hands this 17th day of June, A. D. 1881.

"B. F. ALLEN.

"C. C. ALLEN.

In October, 1881, B. F. Allen was married to Emma A. Cease, a widow with two children, who owned a farm adjoining his. She was the statutory guardian of the children. Before the marriage, in 1880, she had sold to Allen corn and stocks to the amount of \$150. In September following he borrowed from her \$250. The same fall he bought from her 2,250 bushels of corn, at 53 cents per bushel, amounting to \$1,192.50. The next year he bought 2,500 bushels of corn from her, at 25 cents per bushel, \$625. In the fall of 1883 he bought from her 250 bushels of wheat, at 80 cents per bushel, \$200. For this borrowed money and grain he executed his notes, and delivered them

to Mrs. Allen, who held them until some time in July, 1885, when they were surrendered to him in consideration of a deed executed by him to her, conveying to her the property heretofore described. There was a mistake in this deed; and the deed to Kramer on the 13th day of January, 1886, and from Kramer to her on the 20th of January, 1886, were made to correct this mistake. Mrs. Emma A. Allen, with her children, husband and his child, have been living on the farm conveyed to her by Allen since the 19th day of December, 1885, and claims it as her homestead; her husband, with his child, having resided on it for a long time before the marriage and the conveyance to her.

*E. N. Smith*, for plaintiff in error. *Shinn & Yeager*, for defendant in error.

SIMPSON, C., (*after stating the facts as above.*) 1. The first contention of counsel for the plaintiff in error is that the action was dismissed, before the filing of the answer, by an entry on the appearance docket of an order to that effect; that, at any time before an answer is or ought to be filed, the plaintiff has a right to dismiss his action. This involves a construction of section 397 of the Code, and it will be noticed that the sections with reference to a dismissal of a case form a part of the article on "Judgment." It is true that an action may be dismissed by the plaintiff, without prejudice to a future action, at any time before the final submission of the case to the jury or to the court, where the trial is to the court; but as the dismissal is in the nature of a judgment, (*Brown v. Smelting Co.*, 32 Kan. 528, 4 Pac. Rep. 1013,) and may or may not be the final disposition of the case so far as the plaintiff is concerned, it must necessarily require an order of the court, and cannot be accomplished by the mere act of the plaintiff alone. If it is desired to dismiss without prejudice to a future action, how can an entry of that kind be made on the journal of the court without the active intervention of the court itself? The law requires the clerk of the district court to keep an appearance docket, in which is entered the names of parties to an action, the time of the commencement thereof, and other necessary entries. So a trial docket is required to be made out; and there are certain mandatory provisions respecting it, controlling the clerk, and prescribing his duty. When an action is properly entered on these dockets, it does seem as if it would be a dangerous construction in tendency to hold that these dockets could be made, altered, or changed by the mere act of one or both parties to suits thereon. The safer construction is to require that actions can only be disposed of by a judicial act. These dockets are to be controlled by the statutory provisions regarding them, in some respects, and by the orders of the court in others. We think that the order entered by the plaintiff in error on the appearance docket did not have the effect to dismiss the case, and that there was no error in the rulings of the court in regard to it.

2. The next complaint is that the answer of defendant did not present any set-off or counter-claim, and the motion to dismiss ought to have been sustained for that reason. Conceding that the court, on the application of the plaintiff, ought to have dismissed the action so far as the plaintiff is concerned, we are all of the opinion that the answer of the defendant did plead a counter-claim, and that the motion to dismiss was properly overruled. The plaintiff alleged in her petition that she was the owner of certain real property; that she had purchased it from B. F. Allen, and was residing on it as a homestead; that it was his homestead before she purchased it; that the defendant, as sheriff, was about to sell it on an execution issued on a judgment against B. F. Allen. She prayed for a temporary injunction restraining the sale, and a decree on final hearing adjudging her the absolute owner. The defendant denies her homestead rights, as well as those of B. F. Allen; alleges that the sale by Allen and the purchase by her were fraudulent, and made

with the intent to prevent the collection of the judgment of *McGarry v. Allen*; prays that these conveyances be declared fraudulent and void as against McGarry as a creditor of Allen, and that the real property in controversy be subjected to the payment of the McGarry judgment. The defendant asks certain affirmative relief as against the claim alleged in the petition of the plaintiff, and just such relief as he was entitled to if the facts justified the court in granting it; otherwise he would have to sell, take a sheriff's deed, and commence his action to set aside these conveyances as fraudulent as against the creditors of Allen. We think the court ruled right on this question. Under the terms of the motion made to dismiss because of the entry on the appearance docket of the 24th day of March, the ruling of the court was correct in all respects. The plaintiff in error did not ask a dismissal of the case generally, but bases his claim for dismissal on the action of the 24th of March solely; and, on the motion thus restricted, the ruling was necessarily right. Section 398 of the Code expressly provides: "In any case where a set-off or counter-claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action, or failed to appear." If the plaintiff in error in term-time had made an application to dismiss the action, and such application had been granted by the court, instead of trying to enforce the attempt to dismiss by entry on the appearance docket, then the defendant in error would have the right, under this section, to have his counter-claim heard, although the plaintiff's cause of action had been dismissed by an order of the court; but, as there was no dismissal, there was no error in any of the rulings of the court in this matter.

3. It is claimed that the court erred in not making special findings of fact, and separate conclusions of law, as requested by the plaintiff in error. The statute requires the court to state its findings at the request of one of the parties to the action, but that request must be made at such a time, and at such a stage of the proceedings, as to give the court a fair opportunity to comply with it. It is said in *Wilcox v. Byington*, 36 Kan. 212, 12 Pac. Rep. 826, that the prevailing practice is to make the request either before or at the conclusion of the argument. It is held in *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. Rep. 444, that, after the general finding is made, it is too late to make the request. In this case, after the evidence closed, the court announced he would hear the parties on the question of homestead, and the effect of the right of way deed upon it; and, after hearing the argument, said he was of the opinion, and found, that the deed to the railroad separated the land. Then the plaintiff in error asked the court to make special findings of fact and conclusions of law, and this the court refused to do, for the reason, among others, that the trial was concluded before the request was made. We think there was no error in this, under the circumstances.

4. The next disputed question is as to the homestead rights of Mrs. Allen in the land. It is conceded that a part of the land was his homestead, and became hers by purchase and occupancy; but it is contended that the grant of the right of way to the railroad company so segregated the tracts on each side thereof that only the part of the land upon which is situated the dwelling-house can be claimed under the homestead law. The right of way was granted by deed, and, as to a part of it, there can be no doubt but that it is an absolute grant, without reservation or qualification of any kind whatever. As to the other part, this language is recited in the deed: that "this land is to be used for depot, stock-yards, and side tracks; and, when no longer used for railroad purposes, to revert back to the grantor." In construing these words so as to determine the character of this conveyance, reference must be had to the condition of affairs existing at the time they were used to arrive at the intention of the grantors, as well as to the peculiar use to which the land was to be applied. It is evident, from the description of the land in the right of way deed, that at the time of the execution of the conveyance the rail-

road company had already located their line. This may have been done in pursuance of some previous agreement of the grantors with the company. In addition to the ordinary right of way of 100 feet in width, the company wanted land for depot, stock-yards, and side-tracks, and it is with reference to these things particularly that the qualifying words are used. The line of road, as located, enters the farm at the southern boundary, and running north for more than two-thirds of the way, at the ordinary width of 100 feet, then widens, in order to give room for the erection of a depot, stock-yards, and side tracks. With respect to the right of way running north until it reaches the point where it begins to widen, there are no reservations or conditions imposed by the conveyance. For this part of the right of way there seems to be an absolute and unqualified grant; but as to the remainder, involving more than eight acres, it seems from the language used, and the circumstances attending its expression, that the true intent and meaning of the conveyance was to only grant an easement. The condition being annexed to the wider part, and an absolute conveyance having been made to the other, it is evident that they did not intend to make an absolute grant as to that. We think it will better accord with the real intention of the parties to hold that as to the northerly part of the right of way, including the land granted for depot and the other enumerated purposes, only an easement was created. Giving the conveyance the construction and effect that the absolute conveyance of the right of way only extended a part of the way through the land, and there was an easement as to the balance, it would not have the effect to so divide or segregate the land that the homestead right could not apply to the whole tract, because, with the deeded part detached, the balance is connected and contiguous, and can all be claimed and held as a homestead. This land was the property of B. F. Allen, and was conveyed by him to the plaintiff in error at a time when he occupied it as a homestead. The conveyance of a homestead cannot defraud creditors, as under no circumstances can it be subjected to the payment of their debts, except a lien therefor has been duly created by the act of the owners. This has been repeatedly declared by this court in a number of cases, so that there could be no pretense of fraud based upon the conveyance of his homestead by B. F. Allen to his wife. It was material error to hold that the right of way conveyed to the railroad company operated to so divide the land that only that part lying west of the railroad could be held as a homestead; and it was equally erroneous to hold that the conveyance of the homestead of Allen to his wife was fraudulent as to creditors. It seems, from the evidence embraced in this record, that a *bona fide* indebtedness by Allen to the plaintiff in error, accruing both before and after the marriage, was rather conclusively established, and that the circumstances against it were slight and trivial. But, for the errors already enumerated, the case will have to be reversed, and a new trial granted; and this question can then be fought over.

It is recommended that the judgment of the district court of Butler county be reversed, and a new trial granted.

**PER CURIAM.** If the deed from B. F. Allen and C. C. Allen to the railroad company be construed as in the foregoing opinion, then the judgment of the court below must be reversed; for a homestead right, under the homestead exemption laws, may include land separated into parts by an easement. We think the decision in the case of *Randal v. Elder*, 12 Kan. 257, 261, fully and correctly states the law with reference to the unity of the homestead, and also when it may include land separated by other interests. The judgment of the court below will be reversed, and cause remanded for a new trial.

All the justices concurring.

(75 Cal. 519)

## WALSH v. McKEEN. (No. 11,084.)

(Supreme Court of California. April 17, 1888.)

## 1. PLEADING—FORM OF ACTION—AMENDMENT.

Under Code Civil Proc. Cal. § 580, providing that "the court may grant any relief consistent with the case made by the complainant, and embraced within the issue," the error in overruling a demurrer for insufficient allegations to a complaint, which, although seeking legal redress, also alleged facts sufficient to sustain a suit in equity, is cured by an amendment making the complaint seek equitable relief.

## 2. SAME.

Under Code Civil Proc. Cal. § 307, establishing "but one form of civil actions," and section 580, which allows the court to grant any relief consistent with the complaint, it is not error to permit the plaintiff to amend the prayer of his complaint so as to change the action from one at law to one for equitable relief.

## 3. SAME—AMENDMENT—WAIVER OF DEFECTS.

Applications to amend pleadings are addressed to the discretion of the court, and should be allowed at any stage of the trial when justice requires it; and where the court permits an amendment, over defendant's objection of want of notice, offering to grant a continuance if defendant were surprised, the error, if any, is waived by a failure to ask a continuance.

## 4. PARTNERSHIP—ACCOUNTING—WHEN ACTION LIES.

It is not necessary that all the assets of a partnership be collected, and all claims against it filed, before an action for accounting is brought.

Commissioners' decision. Department 2. Appeal from superior court; city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Sarah Walsh, executrix of the last will, etc., of Thomas Walsh, deceased, the respondent, against Robert McKeen, the appellant. Respondent's decedent and the appellant had been partners, and during the trial the action, originally brought for damages in a fixed sum, was so amended as to demand an accounting.

J. C. Bates, for appellant. H. A. Powell, for respondent.

BELCHER, C. C. This is an appeal by the defendant from a judgment entered against him, and from an order denying a new trial. The findings cover all the issues, and are not assailed, but it is claimed that errors of law were committed by the court, for which a new trial should be granted. In the complaint it is alleged that Thomas Walsh, the plaintiff's testator, and the defendant entered into partnership for the purpose of constructing a sewer in the city of San José; that, while the sewer was being constructed, Walsh died, and defendant afterwards completed the work; that about the time they commenced to construct the sewer Walsh advanced \$1,100 for the purpose of carrying on the work, and that the money was delivered to and used by defendant for that purpose; that defendant had received on account of the partnership business the sum of \$20,505.50, and had paid out and disbursed the sum of \$19,632.50, and that all the debts of the partnership had been paid; that plaintiff had demanded of defendant payment of the \$1,100, and one-half the balance of the proceeds of the partnership, but defendant had not paid the same to the plaintiff as executrix, or otherwise. As originally filed, the prayer of the complaint was for judgment against defendant for the sum of \$1,536.50, with interest and costs of suit. The defendant demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and that it was ambiguous and uncertain, because it did not appear therefrom but what Walsh, in his life-time, received all moneys due or coming to him, or which he was entitled to receive, from the partnership business. The demurrer was overruled, and defendant then answered, and, among other things, denied that Walsh at any time advanced the sum of \$1,100, or any sum, for the purpose of commencing and carrying on the work of constructing the sewer, and further denied that all the debts of the partnership had been paid or satisfied. And he alleged that the cost and expense of constructing the sewer exceeded the contract price, and that there

was not then, and never had been, any money or proceeds of the partnership in his hands or possession; and, further, that there had never been any accounting or settlement of the partnership affairs with the plaintiff. During the progress of the trial, the plaintiff was permitted, against the objections of the defendant, to amend the prayer of her complaint so as to ask for an accounting, and for such other or further relief as might be deemed equitable and proper.

1. It is claimed that the court erred in overruling the demurrer. The argument is that the action was one at law, and that such an action cannot be maintained by one partner against another, or one who had been such, until the accounts have been settled, and a final balance ascertained. *Ross v. Cornell*, 45 Cal. 133. Conceding this to be so, still the complaint stated all the facts necessary for an accounting, and when the prayer was amended the action ceased to be one at law. The new complaint was not demurred to, and the error, if any, was then cured.

2. It is further claimed that the court erred in permitting the plaintiff to amend the prayer of her complaint. The objection interposed to the motion was that it was made without sufficient notice, and that the amendment would operate to change an action at law into a suit in equity. We see no error in the ruling. As to the first part of the objection, it is enough to say that applications to amend pleadings are addressed to the discretion of the trial court, and should be allowed at any stage of the trial when necessary for the purposes of justice. *Bank v. Stover*, 60 Cal. 387. The record shows that, in overruling the objection, the court stated that it would grant a continuance, if defendant was surprised by the amendment. No continuance was asked for, and defendant cannot therefore claim error on this ground. As to the alleged change in the nature of the action, an answer is found in the fact that we have in this state but one form of civil actions for the enforcement or protection of private rights, (Code Civil Proc. § 307;) and, where an answer has been filed, any relief may be granted to the plaintiff which is consistent with the facts stated in the complaint, (Code Civil Proc. § 580.) An action does not now, as formerly, fail because the plaintiff has made a mistake as to the form of his remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity." *Grain v. Aldrich*, 38 Cal. 520; *Emery v. Pease*, 20 N. Y. 64; Pom. Rem. § 71. In *Blood v. Fairbanks*, 48 Cal. 171, the plaintiff prevailed in the court below in an action at law. The defendant appealed, and this court held that the plaintiff's remedy was in equity for an accounting. It accordingly reversed the judgment, and remanded the cause for a new trial, with leave to the plaintiff to amend his complaint. If it was proper in that case to remand the cause with leave to amend, it certainly was not error for the court below to permit the amendment to be made which is complained of in this case.

3. The point is made that the action was prematurely brought. This is rested upon the fact that, after the action was commenced, defendant collected \$228.11 of the partnership funds, and, when it was commenced, a suit for \$150, extra wages, was pending against the defendant and plaintiff, but afterwards dismissed. It is not necessary that all the assets of a partnership be collected, and all claims against it be paid and satisfied, before an action for an accounting is brought. If it were, the surviving partner might never get the affairs of the partnership into a condition when such action could be maintained. On the contrary, the action is often brought to settle



all the affairs of a partnership, and, when necessary, the court can provide for the collection of the assets, and the payment and protection of creditors.

We discover no error in the record, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(75 Cal. 513)

METROPOLITAN LOAN ASS'N v. ESCHÉ *et al.* (No. 9,814.)

(*Supreme Court of California*. April 17, 1888.)

1. BONDS—INDEMNITY—RIGHTS OF SURETIES.

In an action on the bond of a secretary of a corporation for misappropriation of funds, it appeared that, prior to the acts complained of, the secretary had been charged with misappropriation, and on an investigation by the corporation, it appearing that he had received money in small amounts, and had, within the time allowed by the regulations of the company, turned it over to the treasurer, he was exonerated. *Held*, that the failure of the company to inform the sureties of such facts would not release them; the court having found, as a matter of fact, that there had been no misappropriation.

2. SAME—REFORMATION FOR MISTAKE—NEGLIGENCE.

In an action on a secretary's bond which was conditioned that the secretary should faithfully perform his duties during his official term, and during any succeeding term for which he might be elected, the sureties claimed that the condition with reference to the succeeding term had been inserted by mistake of both plaintiff and defendant. It appeared that the bond was drawn by the company's attorney and given to the principal, who procured the signature of the sureties, and that the latter had signed the bond on the principal's representation, without reading it. *Held* that, as the principal was not acting as the agent of the company, but for himself, the sureties were not entitled to claim exemption from liability for their own carelessness in failing to read the bond.<sup>1</sup>

3. SAME—FUTURE TERMS OF OFFICE—CONSIDERATION.

The fact that a bond given by the secretary of a company for the faithful discharge of his duties is conditioned for the discharge of such duties during any succeeding term to which he may be elected, is no evidence of want of consideration; and where his sureties, in an action on such bond, allege want of consideration, the burden of proof is on them,—the bond being presumptive evidence of consideration.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

This was an action on a bond of indemnity, brought by the Metropolitan Loan Association against Otto Esche, principal, and Henry Hoesch, H. Neilsen,

<sup>1</sup>A person capable of reading and understanding an instrument which he signs is bound in law to know the contents thereof, unless prevented by some fraudulent device, such as the fraudulent substitution of one instrument for another. *Taylor v. Fleckenstein*, 80 Fed. Rep. 99, and note. But in an action on a promissory note against one who was unable to read, held, that the fact that the note was misread to defendant was a good defense to the action; the evidence being such as would sustain a finding of the jury that reasonable care had been exercised by defendant. *Bowers v. Thomas*, (Wis.) 22 N. W. Rep. 710. So held that the fact that a person signs a note which has been read to him, without reading it himself, if able, is no excuse for the fraud practiced by the person who reads it, but omits purposely a material portion thereof. *Brooks v. Matthews*, (Ga.) 8 S. E. Rep. 627. See, also, *Warden v. Reser*, (Kan.) 16 Pac. Rep. 60. In an action on a written contract, which was read to defendant by plaintiffs' agent, and which the former disputes on the ground of fraud, where he testifies that he had no spectacles, and could not read without them unless the writing was plain, his negligence in failing to read the contract before signing it is a question for the jury. *Chatham v. Jones*, (Tex.) 7 S. W. Rep. 600.

and Charles Meinecke, sureties in such bond. There was a judgment for plaintiff, and defendants Meinecke and Neilsen appealed.

*Cowdery & McCutchen*, for appellants. *Naphtuly, Friedenrich & Ackerman*, for respondents.

BELCHER, C. C. This action was brought to recover money misappropriated by Otto Esche, while acting as secretary of the plaintiff, and is based upon a bond given to secure the faithful performance of his duties. The defendants, Charles Meinecke and Henry Neilsen, were two of the three sureties on the bond. The court below gave judgment against Esche for the full amount claimed, and against Meinecke and Neilsen for their proportions of that amount. Meinecke and Neilsen moved for a new trial, and have appealed from the judgment and order denying their motion. The facts shown by the record are as follows: The plaintiff was organized as a corporation to make loans to its members for the purpose of aiding them in acquiring and improving real estate. By its by-laws the directors were required, at their regular annual meeting, which was to be held on the first Monday of March in each year, to elect a secretary, and the secretary so elected was required to "give adequate security, in such amount as the board may direct, for the faithful performance of his duties." The duties of the secretary were to keep precise minutes of all the proceedings of the association and board of directors, and to receive all moneys paid into the association, and pay the same to the treasurer, taking his receipt therefor, on or before the monthly meeting of the directors. In March, 1875, the defendant Otto Esche was elected secretary, and a resolution was passed by the board "that the bond of the secretary, to be given as provided by the by-laws, be fixed at \$7,500 in United States gold coin." Esche gave a bond in the sum required, and the defendants Meinecke and Neilsen signed it as sureties. The condition of the bond reads as follows: "The condition of the foregoing obligation is such that if the said Otto Esche shall well and truly perform all and singular the duties of secretary of said association for and during his official term, and for and during any succeeding terms for which he may hereafter be elected," etc. In April, 1875, Esche entered upon the discharge of his duties as secretary of the plaintiff, and he was annually re-elected thereafter, and continued to act as such secretary until March, 1883, but never gave a new bond. In 1878 a question arose before the board as to whether Esche had misappropriated \$1,225, money which had been paid to him for the association. He admitted that he received the money, but claimed that he received it in small parcels, and, within the time allowed him to do so, deposited the parcels in bank to the credit of the treasurer. The treasurer denied that the money was placed to his credit, or ever came into his hands. Subsequently the matter was referred for consideration to a general meeting of the stockholders, and after some investigation Esche was fully exonerated by them from all liability or blame. In 1881, Esche misappropriated \$4,300 of the association's money, but the fact that he had misappropriated it was not known until early in 1883. Shortly after the misappropriation was discovered, demand was made that the sureties on his bond make good the loss, and, the demand being refused, this action was commenced.

In their answer to the complaint the appellants alleged that, prior to the defalcation for which they are sought to be held liable, Esche became indebted to the plaintiff in the sum of \$1,225, for money which he had received and misappropriated while acting as its secretary, and that the plaintiff, knowing these facts, released him from payment of that indebtedness, and again re-elected him its secretary; that the plaintiff failed and neglected to notify them of the misappropriation or release, and that they had no notice or information thereof until about the month of March, 1883; that, if they had had such notice, they would have withdrawn from the bond before the misappropriation

of the \$4,300 occurred; and that the release, and the neglect on the part of plaintiff to notify them thereof, operated to release them from any subsequently accruing liability on the bond. And they further, by way of cross-complaint, alleged that the words "and for and during any succeeding terms for which he may hereafter be elected," which are found in the bond, were inserted therein by the mistake of both plaintiff and defendants; that, when the bond was given, it was the intention of plaintiff, and all the parties thereto, that it should only bind the sureties thereon during the term of office ending in March, 1876; that, when the bond was executed, it was presented to them by Esche, and they were requested to sign it as his sureties, and they thereupon did sign it, without reading and without any knowledge of its contents, except that, before signing, Esche informed them that the plaintiff's by-laws required the secretary to give security, and that the bond was nothing more than an agreement on their part to be sureties for him for and during the ensuing year; that they first learned, on or about the 23d day of March, 1883, that the words extending their liability were in the bond, and they were informed and believed that the plaintiff, on or about the same date, first learned of that fact. They, therefore, prayed that the bond be reformed by striking out the words "and for and during any succeeding terms for which he may be hereafter elected."

1. The court below found, as to the alleged "shortage" of \$1,225, that Esche did not misappropriate that sum of money, or any part thereof; and that, prior to the misappropriation of the \$4,300, he was not indebted to the plaintiff in any sum of money whatever. There was testimony tending to support the finding, and it is unnecessary, therefore, to consider what would have been the effect of a different finding. Under the well-settled rule in such cases, the judgment cannot be reversed on this ground.

2. The court also found that the words in the bond which appellants asked to have stricken out, were not inserted therein by the mistake of both plaintiff and defendants; that plaintiff well knew, when it received the bond, that those words were in it, and had so known ever since; and that, when the bond was given, it was not the intention of plaintiff, or of all the parties thereto, that it should bind the sureties thereon only during the term of Esche as secretary, ending in March, 1876. There was testimony to support this finding. The bond was drawn by the attorney, and, when signed, was approved by the president of the association. It was delivered to Esche to procure sureties, and he procured the appellants to sign it. Esche testified that he said nothing about the contents of the bond to either Meinecke or Neilsen. Meinecke testified: "Esche showed me the bond, and said I promised him to sign it. I said I supposed it was in the ordinary form of bond, and that it was not necessary for me to read it. He said 'Yes,' so I signed the bond." Neilsen testified: "Esche brought the bond to me; did not have any conversation with him at the time I signed it." In procuring appellants to sign the bond, Esche was not acting as the agent of plaintiff, but for himself. Appellants would have known the contents of the paper if they had read it; as they should have done before signing, and, there being no special relation of trust or confidence between the parties, they cannot claim exemption from liability, because the bond contained a clause of which, in consequence of their own carelessness, they were ignorant at the time. *Hawkins v. Hawkins*, 50 Cal. 558.

3. It is contended for the appellants that there was no consideration for their undertaking to be responsible as sureties after the expiration of the first year. The point is not tenable. The action is based upon a written instrument, and "a written instrument is presumptive evidence of a consideration." "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Civil Code, §§ 1614, 1615. No want of consideration was shown here. Actions upon

similar bonds have been upheld in other courts. *Manufacturing Co. v. Lawrence*, 1 Allen, 839; *Railroad Co. v. Ellwell*, 8 Allen, 372; *Oswald v. Mayor of Berwick*, 5 H. L. Cas. 856.

The other points do not require special notice.

We find nothing in the record calling for a reversal, and we therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(75 Cal. 534)

ONDERDONK v. CITY AND COUNTY OF SAN FRANCISCO. (No. 9,927.)

(*Supreme Court of California.* April 19, 1888.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ABUTTING UNITED STATES PROPERTY—LIABILITY OF CITY.

Act Cal. March 13, 1868, authorizes the board of supervisors to pay for street improvements in front of United States property in San Francisco, "provided the government \* \* \* shall by its officers refuse to make such payment." *Held*, that the commanding officer of United States forces stationed on the property, the assistant treasurer, and the secretary of war are proper officers to make such refusal.

2. LIMITATION OF ACTIONS—FAILURE TO FIND ON PLEA OF—HARMLESS ERROR.

Where defendant, in a suit on a writing made within the state, pleaded in bar Code Civil Proc. Cal. § 339, which provides that actions on contracts not in writing, or on writings executed out of the state, shall be barred after three years, his defense is not made out, and failure to find upon it is not material error.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. McGUIRE, Judge.

Action on contract to grade a street, by A. Onderdonk against city and county of San Francisco. Judgment for plaintiff, and defendant appeals.

*George Flournoy, Jr.*, for appellant. *Whittemore & McKee*, for respondent.

FOOTE, C. The appeal herein was taken from a judgment in favor of the plaintiff, Onderdonk, and from an order refusing to grant a new trial to the defendant, the city and county of San Francisco. The judgment was entered on the 24th day of January, 1885. The appeal was taken on the 3d day of November, 1884, which, being premature, must be dismissed, upon the authority of *McLaughlin v. Doherty*, 54 Cal. 519.

The action was brought upon a contract to grade Bay street, in the city and county of San Francisco, from the easterly line of Van Ness avenue to Gough street. In the statement on motion for a new trial, the appellant, viz., the city and county of San Francisco, above mentioned, assigned for error several particulars in which it claimed the evidence to have been insufficient to support the decision made and given, and wherein the court making it did so "against law."

The first point, viz., that the evidence did not show the work to have been completed within the time provided in the contract, is abandoned, and need not be noticed.

It is next contended that, under the provisions of the contract itself, the defendant was not liable. The clause of the contract under discussion is as follows: "And it is agreed and expressly understood by the parties to this agreement that in no case (except where it is otherwise provided in the acts aforementioned and referred to) will the said city and county of San Francisco be liable," etc. The contract was made under and by virtue of an "Act repealing article 4 of an act entitled 'An act to repeal the several charters of the city and county of San Francisco,' etc., approved the 19th day of April, 1856," etc. The clause of the contract *supra* includes no exemption on the

part of the city, aforesaid, to pay for improvements made of the kind sued for here, under any law which has become such since 1856. The act authorizing the grading of Bay street, for which this action is instituted, was approved on the 1st day of April, 1878, and has been held to be a modification of and supplemental to the general street laws then in force. *Jennings v. Le Roy*, 63 Cal. 397. According to the terms of that act, the board of supervisors of the defendant here were empowered to have the grading done for which the contract sued on was executed. By the act to be found at page 148, Acts 1868, the board of supervisors of the city and county of San Francisco were authorized to pay for work of the kind done in pursuance of the contract sued on herein, provided the assessments therefor were made in accordance with law; and there is no specification in the statement that the assessment for the street improvement, here alleged to have been made, was not in pursuance of the law in such cases made and provided. So it would appear that the board of supervisors were authorized to have the grading done and to pay for the work, and that the defendant was liable on the contract as made, provided there be not some other bar to the action than the one just discussed. It seems that the proviso was fully met, viz., that the refusal of the government of the United States, by its officers, to pay for such street improvements as this, mentioned in the act of 1868, *supra*, was necessary before the city should pay for them; that such refusal to pay, upon due application, was made by the general in command of the forces of the United States in charge of the government reservation, in front of which the improvement was made; also by the assistant treasurer of the United States, who pays all moneys at San Francisco which are due from that government, on proper requisitions, and by the secretary of war, who is the head of the war department of the government, upon whose requisitions all moneys for army purposes are paid. Rev. St. U. S. 1878, §§ 214, 3673. And the reason of such refusal, as stated by the commanding general and the secretary of war, was that congress had appropriated no money to pay for such improvement. It is not perceived from what other officers of the government an authorized refusal could more properly come, or upon whom a more proper demand for payment could have been made. Further, if there was no appropriation to pay for the improvement, no demand could cause its payment. It must of necessity have been refused payment; and as soon as the fact appeared, as it does in the record, that no money could be paid, because none had been appropriated by congress, there was an end of any further need for a demand that it be paid. The refusal to pay it must have been made by any officer of the government whatsoever, unless he paid it out of his own pocket; and that was not contemplated by the law. The law seems to have been framed with a view that a demand be made on the proper officer of the government; so that, if any appropriation had been made therefor, the city could get the benefit of it, and, if there was no appropriation, the city would pay, and afterwards the government could refund the money, which seems to have been done once before, when paving and curbing was done by the city in front of government property. St. at Large, 1874-75, p. 469. The property in front of which the improvement herein was made, appears to have been declared a military reservation under orders of President Fillmore, of date November 6, 1850, December 31, 1851, and has been held to be a valid reservation for military purposes. *Grisar v. McDowell*, 6 Wall. 381. It was in the immediate charge of the then commander of the department of California, Gen. McDowell, and the secretary of war, who has control of all military posts, as is shown by reference to various acts of congress, and the recognized rule laid down by other departments of the government. 1 Lester, Land Law, 692; 18 St. at Large, 85; 1 Copp, Pub. Land Laws, 117-155; 21 St. at Large, 69-198.

It is urged that there should have been a new trial granted for a failure to find upon the defense of the statute of limitations, under subc. 1, § 339, Code

Civil Proc. We find nothing in this subdivision referred to germane to the action. It relates to a contract, obligation, or liability not founded on an instrument in writing, or upon an instrument in writing executed out of this state. But in this case the action is based either on a contract founded on an instrument in writing, or on an obligation or liability arising out of an assessment made in writing, both executed in this state; and, whatever it may be, it is clear that the defense is not made out. A failure to find on such defense would, then, be an immaterial error, for which the order denying a new trial should not be reversed.

We perceive no error in the findings that the action was not barred by the provisions of sections 338, 342, Code Civil Proc., nor does the appellant in its points and authorities contend to the contrary, although doing so in the assignment of errors.

The point made as to the sufficiency of the pleadings was evidently made under the supposition that the appeal from the judgment would be entertained here; but, as that cannot be, the objections to the pleadings will not be considered on the appeal from the order refusing a new trial. *Shepard v. McNeil*, 38 Cal. 72; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 163. For these reasons, the order refusing a new trial should be affirmed.

I concur: BELCHER, C. C.

I concur in the conclusion: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order refusing a new trial is affirmed, and the appeal from the judgment is dismissed.

(75 Cal. 552)

FOORMAN v. WALLACE. (No. 9,891.)

(Supreme Court of California. April 20, 1888.)

1. VENDOR AND VENDEE—PURCHASER AT EXECUTION SALE—PRIORITY OF UNRECORDED DEED—CIVIL CODE CAL. §§ 1107, 1214.

A bona fide purchaser at an execution sale acquires a good title as against a prior deed where such deed is recorded after the sheriff's certificate, but before the sheriff's deed, under Civil Code Cal. §§ 1107, 1214, giving priority to instruments first recorded.

2. SAME—BONA FIDE PURCHASER—EXECUTION SALE.

A judgment creditor who purchases land at a sale under his own judgment, and merely credits the net proceeds upon such judgment, is a purchaser in good faith, and for a valuable consideration, within the meaning of Civil Code Cal. § 1214, giving deeds executed in good faith, and for a valuable consideration, which are first recorded, priority.

3. SAME—TITLE UNDER RECORDED INSTRUMENT—WHAT IS—CIVIL CODE CAL. § 1107.

A sheriff's certificate of sale, which, by the terms of Code Civil Proc. Cal. § 700, transfers to the purchaser all the right, title, and interest of the judgment debtor, subject to redemption, is an instrument whereby a title is acquired, within the meaning of Civil Code Cal. § 1107, providing that a purchaser who "acquires a title by an instrument that is first duly recorded" may contest a prior unrecorded deed.

4. SAME—CERTIFICATE OF SALE—RECORDATION—NOTICE.

Under Pol. Code Cal. § 4237, requiring the recorder to record all certificates of sale of real estate, and not providing for any acknowledgment of the same, such a certificate, filed and recorded, imparts notice to the world although unacknowledged.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

This action was brought by plaintiff, Simon Foorman, to redeem from a mortgage, and obtain possession of certain land, held by the defendant, James H. Wallace. William Treen, the owner of the land in question, conveyed the same on the 30th day of May, 1878, to one Siefert, but the deed was not put on record until the 17th day of March, 1880. Siefert, on the 3d day

of October, 1881, conveyed to plaintiff. The defendant, James H. Wallace, having recovered judgment against Treen, purchased the land on the 30th day of September, 1879, at an execution sale, under his own judgment, and the sheriff's certificate of such sale was recorded on the 3d day of October, 1879. No redemption was made, and upon the 3d day of April, 1880, he received the sheriff's deed, not having prior to that time any knowledge or information of any conveyance by Treen. Judgment was rendered for the defendant, sustaining his title under the sheriff's certificate and deed, and the plaintiff appeals.

*R. Thompson and Frank Otis*, for appellant. *Jarboe, Harrison & Goodfellow*, for respondent.

SEARLS, C. J. The question involved in this appeal may be stated thus: A. brings an action against B., sues out and levies an attachment upon the land of the latter, obtains a judgment upon which an execution issues, and the land in question is sold. A., the judgment creditor, becomes the purchaser, receives a sheriff's certificate of sale, which is filed and recorded, and in due time receives a sheriff's deed of the premises. B., the judgment debtor, had conveyed the land, before suit brought, by a deed which was not recorded, and of which A. had no notice until after his receipt and record of the certificate of sale, but which was duly recorded before the sheriff's deed issued. If, upon these facts, the title of A. under his sheriff's deed is paramount to that of B. under his deed recorded after the sale and reoordation of the certificate, and before the sheriff's deed was recorded, then the judgment and order appealed from should be affirmed; otherwise a reversal should be had. In other words, is the interest acquired by a purchaser of real estate at a sheriff's sale, whose certificate of sale is properly recorded, destroyed by the production of a deed from the judgment debtor, executed anterior to the sale, but not recorded until after the record of the certificate of sale, and just prior to the expiration of the time for redemption? Appellant answers this question in the affirmative, and further contends that respondent, having purchased the land at a sale under his own judgment, and having merely credited the net proceeds of the sale upon such judgment, is not a *bona fide* purchaser for a valuable consideration.

It has often been held in this state that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration within the meaning of section 1214, Civil Code. *Gassen v. Hendrick*, 16 Pac. Rep. 242; *Frey v. Clifford*, 44 Cal. 335; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. Rep. 659. A like doctrine prevailed under the recording act in force prior to the Code. *Hunter v. Watson*, 12 Cal. 377, where it was said: "A judgment creditor, purchasing at his own sale, without notice, is a *bona fide* purchaser within the act." It follows from these decisions and the findings, that respondent stands in the position of an innocent purchaser for a valuable consideration, without notice at the date of his purchase, in the same manner and to the same extent as an innocent third party would do who had purchased and paid his money.

The question recurs, was the sheriff's certificate of sale, issued to the respondent and recorded, good as against an unrecorded deed? Section 1107, Civil Code, provides as follows: "Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him except a purchaser or incumbrancer who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded." Appellant contends that a sheriff's certificate is not an instrument whereby a title or lien is acquired within the purview of section 1107, Civil Code. An instrument is a writing which contains some agreement, and is said to be so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes conveyances,

leases, mortgages, bills, bonds, promissory notes, wills, etc. Bouv. Law Dict. In *Hoag v. Howard*, 55 Cal. 564, it was held that a writ of attachment was not an instrument within the sense of that term as used in section 1107, Civil Code, and therefore a deed executed prior to a levy of the attachment upon the property conveyed, though not recorded until after the levy, would prevail over the attachment. A writ of attachment, an execution, or other writ is not the record or memorial of any agreement, but simply the mandate of the law commanding something to be done, or not to be done, and is quite independent of the will of the party against whom it runs, and is in no sense an embodiment of his agreement, will, or wishes; and we fully concur in the view taken by the court in that case of the writ of attachment. The court in the same case defined the term "instrument," as used in the Civil Code, to mean "some written paper or instrument signed and delivered by one person to another, transferring the title to, or creating a lien on, property, or giving a right to a debt or duty." The sheriff, under a proper writ, is clothed by law with the power to sell and convey the property of a judgment debtor. This can only be done in the cases, and in the manner, and subject to the limitations, provided by law, but, when this is accomplished, the process is as effective in passing the title as a conveyance by the debtor himself. When real estate is thus sold by a sheriff, "the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and, when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption," etc. Code Civil Proc. § 700. The sheriff is required to give the purchaser a certificate of sale, containing a specification of the facts enumerated in the statute, and a duplicate of this certificate must be filed in the office of the county recorder. The certificate is a memorial signed by the sheriff, in which what has taken place at the sale is set forth. It is the evidence of a sale, whereby, subject to the right of redemption, and of possession in the judgment debtor for the time allowed therefor, the entire equitable title is conditionally vested in the purchaser, subject to be defeated by a redemption; but, if not so redeemed, the certificate is evidence of his right to a deed which shall vest in him the dry, legal title which remained in the judgment debtor. The transfer is not perfect until the execution and delivery of the sheriff's deed, but, by the doctrine of relation, the deed, when thus executed, is to be deemed and taken as though executed at the date when the lien of which it is the sequence originated. The sheriff's certificate to the purchaser is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created, within the meaning of section 1107, *supra*. *Page v. Rogers*, 31 Cal. 301.

By section 4237, Pol. Code, the recorder is required to keep in his office a book to be called "Certificates of Sale," and to record therein all certificates of sale of real estate sold under execution, etc. When the case of *Page v. Rogers*, cited above, originated, the law in force provided for filing certificates of sale, but did not contain a provision for recording them. The court in that case held that the purpose of filing a duplicate of the certificate of purchase made at execution sale was to give notice to third persons of its existence and contents, and although the statute did not define the object, or prescribe the effect, of such filing, yet the effect was to impart constructive notice of the estate acquired under the certificate to subsequent purchasers and attaching creditors, and that such notice continued after the time for redemption had expired, and until the sheriff's deed was executed and recorded. It is objected that there is no provision for the acknowledgment of this class of instruments, and, as this was not in fact acknowledged, its record cannot impart notice. The answer to this proposition is that, the legislature having seen fit to provide for filing and recording duplicate certificates of sale of real property by the sheriff without acknowledgment, none is needed. They are



records of the official acts of a public officer, and, like judgments, need only to be authenticated in the manner provided by law. Doubtless it would be within the power of the law-makers to provide that all instruments should be recorded so as to impart notice without the formality of proof or acknowledgment, had it been deemed proper to do so. As it is, the law requires the sheriff to file, and the recorder to record, duplicate certificates of sale of real property, without providing for their acknowledgment, and this court having long since judicially declared the effect of such filing, and the rule as thus established having become the basis upon which property rights are established, were we inclined to change the conclusion reached, we should hesitate to do so for manifest reasons.

We conclude, therefore:

1. That the certificate of sale given by the sheriff to respondent was an instrument whereby he acquired a title within the meaning of section 1107, Civil Code.

2. That the filing and recording of the duplicate certificate imparted constructive notice to all the world.

3. That such certificate, having been recorded before the deed under which appellant claims, and without actual notice of the existence thereof by respondent, it is prior in time and paramount to appellant's title under such deed, and that, as against respondent, the title of appellant under his unrecorded deed is to be treated as if it had never existed.

The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

(75 Cal. 548)

DANIEL *et al.* v. SMITH *et al.* (No. 11,051.)

(*Supreme Court of California.* April 20, 1888.)

**GIFT—CAUSA MORTIS—WHAT CONSTITUTES.**

Where one a few days before his death delivers to another his bank-book, requesting him to keep it for his daughter, and upon his death deliver it to her, but does not part with the present dominion or control of the book, or the money represented thereby, *held*, there is not a *donatio causa mortis*.<sup>1</sup>

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

This was an action by Emma Daniel and John Daniel, her husband, to recover of the Hibernia Savings & Loan Association, one of the defendants, money on deposit with it. The plaintiff Emma Daniel claimed that the money was given her as a *donatio causa mortis* by Abraham Fielding, the depositor, her father, shortly before his death. Holland Smith, as administrator of the estate of Abraham Fielding, set up a claim to the money, and was made defendant to test his claim. It appeared from the evidence that Abraham Fielding died on the 12th day of May, 1880. That one David Cornfoot, upon the 7th day of May, 1880, called upon Fielding, who was ill, and who then de-

<sup>1</sup>To constitute a valid gift *causa mortis*, it must be made during some illness or peril of the donor, and in contemplation or expectation of death from that illness or peril, and death must also ensue therefrom. *Parcher v. Bank*, (Me.) 7 Atl. Rep. 266. Actual delivery by the donor in his life-time is necessary, or, if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. *Emery v. Clough*, (N. H.) 4 Atl. Rep. 796, and note. There must be as complete a delivery as the nature of the property will admit of. *Gano v. Fisk*, (Ohio,) 3 N. E. Rep. 532, and note. See *Vandor v. Roach*, (Cal.) 15 Pac. Rep. 354; *Henschel v. Maurer*, (Wis.) 34 N. W. Rep. 926; *Woodburn v. Woodburn*, (Ill.) 14 N. E. Rep. 58. To sustain a gift the intention of the donor must be established by clear and precise evidence, *Appeal of Madeira*, (Pa.) 4 Atl. Rep. 908; and a gift *causa mortis* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent, *Basket v. Hassel*, 2 Sup. Ct. Rep. 415; *Shackelford v. Brown*, (Mo.) 1 S. W. Rep. 390.

livered into the hands of Cornfoot his bank-book of deposit in the Hibernia Savings & Loan Association, telling him to keep it during his sickness, and to take charge of his effects, and collect money on a mortgage he owned; and that, if it was necessary to use any of the money on deposit, he would give an order to draw the money; and that Cornfoot should give the book to his daughter, Emma Daniel, when he died. That Cornfoot took the book, and kept it until Fielding's death, when he gave it to her as requested. The plaintiffs appeal from judgment against them.

*Sawyer & Burnett* and *F. J. French*, for appellants. *Nathaniel Holland* and *Joseph Leggett*, for respondents.

BELCHER, C. C. This is the second appeal in this case, and it was taken from a judgment in favor of the defendants, and from an order denying a new trial. The first appeal was from a judgment in favor of the plaintiffs, and the decision thereon may be found reported in 64 Cal. 346. On turning to the report referred to, it will be seen that the court, by THORNTON, J., after carefully reviewing the testimony, summed up the law applicable to this class of cases as follows: "To constitute a *donatio causa mortis* the gift must be made in contemplation of the near approach of death by the donor, to take effect absolutely only upon the death of the donor. There must be a delivery of the property, either to the donee, or to some person for his use or benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time during his life to revoke the gift." And further along in the opinion it is said: "In view of the strict requirements of the law as to delivery shown by the foregoing, we cannot hold that a delivery was established in this case. Nor does it appear that the dominion or control over the bank-book, or the money in the loan society, ever passed from Fielding, or that any interest ever vested in the alleged donee. There was no language of gift used. On the contrary, the testimony indicates, in our judgment, the creation by Fielding of a bailment in trust or agency, which was to terminate with the death of Fielding."

This decision must be treated as the law of the case, unless the facts shown on the second trial were materially different from those shown on the first trial. It is urged for the appellants that there was, on the last trial, proof of the "manual tradition" of the bank-book, and that this difference in the testimony entitled the plaintiffs to have judgment entered in their favor. It is true that Cornfoot testified very clearly that the bank-book was actually placed in his hands by Fielding, and that he took it away, and kept it till after Fielding died, and then delivered it to Mrs. Daniel. But in other respects there was no material change. It did not appear from the testimony given at the first trial that Fielding parted with the dominion or control of the bank-book, or the money represented thereby, and the testimony in the present transcript is, upon that question, substantially what it was before. There was then nothing showing that any interest ever vested in the alleged donee, and no different showing upon that subject is made now. There was no language or gift used before, and none is shown now. All the authorities seem to hold that, before a gift *causa mortis* can take effect, the donor must part, not only with the possession, but also with all present control and dominion over the subject of the gift. It was so declared in the cases cited by Judge THORNTON upon this point; and in *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415, in which a very learned and exhaustive opinion was delivered by Mr. Justice MATTHEWS, the following language is used: "The instrument or document must be \* \* \* delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it; \* \* \* and a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice." In that case the donor

had delivered a certificate of deposit into the hands of the donee, but the court said: "This indorsement which accompanied the delivery qualified it, and limited and restrained the authority of the donee in the collection of the money so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession according to the terms of the instrument, and that, as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition." So in *Walter v. Ford*, 74 Mo. 195, checks were drawn by Walter, and by him delivered to Ford, with directions to deliver them to the parties in whose favor they were drawn if he (Walter) should die, but, if he recovered, to return them to him. The court said: "Ford was the agent of Walter, and bound to obey his instructions, and, so doing, could not have delivered the checks to any one while Walter lived. If they had been given to Ford to be held for the payees, at all events the authorities cited to show that a delivery to an agent or trustee of the beneficiaries is a sufficient delivery would be in point; but that is not this case. The checks were given to Ford, not to be delivered in the life-time of Walter, but after his death. It was in the nature of a testamentary disposition, and possessed none of the elements of a *donatio causa mortis*." Counsel for appellants say there can be no doubt that it was the intention of Mrs. Daniel's father that she should have this money on his death, "and the only question is, shall this intention be defeated by the technical rules of law?" And they "submit that the testimony is clear in making a case that appeals to justice, and that the judgment will be reversed if the court is not bound by the cases."

We consider the court bound by the rules of law established by the cases, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(76 Cal. 563)

WATERS v. DUMAS *et ux.* (No. 9,774.)

(Supreme Court of California. April 20, 1888.)

1. PARTIES—MISJOINDER OF WIFE—DEMURRER.

Where a complaint charges defendants with a joint trespass, but does not make it appear that defendants are husband and wife, a demurrer for misjoinder of the wife as a party will be overruled.

2. JUDGMENT—RENDITION AND ENTRY—LIMITATION.

Under Code Civil Proc. Cal. § 664, requiring judgment to be entered upon a verdict within 24 hours after its rendition, and section 561, subd. 6, providing as a penalty that the action shall be dismissed when judgment is not entered within six months after verdict, the court does not lose jurisdiction of the cause if judgment is entered within six months after the verdict is rendered.

3. DAMAGES—EXEMPLARY DAMAGES—WHEN ALLOWED—CIVIL CODE CAL. § 3294.

Under Civil Code Cal. § 3294, providing that in any action of tort where defendant has been guilty of oppression or malice the jury may give exemplary damages, a charge that plaintiff could recover only actual damages was properly refused, where there was evidence of a wanton, aggravated, and malicious trespass by defendants.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Eliza Waters against Lucien Dumas and Emilie Dumas, his wife, for damages for trespass on real estate. Judgment for plaintiff. Defendants appeal.

Robert Ash, for appellants. P. T. Trusseau, (N. B. Mulville, of counsel,) for respondent.

SEARLS, C. J. This is an action to recover damages for a trespass upon real property. Plaintiff had a verdict for \$301, for which sum, together with costs, judgment was rendered in her favor. The appeal is from the final judgment, and from an order denying a new trial. The complaint avers, in substance, that plaintiff was a resident and occupant of the house No. 50 Stevenson street, San Francisco, (describing it;) that on or about the 13th day of February, 1884, the defendants wrongfully and maliciously took down, removed, and carried away the front door of said house; took out and carried away the windows therefrom; stopped and stuffed the flues of the chimney so as to prevent the escape of smoke through the same; that the weather was wet, cold, and stormy, and that, when plaintiff had tacked cloth to the windows to keep out the cold, defendants tore down the same, threatened and reviled her, struck her with a board or piece of stick; that by reason thereof, and by reason of the cold and the open windows, etc., plaintiff suffered severely, both mentally and physically, to the extent of \$1,000. Defendant demurred to the complaint, and urges that as Emilie Dumas, one of the defendants, was the wife of Lucien Dumas, her co-defendant, and as no reasons are given for joining her as a defendant, the demurrer should have been sustained. The answer to the proposition is that there is not a word in the complaint either showing, or tending to show, that the parties defendant are husband and wife. They are declared against as joint trespassers, and the allegations are amply sufficient to render them liable as such.

The motion to set aside the verdict because judgment was not entered thereon within 24 hours after its rendition was properly denied. It is true, section 664, Code Civil Proc., requires judgment to be entered by the clerk in conformity with the verdict within 24 hours after its rendition, unless the cause is reserved for argument or consideration, or a stay of proceedings is granted. The court does not, however, lose jurisdiction of the cause by a failure to enter the judgment within the time prescribed, or by failure of the clerk to perform his duty. The only penalty provided for such a case is to be found in subdivision 6, § 581, Code Civil Proc., which authorizes the court to dismiss the action, where, for six months after verdict or final submission, the party entitled to judgment neglects to demand or have the same entered. In this case less than four months elapsed between verdict and judgment. We have referred to this ruling of the court for the reason that, assuming all that appellant claims, there was no error; but, had there been, there is no bill of exceptions or authentication of the proceedings sufficient to support an assignment of error.

The third instruction asked by defendants, conceding but not holding it to be presented in the record in such form as warrants its review, was properly denied. It is as follows: "You are instructed that the only damages the plaintiff is entitled to recover in this action, if any, is such damages as she may have sustained in the temporary use and occupation of the premises described in the complaint. No special damages are alleged, and no special damages can be allowed under the plaintiff's complaint." The action was for a wanton and malicious trespass. Special facts in aggravation of damages were set out in the complaint, and there was at least some testimony in support of the allegations. The instruction was, therefore, properly denied, and the proofs were sufficient to warrant exemplary damages under section 3294, Civil Code.

We see no merit in the appeal; and, but for the fact that the testimony at the trial shows some extenuating circumstances, and that we deem the verdict quite large enough, we should feel inclined to add a penalty as for a frivolous appeal. The judgment and order appealed from are affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(75 Cal. 558)

**M'LENNAN v. OHMEN. (No. 11,381.)***(Supreme Court of California. April 20, 1888.)***1. SALE—WARRANTY—ACTION FOR BREACH—EVIDENCE.**

In an action for breach of warranty of a contract, in which plaintiff agreed to give defendant, for a new engine, a certain sum of money and an old engine, there being no evidence as to what the old engine was worth, or what plaintiff estimated it to be worth, the finding of the court as to what the contract price of the new engine was is immaterial.

**2. SAME—WHAT CONSTITUTES A WARRANTY.**

Any affirmation, at the time of a sale, as to the quality or condition of the thing sold, if intended as a warranty, and relied on by the purchaser, is a warranty; and, there being evidence to show such facts, the question should be submitted to a jury for determination.

**3. APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

The trial court has a better opportunity to judge of the weight and conclusiveness of evidence than the appellate court, and findings of fact of such court will not be disturbed where there is evidence tending to support them.

**4. SAME—HARMLESS ERROR—PLEADING—SUPPLEMENTAL COMPLAINT.**

Under Civil Code Cal. § 3388, providing that damages may be awarded, in an action for breach of warranty, for detriment resulting after the commencement thereof, the allowance of the filing of a supplemental complaint, claiming damages since the commencement of the action, where there is nothing in the record to show that such complaint was served or answered, or that any such damages were allowed, is not reversible error.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco. F. W. LAWLER, Judge.

Action by F. P. McLennan against W. H. Ohmen for damages for breach of warranties of a steam-engine. Judgment for plaintiff. Defendant appeals.

*Royce & Cummins*, for appellant. *Olney, Chickering & Thomas*, for respondent.

**BELCHER, C. C.** This is an action to recover damages for breach of warranties of a steam-engine. The plaintiff had a mill in the city of San Francisco, in which he carried on the business of wool scouring. The work in the mill was done by machinery, which was propelled by a steam-engine. The defendant was a manufacturer of steam-engines in the same city. The plaintiff had an old "slide-valve engine," and was informed that an automatic cut-off engine would save him a large amount of fuel. On or about the 1st day of May, 1884, defendant agreed to manufacture and sell to plaintiff, and plaintiff agreed to purchase from defendant, a 12x12 cut-off engine to be used in plaintiff's mill; and the price to be paid for the same was \$750 and the old engine. The defendant manufactured the new engine, and delivered it to the plaintiff on or about the 1st day of July, 1884, and the plaintiff then paid the defendant therefor the price agreed upon. The new engine was at once placed in the mill, and was used by the plaintiff in running his machinery until the 17th day of October, 1884, when he offered to return it to defendant; because of its defects, and failure to fulfill the warranties made by defendant, and demanded the return of the old engine, and remuneration for all damages which he had sustained in consequence of defendant's failure to comply with his contract. The defendant refused to accede to this demand, and this action was afterwards brought. It is alleged in the complaint that the engine, at the time of its delivery to the plaintiff by defendant, was not sound and merchantable; that it possessed a latent defect, not disclosed to plaintiff, in this, that the valves thereof were leaky; that it was not reasonably fit for the purpose for which it was made, to-wit, for the purpose of running plaintiff's wool-scouring machinery; that, at the time of making the contract for the manufacture and sale of the engine, defendant warranted it to save plaintiff 25 per cent. of his coal bills for running his machinery, and thereby induced

plaintiff to enter into the contract; that the engine did not save 25 per cent. in the coal bills, but, on the contrary, caused an increase in the coal bills of 40 per cent.; and that plaintiff had sustained damages, by reason of the premises, in the sum of \$2,500, for which he prayed judgment.

The court below found all the facts to be as alleged in the complaint, except that the damages sustained by the plaintiff were fixed at \$1,600; and for that sum judgment was entered in his favor. In his statement on motion for new trial, defendant specifies as not justified by the evidence (1) the finding that the contract price of the engine manufactured by defendant for plaintiff was \$1,000; (2) the finding that defendant warranted the engine to save plaintiff 25 per cent. of his coal bills; (3) the finding that the engine increased plaintiff's coal bills 40 per cent.; and (4) the finding that plaintiff had sustained damages in the sum of \$1,600. The other findings, in reference to the implied warranties, under sections 1768, 1769, and 1770 of the Civil Code, are not questioned.

The question raised under the first specification is not material. Plaintiff testified that, at the beginning of the negotiations, defendant "stated that he would furnish one of his 12x12 automatic cut-off engines for \$850 in money and my old engine, making \$1,000." Plaintiff afterwards offered \$750 and his old engine; and, as defendant was to have six weeks in which to manufacture the new one, he agreed to accept the price offered. There is nothing to show what the old engine was worth, or what plaintiff estimated it to be worth, and we consider it quite immaterial whether the finding correctly fixed the contract price at \$1,000, or should have fixed it at \$900.

As to the question raised under the second specification, it is enough to say that we think there was evidence from which the court might find the express warranty alleged. To create an express warranty the word "warrant" need not be used, nor are any particular words necessary. Any affirmation made at the time of the sale, as to the quality or condition of the thing sold, will be treated as a warranty, if it was so intended, and the purchaser bought on the faith of such affirmation; and whether it was so intended, and the purchaser acted upon it, are questions of fact for the jury. 5 Wait, Act. & Def. 555; *Polhemus v. Heiman*, 45 Cal. 573; *Horton v. Green*, 66 N. C. 596.

So, as to the third specification. There was evidence tending to show that the new engine consumed as much as 40 per cent. more coal than the old one in doing the same work. We cannot, therefore, say that this finding was not justified.

The law as to the damages which may be recovered in a case of this kind is declared in the Civil Code as follows: "Sec. 3313. The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time. Sec. 3314. The detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose." The plaintiff testified that he had "expended in money since the Ohmen engine was put in, in an attempt to make it do what it was wanted to do, \$1,087.51;" and it was admitted that the then present value of the engine was only \$250. It is claimed for the appellant that the plaintiff's testimony as to some of the items of his expenditures was indefinite and uncertain, and that some of the money alleged to have been expended by him ought not to have been considered in estimating his damages. It is true, the testimony seems open to criticism, but the court below had a better opportunity to judge of its weight and worth than we have. The court evidently rejected some of the items, or the damages would have been placed at a higher figure than they were. We are not informed which items were re-

jected, or how the exact sum of \$1,600 was fixed upon; but, looking at all the testimony, we cannot say that the court was not authorized to find as it did.

During the progress of the trial the plaintiff was permitted, against the objections of the defendant, to file a supplemental complaint, setting forth "that since the commencement of this action the said plaintiff, by reason of the breach of the warranties set forth in said complaint, has suffered damage in the further sum of \$141.05," for which he prayed judgment. Conceding that the court erred in permitting the supplemental complaint to be filed, still we are unable to see that defendant was prejudiced thereby. There is nothing to show that it was served or answered, or that any damages claimed under it were allowed. Besides, plaintiff was entitled, under his original complaint, to recover damages "for detriment resulting after the commencement" of his action. Civil Code, § 3283. Looking at the whole record, we find no sufficient cause for reversal of the judgment, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(75 Cal. 525)

BRISON v. BRISON. (No. 12,364.)

(*Supreme Court of California.* April 19, 1888.)

1. TRUSTS—CONSTRUCTIVE TRUSTS—STATUTE OF FRAUDS.

Under Civil Code Cal. § 1572, defining as actual fraud a promise made without intention of performing it, and with intent to induce another to enter into a contract, an oral promise made by a wife, upon a conveyance of land from her husband, to reconvey the same when requested, with no intention to keep such promise, is such actual fraud as to give rise to a trust, and bring the promise within a provision of the statute of frauds excepting from its operations trusts arising by operation of law.

2. SAME—RESULTING TRUSTS—CONFIDENTIAL RELATIONS.

Under Civil Code Cal. § 158, making transactions between husband and wife subject to rules controlling persons occupying confidential relations, a conveyance of land by a husband to his wife, upon her oral promise, in which the husband had confidence, to reconvey the land when requested, is constructively fraudulent, and gives rise to such a trust as to bring such oral promise within a provision of the statute of frauds excepting from its operations trusts arising by operation of law.

3. SAME—ACTION TO ESTABLISH—PAROL EVIDENCE TO CONTRADICT DEED.

In an action by a husband to compel his wife to reconvey to him certain lands conveyed to her upon her oral promise to reconvey them when requested, parol evidence is admissible to contradict the consideration expressed in the deed, and to show fraud and a resulting trust.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

A. P. Catlin and Add. C. Hinkson, for appellant. A. L. Hart, for respondent.

HAYNE, C. This was a suit to have a trust declared as to real property, and for a conveyance. The complaint shows substantially the following facts: The plaintiff and the defendant were husband and wife. The plaintiff was the owner of the property in controversy, upon which there was a mortgage. In order to raise money to pay off the mortgage, the plaintiff determined to go to Arizona, and engage in business there, and was desirous of making a will before his departure, so that the property should go to his wife. But being influenced by the wish to save her the expense of probate proceedings in case of his death, and having confidence in her, and relying on her parol promise that she would reconvey to him upon his request, he made a deed to her absolute in form, and took no written acknowledgment from her. The deed recited that it was made in consideration of love and affection, and of the sum

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of \$1, the receipt of which was acknowledged. But it is averred that, "though said deed recites a consideration, yet in truth and in fact there was no consideration therefor, and no money was paid or intended to be paid as a consideration for said deed." It is also averred that the promise by which plaintiff was induced to make the deed was in bad faith and false, and "made with intent on her part to deceive, and did deceive, the plaintiff." The defendant having refused to reconvey the property, the plaintiff brought this suit to compel a reconveyance. The court below gave final judgment for the defendant upon demurrer, and the plaintiff appeals. The argument for the respondent is based upon the statute of frauds, and upon the rule that a writing shall not be contradicted or added to by parol evidence.

The statute of frauds expressly provides that a contract to convey land shall be void unless in writing (Civil Code, § 1624, subd. 4,) and that no trust in real property shall be valid unless created by writing or by operation of law. Civil Code, § 852. Under these provisions there can be no doubt but that the defendant's promise to convey was invalid, and could not be enforced. It is to be observed, however, that the statute excepts from its operations such trusts as arise "by operation of law." Substantially the same exception is in the English statute of frauds, and in the statutes of most of the United States. And the universal construction given to it is that it excepts from the operation of the statute, among other things, trusts which arise from fraud, actual or constructive, or, as they are termed, constructive trusts. It is no longer worth while for any counsel to argue against this construction of the statute. The only point which is open to debate in cases of this character is whether the facts show such a case of fraud as falls within the exception. Such fraud may be either actual or constructive; and, in our opinion, both exist in the case before us.

1. We think there was actual fraud. As above stated, the complaint shows that the parol promise upon which plaintiff relied was false and "in bad faith," and "made with intent to deceive." The construction which we think must be given to this averment is that the promise was made without any intention of performing it. This is a well-recognized species of fraud. See Bigelow, *Fraud*, (Ed. 1888,) 483, 484; *Sandfoss v. Jones*, 35 Cal. 481, 482. And the Civil Code expressly provides that "actual fraud \* \* \* consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: \* \* \* A promise made without any intention of performing it." Civil Code, § 1572. Now, inasmuch as it is admitted by the demurrer that the promise was made without any intention of performing it, we think the case falls directly within the provision. An instance of the application of the principle to facts similar to those of the case before us is *Newell v. Newell*, 14 Kan. 202. It is to be observed of this ground that the essence of the fraud is the existence of an intent, at the time of the promise, not to perform it. But for such intent there would be no actual fraud; for it is well settled that the mere failure to fulfill a promise is not fraud. *Perry v. McHenry*, 13 Ill. 236; *Wheeler v. Reynolds*, 66 N. Y. 234; *Levy v. Brush*, 45 N. Y. 589; *Burden v. Sheridan*, 36 Iowa, 125; *Cowan v. Wheeler*, 43 Amer. Dec. 283; *Boyd v. Stone*, 11 Mass. 348. But, if the evil intent existed, there was actual fraud; and, so far as this ground is concerned, it is immaterial whether there was a confidential relation or not. *Christy v. Sill*, 95 Pa. St. 387. If actual fraud existed, the statute of frauds is no defense. And it does not need any citation of authorities to prove that in cases of such fraud the rule as to contradicting or adding to a writing by parol evidence has no application.

2. But if the intent not to perform, above referred to, had not been averred, we think the plaintiff is nevertheless entitled to relief upon the other facts alleged, on the ground of the confidential relation existing between the par-



ties. It is not every case where parties trust each other that the law recognizes as confidential, (*Doyle v. Murphy*, 22 Ill. 508; *Steele v. Clark*, 77 Ill. 474; *Weer v. Gand*, 88 Ill. 493, 494;) but the relation of husband and wife is expressly declared by statute to be of that character. The provision of the Civil Code is as follows: "Sec. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on 'Trusts.'" It is not surprising that, in taking away the wife's common law incapacity to contract, the legislature should have thought it prudent to throw around her the safeguards which arise from the trust relation. Possibly, at first view, it might seem strange that it should have been thought necessary to accord the same protection to the husband. Perhaps this is to be regarded as an acknowledgment of woman's position in modern society. But, at any rate, the provision is in positive and direct language; and, where such is the case, the courts are not at liberty to disregard it. Nor is it necessary to consider what would be the rule in cases where it appears that there was in fact no actual confidence between the parties; that is to say, where the wife is living in independence of or hostility to the husband. (see *Falk v. Turner*, 101 Mass. 496;) for it is averred that the plaintiff "had at all times confidence in his said wife and her devotion and fidelity to him," and that he made the deed "having confidence in his said wife, and in her said representation and promises, and relying upon the same." The relation of the parties to each other, therefore, was confidential in fact as well as in law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it. The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud. 1 Story, Eq. Jur. §§ 258, 307. The law, from considerations of public policy, presumes such transactions to have been induced by undue influence. Civil Code, § 2235; Bigelow, Fraud, (Ed. 1888,) 261, 262; Kerr, Fraud & M. (Bump's Amer. Ed.) 151; Hov. Fraud, 18. The extent and variety of the application of this principle to persons in confidential relations with each other may be seen from the notes to the leading case of *Huguenin v. Baseley*, 2 Lead. Cas. Eq. pt. 2, p. 1156. From the cases there cited it will abundantly appear that, while it is not impossible that a gift between persons in such relations may be valid, yet that all such transactions are constructively fraudulent, and are only to be upheld upon a showing of special circumstances. See, also, *Hatch v. Hatch*, 9 Ves. 296. Now, if this be so,—if the law does not permit such transactions to stand even where there was an intention that the donee should have the property,—how much more should it interpose where, as here, there was no such intention, but only an intention that she should retain the semblance of ownership for a time.

We think the authorities fully bear out the assertion that in such cases a constructive trust arises, and that the statute of frauds has no application. In *Wood v. Kabe*, 96 N. Y. 426, a son was induced by the parol promise of his mother to confess a judgment in her favor, and allow her to purchase under it a piece of his real property. It was held that a constructive trust arose; and the court, per ANDREWS, J., said: "It was, on the part of the son, the case of a confidence induced, not by the bare promise of another, but by the promise and the confidential relations conjoined. The confidence, in fact, has its spring and origin in the relation, and that relation was a controlling ingredient moving his action. It would be a gross wrong to permit that confidence to be betrayed, and we are of opinion that the statute of frauds cannot be invoked as a bar to relief. The principle that, when one uses a confidential relation to acquire an advantage which he ought not in equity and good

conscience to retain, the court will convert him into a trustee, and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds." So, where a devise is made to one upon his parol promise to hold it in trust for another, a trust arises, and the statute of frauds is not allowed as a defense. *Church v. Ruland*, 64 Pa. St. 442; *Barrell v. Hanrick*, 42 Ala. 71, 72; *Hoge v. Hoge*, 1 Watts, 163. So it has been held, although there is some conflict in the authorities, that where one is allowed to purchase at an execution sale, upon his parol promise to hold for the judgment debtor, a trust arises. *Wolford v. Herrington*, 86 Pa. St. 39; *Arnold v. Cord*, 16 Ind. 177. But the case which we think is most directly in point is *Young v. Peachy*, 2 Atk. 254. There a father obtained from his daughter, without consideration, a conveyance of real property, upon his parol promise to hold it for a particular purpose, viz., "as a trustee only for her and her heirs, \* \* \* and that he would not claim or insist upon any benefit or advantage thereof." No actual fraud was shown. The father died bankrupt: and on a bill against the assignees it was decreed that the conveyance should be set aside, not upon the ground of an implied or resulting trust, but upon the ground of constructive fraud, which would now be said to give rise to a constructive trust. Lord HARDWICKE said: "There have been a great many cases even since the statute of frauds where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud, which this court ought to relieve against. The doing it is *dolus malus*, and that appears to be the present case." See, also, *Haigh v. Kaye*, 7 Ch. App. 469. The principle of this case was extended, in *Murray v. Dake*, 46 Cal. 648, 649, to a transaction between parties who did not stand in confidential relations to each other. Whether that was a proper extension of the principle need not be considered here. It must be admitted that there are cases in which the relief has been denied. But it will generally be found that in such cases the confidential relation has been overlooked; and we think the cases we have cited are in accordance with sound principle. For, if the relief cannot be granted in this case, we do not see how it could be granted if an attorney should, by his parol promise, induce his client to put the property in his name for some temporary purpose, and then refuse to reconvey on the ground of the absence of a written acknowledgment; and so of principal and agent, parent and child, trustee and *cestui que trust*, etc. It is to be observed that the trust is not a resulting trust, properly so called. The relief is not granted merely on the ground of want of consideration. The fact that a deed is without consideration, or is, as is sometimes said, voluntary, is not of itself sufficient to avoid the deed. *Viney v. Abbott*, 109 Mass. 300; *Jackson v. Garnsey*, 16 Johns. 189; *Green v. Thomas*, 11 Me. 321; *Laberee v. Carleton*, 53 Me. 212; *Poe v. Domec*, 48 Mo. 443. This is at least one of the things designed to be expressed by section 1040 of the Civil Code, which provides that "a voluntary transfer is an executed contract, subject to all the rules of law concerning contracts in general, except that a consideration is not necessary to its validity." The want of consideration, however, is a fact proper to be proved in connection with and as a part of the constructive fraud. *Shotwell v. Shotwell*, 24 N. J. Eq. 385. Nor does the recital of a consideration stand in the way of the relief. As is well known, it was a settled rule of the early law that, if no consideration was expressed or proved, a use resulted to the grantor. To prevent this it became common to make the deed recite a consideration; and, while such recital could be contradicted for collateral purposes, it could not be contradicted for the purpose of avoiding the deed, (*Farrington v. Barr*, 36 N. H. 89; *Coles v. Soulsby*, 21 Cal. 47; *Rhine v. Ellen*, 36 Cal. 362; *Martin v. Splitale*, 69 Cal. 614, 11 Pac. Rep. 484,) or for the purpose of raising a resulting trust, (*Russ v. Mebius*, 16 Cal. 356; *Graves v.*

*Graves*, 29 N. H. 129; *Philbrook v. Delano*, 29 Me. 412, 413.) But this only means that the recital could not be contradicted for the mere purpose of showing a want of consideration. Where fraud is charged, the want of consideration may be shown in connection with and as part of the fraud. In cases like the present, the confidential relation is one circumstance, the parol promise is another, and the want of consideration is a third. In cases of fraud, actual or constructive, no mere form of words which the parties have made use of can shut out inquiry as to the real facts; and this, from the necessity of the case. For, as has been pertinently asked, if parol evidence be not admissible, how else can the fraud be shown?

The objection that parol evidence is not admissible to contradict or to add to the deed is a distinct ground from the statute of frauds. 1 Story, Eq. Jur. § 158. The admissibility of such evidence is sometimes put upon the ground that it does not contradict or add to the deed. In *Hall v. Livingston*, 3 Del. Ch. 373, the chancellor said in reference to this subject: "There is a well-recognized distinction between contradicting a deed or impairing its legal operation, and raising out of the transaction an equity *de hors* the deed, binding the grantee's conscience to hold the land for the real purposes of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work fraud. Such an equity is held to be independent of the deed, and not excluded by it as a mere conveyance of the legal estate, unless there be in it some terms or implication to that effect. To support such an equity parol evidence is admissible, not as contradicting the deed, but as explanatory of the transactions out of which the equity arises." Perhaps the most comprehensive and philosophical expression of the rule is that parol evidence is admissible to raise a trust in cases of actual or constructive fraud. But, whatever may be thought of the terms in which it is expressed, the rule itself is well settled. 2 Whart. Ev. § 1038; Bigelow, Fraud, (Ed. 1888,) c. 10, § 8; *Reetes v. Bass*, 39 Tex. 631; *Church v. Kuland*, 64 Pa. St. 442; *Isenhoot v. Chamberlain*, 59 Cal. 637. If we are right in the foregoing, the point as to the necessity of an acknowledgment by the wife before a notary does not require serious consideration. The statute has no relation to trusts raised by parol evidence.

We therefore advise that the judgment be reversed, with directions to overrule the demurrer to the complaint, with leave to defendant to answer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer to the complaint, with leave to defendant to answer.

(75 Cal. 570)

PEOPLE v. STITES. (No. 20,377.)

(Supreme Court of California. April 20, 1888.)

CRIMINAL LAW—ATTEMPT TO COMMIT CRIME—WHAT CONSTITUTES.

Proof that defendant had prepared a dynamite bomb to place upon a railroad track, and that, with the bomb in his possession, defendant was on his way to a previously appointed rendezvous with his confederate, whence the two intended to proceed to the track, and place the bomb thereon, but was prevented from accomplishing his purpose by the presence of officers, clearly establishes an attempt to place the bomb upon the track.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT and W. T. WALLACE, Judges.

Indictment of John E. Stites for attempting to obstruct a railroad track. Defendant was convicted, and appeals.

*Robert Ferral and Walter Gallagher*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BELCHER, C. C. The defendant was charged with the crime of attempting to place an obstruction upon the track of the Sutter-Street Railroad in the city and county of San Francisco, and was convicted. He moved for a new trial, and has appealed from the judgment and order denying his motion. The motion was made upon the ground that errors of law were committed by the court during the trial, and that the verdict was contrary to the evidence. In the brief filed for appellant here it is distinctly stated that "the appellant does not desire a new trial upon any other ground than that the evidence fails to prove the commission of the crime for which he was convicted." We shall therefore assume that all of the supposed errors of law are waived. In denying the motion for new trial, the court below, by WALLACE, J., (HUNT, J., concurring,) filed an opinion which fully meets and answers all the points made in support of the motion. We quote and adopt so much of that opinion as relates to the question of the sufficiency of the evidence to justify the verdict. It is as follows:

"The information against the prisoner is founded upon the statute, (Pen. Code, § 587,) which provides that any person who maliciously places an obstruction upon the track of any railroad shall suffer imprisonment in the state prison not exceeding five years, etc., (Id. § 664.) 'Any person who attempts to do so shall be imprisoned not exceeding two and a half years,' etc. The prisoner was found guilty of such an attempt, committed by him on the 16th day of February last, upon the track of the Sutter-Street Railroad Company, and asked for a new trial upon four several grounds now to be considered: *First*. It is insisted that the entire evidence given at the trial is insufficient to establish the attempt of which the prisoner was convicted. The principal facts made to appear at the trial are substantially as follows: On the 15th day of February last, the day preceding that on which the alleged attempt was made, the prisoner and a confederate of his were in consultation as to how they could most advantageously and effectively,—that is to say, how they might, with the most assured degree of personal safety to themselves, and the greatest attainable hazard to the lives and property of others,—place an explosive upon the track operated by the company mentioned, to which company and the railway it operated the prisoner appears to have been actuated by feelings of intense and bitter hostility. The confederate was already possessed of the explosives proposed to be employed, or rather of the dynamite cartridges which could be wrought into a bomb suitable for the purpose in hand, and which, with the addition of the necessary gun caps and other fulminating agencies, would make up an explosive, proven at the trial to be of the highest known power. It was deemed important to determine in advance at what particular point on the track of the road the explosive could be used with the most destructive effect, and, as the prisoner had then recently and for several consecutive months been in the employ of the company as a conductor on the road, and had in that way gained intimate personal knowledge of the railway property, his confederate asked him if he 'knew of a good place to put dynamite on the car track.' To this inquiry the prisoner responded that it was 'immaterial where he put it, if he did not get caught.' After some further consultation the parties separated, with the understanding that on the next morning, at 4:30 o'clock, they would meet at the junction of Turk and Hyde streets, near the dwelling-house of the prisoner, for the purpose of immediately proceeding to put in execution the project in hand. The cartridges were delivered to the prisoner, who, at the dwelling-house in which he and his family resided, and by the use of the sewing-machine employed in

that house, prepared, or caused to be prepared, the cloth and bomb in which two dynamite cartridges with a large number of fulminate caps were inclosed; the whole constituting an agency of terrible destructive power, and which, being laid upon the track of the road, would be readily exploded by the contact of a passing team or passenger car. The building or house of the prisoner was situated on the eastern line of Larkin street, and its front, looking to the west, is within a few feet of the track of the railway running in a northerly and southerly direction along the street. The rear of the house is bounded by an alley-way or *cul-de-sac*, called 'Dodge Place,' which runs northwardly to the southern line of Turk street, into which it opens, at a short distance east of Larkin street. The place at which the prisoner and his confederate had agreed to meet—the junction of Hyde and Turk streets—was to the eastward of the point where Dodge alley intersects the southern line of Turk street. About a quarter past 4 o'clock on the morning of the 16th of February, the prisoner left his dwelling to join his confederate, pursuant to the appointment they had made on the preceding day. He passed to the rear of the dwelling-house, walking on the western side of Dodge alley in a northerly direction, and approached the southern line of Turk street. He had at that time in his possession, in the right-hand pocket of the overcoat he wore, the dynamite bomb prepared in his dwelling-house, weighing some three pounds, and being about twelve or fourteen inches long, by some two or two and a half inches in width. As the prisoner approached the southern line of Turk street, on his way to meet his confederate, he was surprised at the sight of several police officers who, as he then discovered, were intently observing him, and who had been in fact, and without his suspecting it, for several hours on the watch for his appearance. Upon observing this state of things the prisoner immediately turned towards the east, and passing upon the southerly line of Turk street, walked rapidly to the junction of Turk and Hyde streets, and continued thence down the latter street, on its westerly side, until having arrived opposite the house, 178, and observing that he was being followed by the officers, he surreptitiously deposited the bomb in the flower garden in front of that house, by dropping it over the fence as he passed along. From this point he moved over and immediately down Hyde street, striking soon into a run, and after having been hotly pursued by the officers, who fired several times, he was finally captured on McAllister street. It should be here observed that nearly all of the matters stated in the foregoing outline of the evidence are absolutely admitted by the prisoner to be true in point and fact. The fact of the consultation between himself and his confederate on the 15th of February; the appointment to meet next morning; the endeavor by the prisoner to keep that appointment; his detection, flight, and capture,—are not any of them denied by him. He denies, however, that he had the dynamite bomb in his possession at the time. In his statement of his connection with this affair, made by him to the officers immediately upon his arrest, he at first denied that he had the dynamite bomb in his possession, and that he threw it away in his flight. But at a subsequent time, upon being informed that he had been distinctly seen by some of the pursuing officers to do so, he at last replied, 'I might as well give it up, if those officers are against me, or saw me do it.' Again, at a later period, he testified at the trial as a witness in his own behalf, and did not then deny his possession of the dynamite bomb on the morning of the 16th of February, although he testified upon other points made against him upon the part of the prosecution. Further, immediately after his arrest, his dwelling-house was searched by the officers, and they there discovered in the sewing-machine found there pieces of cloth, thread, and other material exactly corresponding with the cloth, thread, and some of the other material of which the bomb had been fabricated. In short, the truth of the facts stated are made morally certain; established beyond a reasonable doubt, by a variety of evidence of the most persuasive character.

"It is remarked by a distinguished writer upon criminal law that the definition of an 'attempt,' as the word is understood in criminal jurisprudence, is intricate, and, as he says, 'but imperfectly understood by the courts.' 1 Bish. Crim. Law, § 725. Indeed, an experiment made will probably satisfy any one that it is hardly within the compass of our language to frame any universal definition which, precisely indicating the lines of inclusion and exclusion, will prove to be both positively and negatively accurate, when applied to the facts of a particular case. Mere intention to commit a specific crime does not itself amount to an 'attempt' as that word is employed in the criminal law. There must in addition to the wicked intent—the *mens rea*—be some act done towards the ultimate accomplishment of the purposed crime. But even such acts do not always of themselves amount to an 'attempt,' or to an offense of which human laws will take cognizance, for if they be but acts of preparation, however elaborate, our municipal law (at least as it existed February last) would not assume to deal with them. For instance, the construction of the dynamite bomb by the prisoner at his home on the night of the 15th of February, with the deliberate intention on his part to employ it the next morning in destroying the lives and property of others, atrocious as it was, and indefensible *in foro conscientia*, was but an act of preparation, and when perfected did not render him amenable to the municipal law as then existing, or punishable by its rules. But when the prisoner left his house on the morning of the 16th day of February and went to Turk street, pursuant to the antecedent arrangement between his confederate and himself, it amounted to an overt act done by him for the purpose of effecting the crime intended, and was in law and fact a criminal attempt. Before he left his house he was already fully prepared, and carried with him the instrument he was to use in effecting the crime he intended. Nothing, in fact, remained for him to do but deposit it on the railway at the time easily within his reach. In considering whether a particular act done amounts to an attempt in a criminal sense, the proximity or remoteness of the person or thing intended to be injured is generally an important element, as the adjudicated cases will show. The learned argument of counsel delivered in 1862 in the case of *Reg. v. Cheeseman*, and often referred to by courts and text writers, illustrates this idea. He observed as follows: 'A man may do an act with intent to commit some crime anywhere; for example, a man may buy a rifle in America with intent to shoot a man in England, but the buying of the rifle could not be construed into an attempt to shoot the man. If a notorious burglar is seen to put a picklock key into a door the jury may assume that he is attempting to break into the house, but if he were found purchasing a picklock key ten miles from the house in question it would be impossible, without other evidence, to say that it was bought with intent to break into that house.' — Leigh & C. 140. The observations of BLACKBURN, J., in the same case, are suggestive: 'There is no doubt a difference between the preparation antecedent to the offense and the actual attempt, but if the actual transaction has commenced, which would have ended the crime if not interrupted, there is clearly an attempt to commit the crime.' The proximity on the one hand, and remoteness on the other, of the intended subject of the injury enter largely into the question of whether the actual transaction has commenced. The circumstances of the case in hand satisfy all known requirements of mere proximity. The track of the railway runs but a few feet from the doorway of the dwelling-house of the prisoner, and it is apparent, therefore, that, if in that house he performed an overt act towards presently executing his intended crime, or if he there commenced the doing of such an act which was continuous in its nature, and intended to be forthwith completed elsewhere, he committed the offense charged, if, while so attempting the perpetration of the crime, he was interrupted by extraneous causes preventing him from proceeding further in the execution of his purpose. We do not in this connection overlook the fact

pointed out in the argument for the defense that the movements of the prisoner at the time he was interrupted by the officers had carried him not nearer to, but further from, the track of the road upon which it was his intention to place the explosive he carried; or, to quote the language of the learned counsel, 'every step the defendant took, from the time he left his own door until his arrest, was a step away from, and in an opposite direction to, the line or lines of the Sutter-Street cable cars.' In our judgment, however, there is no significance whatever in this circumstance. If, indeed, there was any doubt of the intent with which the prisoner began his movement on the morning in question, the direction in which he traveled with reference to the location of the road might have been of importance. If the criminal intent here were to be inferred only from the precise act then done, it might with much plausibility be argued that a man really intending to presently fire a house, or blow up a roadway, would be found approaching and not receding from the object he intended to destroy. But, as observed already, we know the criminal intent of the prisoner here, as an independent fact; he admits it; his counsel did not deny it; and, therefore, if the prisoner, armed for the purpose, and within a few steps of the line of the road, was, when interrupted, in motion, and actively maneuvering to accomplish the crime intended, it is of no practical importance that at the exact moment of interruption he had reached a point further (by a distance equal to the width of his dwelling-house) from the track than he was when he actually started out on his criminal endeavor. It should not be forgotten in this connection that the plan agreed upon between the prisoner and his confederate, on the day before, necessarily required as part of the means of executing it, that the first movement of the prisoner should be towards the east,—in a direction from and not towards the track of the road. The dwelling-house of the prisoner is to the east of the railroad; and the conjunction of Hyde and Turk streets, where the confederates had agreed to meet, is at a point still further to the east. From that place they were to reach the roadway; not necessarily at the nearest point, but at the one deemed safest for them,—the point where they would be least likely to 'get caught;' and it was while pursuing the prearranged details of the enterprise that the prisoner reached the southern line of Turk street, where he discovered the presence of the officers on the watch there for his appearance. This was an interruption which practically put an end to his criminal endeavor, and but for that interruption, so far as appears, he would have effected the crime he was then attempting to consummate. He was engaged at that moment in an active endeavor to reach the road at a point deemed by him most eligible for the purpose in hand, and in all probability already actually selected in his own mind. He was armed with the necessary explosive, and all this occurred within but a few steps of the railroad which was the immediate subject of the injury intended. We have carefully examined all the authorities upon the subject of criminal attempts within our reach. Of course, the circumstances of each case differ in a greater or less degree from those of all other cases; the nature of the crime proposed as being one of actual violence or otherwise, the particular agencies by which it was intended to be committed, the actual or supposed adaptation of those agencies to the purpose in hand as being likely to effect the object intended, and a variety of other details, varying from time to time as the discoveries of science and the progress of invention have produced novel instrumentalities of destruction, while they have not disturbed the rules of decision, have constantly called for new applications of those rules by the courts to the improved agencies employed in the perpetration of crime. It would be unprofitable to cite the authorities here. The question before us involves the mere application of recognized rules to the particular facts of the case in hand, and, as observed by the learned commentator to whom we have already referred, 'perhaps the only practicable method is for the judge in each case to consider the special facts in determining whether or not a criminal at-

tempt has been proven.' We are of the opinion that upon the facts in evidence, tested by the rules referred to, the prisoner is guilty as charged in the information."

We advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(75 Cal. 595)

MOYLE *et al.* v. LANDERS *et al.* (No. 11,906.)

(Supreme Court of California. April 21, 1888.)

APPEAL—REQUISITES—NOTICE—SERVICE ON ATTORNEY—DEATH OF CLIENT.

Where the record on appeal shows there were several defendants, all represented by the same attorney of record, and the attorney of record accepted service, for all the defendants, of a notice of appeal, and it appears that one of the defendants died between the date of the judgment and the service of the notice,—a fact unknown to plaintiff or his attorney,—a motion to dismiss the appeal as to the legal representatives of the deceased, on the ground that the service of the notice as to the deceased was void, made by the same attorney who accepted the service, will be denied without prejudice.

In bank. Appeal from superior court, city and county of San Francisco; T. H. RIORDAN, Judge.

Motion to dismiss an appeal.

L. E. Bulkely, for appellants. H. Sieberst, for respondents.

McFARLAND, J. This case is now before us upon a motion to dismiss the appeal as to the respondent Michael Landers, and his legal representatives. Upon an examination of the papers, we find that there were several defendants in the court below, and that they all appeared by the same attorney of record. Judgment went for defendants; and in due time plaintiffs filed their notice of appeal, and served it on the said attorney of record, who accepted service for all the defendants. As a matter of fact, however, the defendant Michael Landers had died between the entry of the judgment and the service of the notice of appeal; this fact being unknown to plaintiffs or their attorney. And this motion is based on the ground that the service of the notice of appeal was void, because, at the time of the service, the said Landers was dead; and it is made by the same attorney who accepted the service. In such a case this court will not entertain a motion to dismiss the appeal, made by the attorney who accepted service for the dead man. The motion to dismiss is denied without prejudice.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.

(75 Cal. 580)

*In re* WILSON. (No. 12,496.)

(Supreme Court of California. April 20, 1888.)

1. POOR DEBTORS—EXAMINATION AND DISCHARGE—CONFINEMENT FOR CONTEMPT—FAILURE TO PAY ALIMONY.

Code Civil Proc. Cal. § 1143 *et seq.*, entitling persons confined in jail under executions issued in civil actions to a hearing as to their property and effects, with reference to a discharge, before the judge of a superior court, extends to a person confined in jail for non-compliance with an order of court for the payment of alimony.

2. SAME—HABEAS CORPUS—ISSUE OF MANDATE.

Where, on an application for mandate on the ground that petitioner had applied to respondent, a judge of the superior court, for an examination under Code Civil Proc. Cal. § 1143, entitling those in jail under execution to an examination as to their property, etc., with reference to a discharge, the answer of respondent denies petitioner's right to such examination under the Code, but avers that he was accorded the examination, and that his discharge was refused on the ground that, in



the judgment of respondent, he was not entitled to it, the case being submitted on the answer as true, though the prisoner is entitled to such examination, the appellate court will not assume that the decision was not on the merits of the evidence in the examination, and the writ will be refused.

In bank. Application for writ of mandate to superior court, Alameda county.

*Craig & Meredith*, for petitioner. *Fred. E. Whitney*, for respondent.

McFARLAND, J. In a certain action for divorce brought against petitioner, William I. Wilson, by his wife, in the superior court of Alameda county, the said court on February 1, 1887, made an order requiring petitioner to pay plaintiff therein \$200 per month alimony, and \$800 counsel fees. On April 25, 1887, the said court committed petitioner to the custody of the sheriff until said money should be paid, and since that date petitioner has been in jail under said orders. The petition states that on December 8, 1887, the petitioner, after due notice, applied to the respondent, Hon. NOBLE HAMILTON, judge of the superior court of said county, to be discharged, under sections 1143 *et seq.*, Code Civil Proc.; and that the respondent refused, and still refuses, to allow petitioner "to be examined, or to take the oath prescribed by, or in any manner to receive any of the benefits or privileges provided for by, said sections of said Code." The answer of respondent first sets forth that petitioner "was not confined in jail on an execution issued on a judgment rendered in a civil action;" that he was so confined by virtue of "a commitment for contempt of court," and that he "was not, and still is not, entitled to be examined, or to be discharged from custody, under the provisions of said sections" of the Code. If these were the only statements contained in the answer, it would be clear that respondent refused to allow petitioner to be examined, and to consider his application to be discharged, on the ground that his case did not come within the provisions of said sections of the Code. But the respondent in his answer denies that he refused to hear petitioner's application for discharge, and, "on the contrary, alleges that defendant, as superior judge of Alameda county, did, on the 8th day of December, 1887, hear the said application of said William I. Wilson, and all evidence, matters, and things produced in behalf of said application, and then and there listened patiently to the argument of counsel for said William I. Wilson," etc.; and "that afterwards, on the 9th day of January, 1888, defendant rendered his decision, and denied the application of said William I. Wilson for discharge," on the ground that "he was not, in the judgment of defendant, entitled thereto." It is probable that the respondent refused to discharge the petitioner, and to consider the merits of the case, upon the ground that, having been committed for contempt, he could not under any circumstances be discharged under the sections of the Code referred to. But as the case was submitted on the answer taken as true, and as it avers that respondent did hear the application, "and all evidence, matters, and things produced in behalf of said application," and denied the discharge because the petitioner "was not in the judgment of respondent entitled thereto," we cannot take the fact to be that respondent refused to act in the premises, or to hear and determine the application. The writ of mandate must, therefore, be dismissed.

As, however, the petitioner may make another application for discharge before the respondent, or some other superior judge, and may renew it every 10 days, it may be well here to correct an error into which the respondent evidently fell. Section 1143, Code Civil Proc., is as follows: "Any person confined in jail on an execution issued on a judgment rendered in a civil action must be discharged therefrom upon the conditions in this chapter specified." The succeeding sections of the chapter provide that such person, upon notice, may apply to a judge of a superior court of the county for his discharge; that the judge must examine him under oath as to his property and effects, and

his ability to pay, etc., and hear such other legal and pertinent evidence as may be produced by him or the creditor; and that if, upon the examination, the judge is satisfied that the prisoner should be discharged, he must, after administering a certain prescribed oath, order his discharge. But in the case at bar the respondent seems to have considered that a person in jail for contempt for non-compliance with a general order for the payment of money to a party to an action is not a person included in said section 1143, and may be confined for a life-time, although his inability to pay be clearly established. There is a well-settled distinction between a civil and a criminal contempt. The former consists, generally, in failing to do something ordered to be done by a court, in a civil action, for the benefit of the opposing party therein; the latter consists in acts of disrespect of the court, such as disorderly or violent conduct in its presence or immediate vicinity, or in the doing of a forbidden act, resistance to process, etc. Rap. Contempt, § 21 *et seq.*; *Phillips v. Welch*, 11 Nev. 187; *People v. Spalding*, 10 Paige, 284. There might be instances, of course, where the character of the contempt would be of difficult determination, but there is no doubt that in the case before us the failure to comply with an order for the payment of money generally was a civil contempt. And the authorities seem to be clear that in a case of civil contempt, that is, when a defendant in a civil action is ordered by the court to pay money generally to the plaintiff, and is committed until he shall have paid it, the prisoner is in custody as under an execution. It was so held in England under the "Lords Act." *Rex v. Stokes*, Cowp. 136. In *Van Wezel v. Van Wezel*, 3 Paige, 43, which, like the case at bar, was contempt for not paying alimony, McCoun, vice-chancellor, says: "It is, to all intents and purposes, an execution. The order is a judgment rendered in favor of one party against the other for the payment of a sum certain, or which may be reduced to a certainty if it be for costs, by taxation. The object of the precept is to execute the order, to give it effect, and to enforce its performance; and, when the party is imprisoned upon it, he is, within the letter and meaning of the law, imprisoned by virtue of an execution." See, also, *People v. Spalding*, 10 Paige, 284, 7 Hill, 301; *Case of Watson*, 3 Lans. 413; *People v. Cowles*, \*43 N. Y. 49; *Jackson v. Billings*, 1 Caines, 252. We think, therefore, that if the petitioner shall make another application for discharge, under the sections of the Code above mentioned, it will be the duty of the superior judge to whom it shall be made to consider the case as coming within the provisions of those sections; to hear evidence touching his property and effects; to discharge the petitioner if he be satisfied, from the evidence, of his inability to pay; and to remand him, if he be not so satisfied. To hold that the petitioner, though utterly penniless, must suffer a life imprisonment for debt because of the particular form in which the imprisonment was imposed, would be a gross violation of the plain intent of the Code. Writ dismissed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

I concur in the judgment: MCKINSTRY, J.

(76 Cal. 542)

TOY v. SAN FRANCISCO & S. R. R. Co. (No. 9,957.)

(*Supreme Court of California*. April 20, 1888.)

APPEAL—PRACTICE—PARTIES—CODE CIVIL PROC. CAL. § 940.

Defendant moved to have certain persons substituted as defendants in his stead, and made them parties to such motion. The motion was denied, and judgment entered against defendant. Held that, on appeal from such judgment by defendant, such persons are adverse parties within the meaning of Code Civil Proc. Cal. § 940, providing that notice of appeal shall be served on the adverse party.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*Assumpsit* by George D. Toy against San Francisco & San Rafael Railroad Company. Judgment for plaintiff, and defendant appeals.

*Lloyd & Wood*, for appellant. *Olney, Chickering & Thomas*, for appellee. *H. A. Powell*, for S. H. Harmon.

FOOTE, C. This action was brought to recover a certain sum of money alleged to be due the plaintiff. Before any answer was filed to the complaint, the defendant moved, upon affidavit, that an order of the trial court should be made substituting S. H. Harmon and the Gordon Hardware Company in place of the defendant, and discharge it "from liability to any party, upon its depositing in court the amount claimed in the contract mentioned in the complaint." Upon the hearing of this motion it was refused, and, the defendant failing to answer, judgment by default was given, and made in favor of the plaintiff as prayed for. From that judgment this appeal is taken. It is claimed that the court, upon the proof made, should have substituted S. H. Harmon and the Gordon Hardware Company in place of the defendant; and it is perfectly plain that, if the judgment is reversed, it must be because this substitution was not made; and it must result from such reversal that Harmon and the Gordon Hardware Company will become the defendants in the action, and the present defendant be "discharged from liability to any party." Although not named as parties to the judgment as it stands, Harmon and that company were served with notice of the motion, under the provisions of section 386, Code Civil Proc., and appeared in the court below, and became *quasi* parties to the action, so far as their rights were affected by the granting or refusal of that motion. The order of the court below absolved them from all connection with the cause from that time, and the effort now is to reverse the action of the trial court in that respect, and to make them parties defendant.

A motion is made to dismiss the appeal because Harmon and the Gordon Hardware Company, nor their attorneys, were not served with notice thereof. And the question to be determined upon that motion is whether or not they are "adverse parties" in the sense in which that term is to be taken under section 940, Code Civil Proc. Harmon and the Gordon Hardware Company, certainly became *quasi* parties to the action when they were served with notice of the motion to substitute them for the defendant in the court below. By the action of that court their rights were affected and determined. If the contention of the appellant is to prevail, it seems plain to us that *quasi* parties to the action, whose rights were passed upon in the trial court, will be affected to such an extent as that they will have put upon them as defendants a burden which the court below refused to impose. Therefore, their interests in relation to the subject-matter of the appeal is in conflict with the reversal of the judgment appealed from, and they were entitled to notice of the appeal. *Williams v. Mining Ass'n*, 66 Cal. 193, 5 Pac. Rep. 85, and cases cited; *In re Medbury*, 48 Cal. 83. At the appellant's instance they were made parties to the motion to substitute in the court below. By the appeal it is sought to allow the appellants to effect that in the supreme court which was denied them in the trial court, the result of which would be that *quasi* parties to the action would be concluded of their rights to be heard in the appellate court upon a matter in which they were heard and their rights determined in the lower court. The appeal should be dismissed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

(75 Cal. 566)

## HENDY v. MARCH. (No. 9,714.)

(Supreme Court of California. April 20, 1888.)

## 1. ACCOUNT STATED—WHAT CONSTITUTES.

Where it appears that an account against defendant has been presented and examined by him, and no objections made thereto for several months, it becomes an account stated.<sup>1</sup>

## 2. SAME—MISTAKES—PLEADING.

A party seeking to take advantage of a mistake in an account stated must put such mistake in issue by his pleadings.

## 3. PARTNERSHIP—WHAT CONSTITUTES—AGREEMENT FOR USE OF SHIP.

Under Civil Code Cal. § 2395, declaring that a partnership is an association of persons for the purpose of carrying on business together, and dividing the profits, two persons having agreed that one should furnish money to keep a ship in repairs, collect the earnings, divide the surplus with the other, and, in case the earnings were not sufficient to pay the advances, such other was to pay a portion of the deficiency, are partners, and the statute of limitations will not commence to run against the party making the advances until the affairs of the firm are closed.<sup>2</sup>

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action on an account stated, by Joshua Hendy against W. F. March. Judgment for plaintiff, and defendant appeals.

*J. H. Skirm and John C. Hall*, for appellant. *W. H. Hart*, for respondent.

HAYNE, C. Action on an account stated. The court found that the account was stated as alleged. The defendant contends that the finding is not sustained by the evidence.

There being a substantial conflict, it must be assumed at this stage of the case that the version of the plaintiff's witnesses is the true one. According to them, the account was made up and presented to the defendant, who went over it with the expert, and "made no objections whatever to the account," from the time it was presented to him in August, 1881, "until after this suit was brought," which was on November 25 of the same year. This was a sufficient acquiescence from which to imply an assent. It seems to be well settled that the assent may be implied. In *Terry v. Sickles*, 13 Cal. 427, the court, per COPE, J., said: "If the account be sent to the debtor, and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated." In relation to this subject, Judge Story says: "It is sufficient if it has been examined and accepted by both parties, and this acceptance need not be express, but may be implied from circumstances. Between merchants at home an account which has been presented, and no objection made thereto, after the lapse of several posts is treated, under ordinary circumstances, as being by acquiescence a stated account. Between merchants in different countries a rule founded in similar considerations prevails. If an account has been transmitted from the one to the other, and no objection is made after several opportunities of writing have occurred, it is treated as an acquiescence in the correctness of the account transmitted, and therefore it is deemed a stated account." 1 Eq. Jur. § 526. The same rule is laid down by Greenleaf. 2 Greenl. Ev. § 126. The evidence above referred to brings the case fairly within this rule. And the account was undoubtedly final in character, and showed an indebtedness against defendant of a specific amount, and was sufficient in all respects to serve as the basis of an account stated.

<sup>1</sup>See, also, as to what constitutes an account stated, *Heidenheimer v. Ellis*, (Tex.) 8 S. W. Rep. 606; *Walker v. Steele*, (Colo.) 12 Pac. Rep. 423; *Whitehead v. Darling*, (Ky.) 5 S. W. Rep. 356; *Rehill v. McTague*, (Pa.) 7 Atl. Rep. 224; *Rhynne v. Love*, (N. C.) 4 S. E. Rep. 536.

<sup>2</sup>See *Clift v. Barrow*, (N. Y.) 15 N. E. Rep. 327, and note.

The defendant contends, however, that, even if this be so, he is entitled to show mistakes in the account. But an account stated becomes a contract. As was said by the court, per SHAFTER, J., in *Carey v. Petroleum Co.*, 33 Cal. 697: "An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking. *Foster v. Alanson*, 2 Term R. 479; *Holmes v. D'Camp*, 1 Johns. 36. Therefore, an account stated with a new firm may include debts due to a former firm, or to one of the partners. *David v. Ellice*, 5 Barn. & C. 196; *Gough v. Davies*, 4 Price, 200. An action upon an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties." It follows that, as is the case with other contracts, the mistake must be put in issue by the pleadings. *Auzerais v. Naglee*, 15 Pac. Rep. 372; *Terry v. Sickles*, 13 Cal. 427. The pleadings here did not present any such question. Furthermore, we cannot say from the evidence that there was any mistake.

Nor is the statute of limitations a bar to any part of the plaintiff's demand. The plaintiff and the defendant were partners in the use and earnings of the vessel. The finding is that, being each the owner of an interest in the vessel, it was agreed that the plaintiff "should take the charge and management of said schooner, W. F. March, and that the plaintiff should advance money to keep said schooner in repair and equipped for use, and to advance all necessary running expenses of said schooner, and to collect all earnings of said schooner, and apply said earnings to his advances, and the surplus, if any, to be divided as follows: three-quarters to the plaintiff, and one-quarter to defendant; and, if the earnings were not sufficient to pay the advances, then defendant was to pay plaintiff one-fourth of the deficiency." Here is a distinct agreement to share in the profits and loss arising from the use of the vessel, and such an agreement constitutes a partnership. Civil Code, § 2395. It is not necessary to say that the partnership extended to the ship itself as contradistinguished from its use. "Part owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship." Civil Code, § 2396. But the use of a ship is distinct from the ship itself, and there may be a partnership in the use or earnings, although as to the vessel itself the parties are tenants in common. *Merritt v. Walsh*, 32 N. Y. 689; *Bulfinch v. Winchenbach*, 3 Allen, 161; *Mumford v. Nicoll*, 20 Johns. 633; *Hinton v. Laro*, 10 Mo. 701. The above finding is within the issues; for the defendant pleaded the statute of limitations, and, this being denied by force of the provision of the Code, anything which related to the issue so raised was proper to be examined. The evidence, in our judgment, sustains the finding. Indeed, it seems to have been the understanding of the defendant that he was the partner of the plaintiff, for he says: "I never was satisfied with the account, nor were either of the partners." If such was the relation of the parties, it is manifest that the statute of limitations did not begin to run until the affairs were wound up, and the balance due agreed upon between the parties, which was the result of the account stated.

We see no error in the admission of evidence. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(75 Cal. 601)

MECHANICS' FOUNDRY OF SAN FRANCISCO v. RYALL. (No. 11,209.)

(Supreme Court of California. April 24, 1888.)

INJUNCTION—AGAINST TRESPASS—PLEADING—SUFFICIENCY OF ALLEGATION.

Complainant, praying an injunction against trespass by a former employe intruding into his workshop, alleged that the law afforded no adequate protection; that a

continuance of the trespass would result in irreparable injury to him; that defendant was unable to respond in damages; that pecuniary compensation for the actual damages would not be adequate relief; and that restraint was necessary to prevent continuance of the intrusions, and multiplicity of suits. *Held*, that neither the naked allegation of irreparable injury, nor the insolvency of the trespasser, were sufficient to warrant an injunction against a trespass.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action for injunction by Mechanics' Foundry of San Francisco, against Joseph E. Ryall. At first trial, plaintiff obtained damages and an injunction. Defendant appealed. Judgment was reversed, and the case remanded. At the second trial, on an amended complaint, defendant entered a general demurrer, which was sustained, and the action was dismissed. Plaintiff appeals.

*Manuel Eyre*, for appellant. *R. Percy Wright*, for respondent.

BELCHER, C. C. This action was brought to obtain an injunction restraining the defendant from doing certain acts complained of by plaintiff. The case was before this court on a former appeal, and it was held that the complaint, as then framed, did not state facts sufficient to constitute a cause of action. 62 Cal. 416. The allegations of the complaint are set out in the opinion. When the case went back to the superior court, an amended complaint was filed, and to that a general demurrer was interposed and sustained. Plaintiff declined to further amend its complaint, and thereupon judgment was entered dismissing the action. The additional allegations in the amended complaint are: "That an action at law will be wholly inadequate to protect this plaintiff; that a continuance of such acts,—and defendant announces his positive determination so to continue them each day,—will work irreparable injury to this plaintiff; that, if not restrained, such acts will, before it will be possible to obtain a decision in an action at law, work irreparable injury to this plaintiff, and utterly ruin its business; that said defendant is utterly unable to respond in damages; that he is impecunious and totally without means; that pecuniary compensation for the actual damages from day to day will not afford adequate relief, nor prevent the continuance of said intrusions; and restraint is necessary to prevent multiplicity of suits."

It was alleged in the original complaint that defendant was a stockholder in the corporation plaintiff, and in the amended complaint that he was a stockholder and director of the corporation. This allegation was stricken out of the amended complaint; but on whose motion or for what reason it was done does not appear. If defendant was in fact a stockholder and director of the corporation, it is not easy to see how he could be called a trespasser for doing the acts complained of. But, however this may be, before a court of equity will interfere to restrain a trespass, it must appear that the injury to result from the trespass will be irreparable in its nature; and it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so. "The mere allegation that irreparable injury will result to the complainant unless protection is extended to him is not sufficient. The facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded." *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Waldron v. Marsh*, 5 Cal. 120; *Turnpike Co. v. Supervisors of Yuba*, 13 Cal. 190; High, Inj. (2d Ed.) § 722. Nor will equity interpose to restrain a trespasser simply because he is a trespasser and is insolvent. Other facts and circumstances must be shown before the extraordinary remedy of injunction can be invoked. "The fact that a trespasser is insolvent will not give chancery jurisdiction to enjoin his acts, where the other circumstances of the case preclude it." *Turnpike Co. v. Barnett*, 2 Cart. (Ind.) 536; 1 High, Inj. (2d Ed.) § 701. There may be other efficient means of preventing the commission of the threatened trespass which can be availed of without any violation of law; and,

if so, such means should first be resorted to. In the case last above cited, where an injunction was asked to restrain trespassers, it was said: "If these men are not responsible for their acts in damages, we should suppose they might be crowded out of the way by a *molliter manus imposuit*." Many cases might be mentioned where this rule would be applicable. For example, if one should discharge his cook or a clerk in his store, and the cook or clerk should return and insist upon his right to occupy his former place in the kitchen or at the counter, and should threaten to continue to do so every day, to the exclusion of any other cook or clerk, no one would think it necessary to ask for an injunction to stop the intrusions, or that a court of equity would grant the relief if it were asked for. We see no reason why the same rule should not be applied here. If the defendant had no right to enter and occupy a place in the plaintiff's foundry, it would seem that he might easily have been stopped at the door, or, having entered, have been put out by calling in a policeman if necessary.

In our opinion, the demurrer was properly sustained, and the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(75 Cal. 584)

GOODWIN v. McCABE. (No. 11,293.)

(Supreme Court of California. April 21, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—CONSTRUCTIVE POSSESSION—NATURAL BOUNDARIES.

Where plaintiff claimed by prior possession land bounded partly by fences and partly by a lake and slough, the court instructed the jury that it was sufficient to constitute possession if plaintiff had a substantial inclosure, such as would protect crops, turn cattle, etc., without mentioning the natural barriers. *Held*, that plaintiff was entitled upon specific request to have the jury also instructed as to the effect of such natural barriers.<sup>1</sup>

2. SAME—COLOR OF TITLE—SWAMP-LAND CERTIFICATES.

A certificate of purchase of swamp-land constitutes color of title; Code Civil Proc. Cal. § 1925, declaring it "evidence that the holder \* \* \* is the owner of the tract described therein;" and entry thereunder in good faith, and using for grazing purposes, constitutes constructive possession, even if the land is not inclosed.<sup>2</sup>

3. PUBLIC LANDS—HOMESTEAD ENTRY—ADVERSE CLAIMANTS—CONSTRUCTIVE POSSESSION.

Taking possession either with or without force, under a United States homestead entry, is invalid where the land is in the actual possession of one who has no title, but a mere possession; but valid, if without force, and the possession of the adverse claimant is constructive only.

4. EVIDENCE—DOCUMENTS—MAPS FROM LAND-OFFICE.

A copy of a map of land on file in the office of the register of the land-office, and certified by him, is admissible in evidence.

Commissioners' decision. Department 2. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Ejectment by Charles Goodwin against William B. McCabe. Judgment for defendant, and plaintiff appeals.

*Fox & Kellog* and *Eug. W. Britt*, for appellant. *R. W. Crump* and *S. K. Welch*, for respondent.

HAYNE, C. Ejectment. The plaintiff relies on prior possession. The defendant relies on a homestead entry under the laws of the United States.

<sup>1</sup>On the subject of adverse possession, see *McLaughlin v. Del Re*, (Cal.) 16 Pac. Rep. 881, and note.

<sup>2</sup>On the subject of color of title, see *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12, and note. v.17p.no.8—45

Verdict and judgment for defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

We think that the judgment and order must be reversed for the refusal of certain instructions requested by plaintiff. The land in controversy is public land. The plaintiff resided upon an adjoining piece, to which the title is undisputed. In order to make out his possession, he proved that the whole tract, including that upon which he resided, had on one side a body of water known as "Clear Lake," on another a slough which emptied into the lake, and on the remaining sides a fence built partly by himself and partly by his neighbors; and he gave evidence tending to show the pasturing of his cattle there. The greater part of the evidence related to the character of the slough; that is to say, whether it was of sufficient depth and firmness of bottom to turn cattle. In its charge the court made no mention of the natural boundaries, but simply told the jury that it was sufficient for the plaintiff to have a substantial inclosure, and that "a substantial inclosure is such a one as a prudent farmer would have to protect a growing crop, and sufficient to protect the land from cattle, horses, and hogs; the character of the land and the crops growing upon the same being considered." This was all which was said upon the subject. No reference to natural barriers was made. Thereupon the plaintiff requested the court to give the following instruction: "If plaintiff, at any time before the defendant entered upon the land in controversy, built a fence of any kind in such a manner that, together with natural barriers, it formed a complete inclosure sufficient to turn cattle, which inclosure included within it the land in controversy; and if said land was suitable for pasturage, and was used by plaintiff for that purpose up to the time of the entry of the defendant,—then there was established in plaintiff such possession of said lands as to entitle him to recover, and your verdict will be for the plaintiff." The court refused to give the instruction, and the plaintiff excepted. We think the instruction should have been given. Natural barriers may or may not be of such a character as to serve as part of an inclosure by which a party subjects land to his dominion and control, and so acquires possession of it. Whether they are of such a character in any given case is a question for the jury, under proper instructions from the court. *Brumagin v. Bradshaw*, 39 Cal. 41, 51. In this case, if the natural barriers were of such a character as, in connection with the fences, to make a sufficient inclosure, and the plaintiff pastured his cattle there, he certainly had actual possession of the tract in controversy. *Id.*; *Southmayd v. Henley*, 45 Cal. 102; *Pierre v. Stuart*, *Id.* 280. The plaintiff had a right to have the jury instructed as to the effect of natural barriers. For aught we can see the jury may have supposed that the substantial inclosure referred to by the court meant an inclosure erected by man. If no request had been made, the charge, although meager, might be sufficient. But, in view of the specific request, we think there was error.

We think also that the fourth, fifth, and eighth instructions requested by plaintiff should have been given.

The foregoing is sufficient to dispose of the appeal. But inasmuch as the other questions argued will arise upon a retrial, we think they should be passed upon. The plaintiff at the trial put in evidence two swamp-land certificates, the amounts due upon which had been fully paid up. These, the counsel expressly stated, were not introduced to show title, but to show color of title,—to define the extent of his possession. These certificates seem to be regular on their face, and we think they constituted color of title. Such a certificate is "evidence that the holder \* \* \* is the owner of the tract described therein." Code Civil Proc. § 1925; *Laugenour v. Heinagin*, 59 Cal. 625. And if the plaintiff entered under it, believing in good faith that it conferred upon him a right to the land, and pastured his cattle there, he had constructive possession of the tract, even if it was not inclosed. *Webber*



v. *Clarke*, 15 Pac. Rep. 431. Such a constructive possession would enable him to maintain ejectment against a mere intruder. But the defendant was not a mere intruder. He had made his homestead entry under the laws of the United States, and had paid the sums which such laws required him to pay, and he produced the receipts for such payments from the proper officer. By so doing he had connected himself, as far as was then possible, with the government title. No final certificate could at that time have been issued. Rev. St. § 2291. He had done all that he could do up to that time. And if his proceedings were valid, he had done enough to enable him to defeat an action of ejectment by one who had no title but a mere possession. See *McDonald v. Edmonds*, 44 Cal. 330. The cases of *Pulliam v. Gravel Co.*, 52 Cal. 605, and *Pickard v. Kelley*, Id. 89, are not at all in conflict with this. Those cases simply decided that the papers did not tend to show possession. As a matter of course they did not. Possession was to be proved by other evidence. It is contended, however, that the defendant's proceedings were not valid for the reason that the land was then in the actual possession of the plaintiff. If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. In *Atherton v. Fowler*, 96 U. S. 513, the land was in the actual possession of the plaintiff's testator, and the entry of the defendant was forcible. The opinion does not seem to have in view the case of an entry upon actual possession without the use of force. In *Durand v. Martin*, 120 U. S. 369, 7 Sup. Ct. Rep. 587, Martin "was in actual possession under color of title." The report does not show whether the entry of Durand was with force. In *Quinby v. Conlan*, 104 U. S. 423, the rule was stated to be that "a settlement cannot be made upon public land already occupied." The element of force was not adverted to. In *Mower v. Fletcher*, 116 U. S. 381, 6 Sup. Ct. Rep. 409, the court said that if a party "enters into possession of the land, and improves and cultivates and holds it, no one, by forcibly or surreptitiously getting into possession, can make a pre-emption settlement," etc. And the reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not. See, also, *McBrown v. Morris*, 59 Cal. 68. But we do not think the rule applies where the first party has a mere constructive possession. The reasoning of the court in the cases above mentioned does not seem to cover such a case. And in *Belk v. Meagher*, 104 U. S. 287, the court, per WAITE, C. J., said: "We also all agree that if a peaceable entry had been made on lands which had not been inclosed or improved, a good right might have been secured." The ultimate question to be submitted to the jury, under proper instructions, therefore, is whether the plaintiff had actual possession of the land at the time of the defendant's entry. If he had, the defendant's proceedings were invalid, and the plaintiff must recover; if he had not, the defendant's proceedings were a good defense.

Certain objections were taken to the admissibility of evidence, which we will notice briefly. We think the receipts of the receiver of the land-office were properly admitted. Whether the affidavit required by section 2290, Rev. St., ought to have been introduced need not be decided, as upon a retrial the defendant will doubtless introduce the affidavit. The certified copy of the map was also properly admitted. Section 2224, Rev. St., does not apply to the case. That section has reference to papers on file in the office of the surveyor general of certain states. The map in question was not in the office mentioned, but in that of the register; and he, as the custodian of the record, was the proper person to give a certified copy of it. In *Murphy v. Sumner*, cited by appellant, the register attempted to certify to the fact that certain land had been listed. The court said that he ought to have given a certified copy of the list. If in this case the register had attempted to certify that the

land was of a certain character the case would have been in point. In giving a certified copy of the document, showing its character, he followed the course pointed out in the case. We advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and cause remanded for a new trial.

(75 Cal. 590)

**ALPERS v. SCHAMMEL et al.** (No. 9,697.)

(*Supreme Court of California*. April 21, 1888.)

**1. PARTNERSHIP—ACTIONS AGAINST—ALLEGATION OF PARTNERSHIP.**

The following complaint: "Plaintiff \* \* \* avers that said defendants are \* \* \* copartners \* \* \* under the firm name of S., R. & Co.; that said defendants, copartners as aforesaid, \* \* \* being indebted to plaintiff, \* \* \* executed their promissory note in words following: 'On demand, after date, without grace, we promise to pay ourselves, or order, \* \* \* S., R. & Co.,'—substantially avers the execution of the note by defendants as copartners.

**2. ABATEMENT AND REVIVAL—DEATH OF PARTY BEFORE SERVICE—EFFECT ON JUDGMENT.**

In an action against three copartners, two of whom appeared and answered, but there was no appearance for the third, nor default taken against him, and he died two days after the action was begun, and it did not appear that notice was served on him. Afterwards a verdict was returned for plaintiff. *Held*, that the verdict should be held to be against the two only who were served and answered, and a judgment against all the defendants should be modified by dropping the deceased defendant.

**3. JUDGMENT—RENDITION AND ENTRY—EXCESS OF VERDICT.**

Where the clerk, without authority, enters judgment in excess of the verdict, with interest from the time the entry was made, the judgment should be modified as of the amount of the verdict, with interest from the date of the verdict, in accordance with the statutory form.

**4. APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

Where there is, on the record, no specification of the particulars in which the evidence is insufficient to sustain the verdict, the question cannot be considered on appeal.

**5. SAME—MATTERS NOT APPARENT ON RECORD.**

Alleged error by the court in denying a new trial, in that the verdict was against the law, cannot be considered, where the notice of intention to move for a new trial is not made a part of the statement or bill of exceptions.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Charles Alpers brought an action on two promissory notes against Henry Schammel, Frank B. Reynolds, and William L. Bolte, averring in his complaint as follows: "That the said defendants are, and were at all times herein mentioned, copartners, and as such carrying on business in the said city and county of San Francisco, under the firm name and style of Schammel, Reynolds & Company; that on the 23d day of December, A. D. 1862, at said city and county, the said defendants, copartners as aforesaid, became and were justly indebted to plaintiff in the full sum of fifteen hundred dollars gold coin of the United States, and, being so indebted, then and there made, executed, indorsed over, and delivered to plaintiff their certain promissory note in writing, in the words and figures following, viz.: 'On demand, after date, without grace, we promise to ourselves, or order, the sum of fifteen hundred dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon, in like gold coin, at the rate of two per cent. per month from date until paid. SCHAMMEL, REYNOLDS & Co.' That plaintiff is now the owner and holder of said promissory note, and no part thereof has been paid, although demanded." Dated February 26, 1883. Feb-

ruary 20, 1884, a jury returned a verdict of \$3,686.35 for plaintiff. On this verdict a judgment purporting to be dated February 20, 1884, was entered, against all the defendants, for \$3,772.35, (\$86 more than the verdict;) the excess being the interest from February 20, 1884, to June 19, 1884, the date the judgment purports to have been recorded, and from which date it drew interest as recorded. Defendants appeal.

*Fisher Ames* and *Geo. D. Collins*, for appellants. *R. Percy Wright*, for respondent.

THORNTON, J. Action on two promissory notes. It is urged that the complaint does not show that the notes in suit were executed by the defendants as copartners. We cannot concur with counsel in this contention. We are of opinion that it is substantially averred that the notes were executed by defendants as copartners. This being so, there is no variance between the proof and the allegations of the complaint. Further, there was no objection made to the notes, when offered in evidence, on the ground that they varied from the averments of the complaint. If such objection had been made, it might have been obviated by amendment. And, as the cause was tried, as it clearly appears it was, as if the notes had been averred to have been the notes of the copartnership, we deem it unnecessary to say anything further on this point.

It is contended that the delivery of the notes is not shown by the evidence, but the verdict is not attacked on any such ground, as there are on the record no specifications of the particulars in which the evidence is insufficient to sustain the verdict. The point urged cannot, therefore, be considered.

The further contention is made that the verdict is against law, for the reason that there is no evidence that there was a delivery to the plaintiff of the notes sued on, and the court therefore erred in refusing a new trial. The notice of intention to move for a new trial is no part of the record herein, unless made so by a statement or bill of exceptions, (*Hook v. Hall*, 68 Cal. 22, 8 Pac. Rep. 596;) and, as the notice does not appear in the statement herein, the point is not before us for consideration.

It is averred in the complaint that Henry Schammel, Frank B. Reynolds, and William L. Bolte, constituted the firm of Schammel, Reynolds & Co. The two first mentioned appeared and answered. There was no appearance by Bolte, and no entry of default against him for not answering. There is uncontradicted evidence in the record that Bolte committed suicide within two days after the action was begun; and, as his default was not entered, it may well be inferred that he was not served. The cause came on for trial on the 20th day of February, 1884, and on the same day a verdict was entered in the following words: "We, the jury in the above-entitled action, find for the plaintiff, and assess the damages in the sum of thirty-six hundred and eighty-six and 35-100 dollars, (\$3,686.35.)" This verdict could only regularly have been against the defendants who appeared and answered. It could not have been against Bolte if he was served and had lived until the trial, unless he had answered. If he was served and failed to answer, then his default should regularly have been entered. If he was not served, then the action should regularly have proceeded against the defendants who were served, (Code Civil Proc. § 414,) or who appeared and answered. In no event, in a regular course of procedure, could there have been a verdict against him. We think, therefore, that this verdict should be held to be a verdict only against Schammel and Reynolds, who answered.

On this verdict a judgment was entered against Schammel, Reynolds and Bolte. This clearly appears from the judgment entry. Further, judgment was entered by the clerk on the verdict for \$3,772.35, (\$86 more than the amount of the verdict returned,) with interest at the legal rate from the time it was made. This was in excess of the authority vested in the clerk by the statute. The judgment should have been entered for the amount of the ver-

dict, with interest at the legal rate from the day on which it was returned by the jury. The respondents' mode of accounting for the insertion of a sum greater than the verdict on the judgment is not sustained by the record; and, if it was, it would not be in accordance with the mode pointed out by statute.

The judgment should be modified, in accordance with the proceeding, by striking out the name of William L. Bolte, and by inserting in it the amount stated in the verdict as returned, viz., \$3,686.35. We find no other errors than the above in the record.

The judgment and order are reversed, and the cause remanded to the court below, with directions to modify the judgment in the manner above pointed out. But, as this modification might have been made in the court below without appeal to this court, the appellants will recover no costs on this appeal. Ordered as above.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

#### MODIFIED OPINION.

(April 23, 1888.)

**PER CURIAM.** By inadvertence herein, the judgment as entered does not express the views of the court. The court did not intend to order a new trial. Its intention was to modify the judgment in the particulars indicated in the opinion. The following, which is in accordance with what the court intended to express, will be substituted for that part of the opinion (the last clause) which states the judgment: "The order denying a new trial is affirmed. The judgment is reversed, and the cause remanded to the court below, with directions to modify the judgment in the manner pointed out, and, as so modified, is affirmed. But as this modification might have been made in the court below without an appeal to this court, the appellant will recover no costs on this appeal." Ordered accordingly.

(75 Cal. 604)

#### HUMBOLDT COUNTY v. DINSMORE. (No. 11,342.)

(*Supreme Court of California.* April 26, 1888.)

#### 1. HIGHWAYS—STATUTORY ESTABLISHMENT—COLLATERAL ATTACK—QUALIFICATION OF PETITIONERS.

In an action instituted under Code Civil Proc. Cal. pt. 3, tit. 7, for the condemnation of lands alleged to be necessary for a public highway, it appeared that the petition to establish the highway did not show that the proposed road was in the road-district where the petitioners resided, or that it was in the state of California. *Held*, that it was not error to admit the petition in evidence, as Pol. Code Cal. § 2682, relating to the requirements of a proper petition, does not include an allegation that the signing petitioners are 10 freeholders of the road-district, and taxable therein for road purposes, wherein the proposed road is to be constructed; that being something which the board had jurisdiction to determine as a fact on the evidence before it on the hearing of the matter.

#### 2. SAME.

In an action for the condemnation of a strip of land belonging to defendant, alleged to be necessary in the establishing of a highway, the introduction in evidence of the order of the board of supervisors cannot be objected to on the ground that the board did not possess the power to act on the petition before determining the fact that it was signed by at least 10 freeholders of the road-district, taxable therein for road purposes, as it must be presumed that the order was made on a sufficient finding unless the contrary appears on the record.

#### 3. SAME—APPROVAL OF BOND.

Pol. Code Cal. § 2683, requires that the bond that accompanies a petition to establish a highway be approved by the board of supervisors, but the bond must be considered as sufficiently approved where the board, recognizing the petition and bond to be such as required by law, orders viewers to be appointed; and no objection to its introduction in evidence, in an action to condemn land for such road, can be sustained on the ground of want of approval.

#### 4. SAME—NOTICE TO OWNERS.

Under Pol. Code Cal. § 2685, providing that viewers on the establishing of public highways must, *inter alia*, "notify the resident owner or agent of land over which

it passes, of the proposed route," the notice need not be in writing; and where the owner was notified personally, and attended the survey, he cannot object to the introduction in evidence, in an action to condemn land for such road, of the viewer's report, on the ground of want of notice.

5. SAME—NECESSITY OF ROAD.

Pol. Code Cal. § 2686, which provides what the report of viewers on the establishing of highways shall contain, does not require them to specify as a fact that they had ascertained the necessity for the road, or that the same should be opened. Therefore the fact that the report did not contain a finding thereon does not deprive the board of supervisors of the power to adjudicate in the premises.

6. SAME—DESCRIPTION OF PROPOSED ROAD.

In an action for the condemnation of a strip of land belonging to defendant, alleged to be necessary for a public highway, objection to the admissibility in evidence of the records of the board of supervisors, on the ground of insufficient description, cannot be sustained, where, from the viewers' report, the map of survey, and the petition, the *termini* and description of the road can easily be determined.

7. SAME—WIDTH OF ROAD—VARIANCE BETWEEN PETITION AND REPORT OF VIEWERS.

Since Pol. Code Cal. § 2681, enumerating the requisites of a petition to establish a highway, enacts "that all such highways shall be at least 40 feet wide," the order of the board of supervisors cannot be considered void where, having the power, it approved the report of the viewers containing a declaration that the road shall be 60 feet wide.

8. SAME—CONFIRMATION OF VIEWERS' REPORT—WAIVER OF OBJECTION.

In an action for the condemnation of a strip of land belonging to defendant, alleged to be necessary for a public highway, it appeared that defendant, the only complainant, although present when the order was made, and represented by counsel, made no offer of any evidence against the new road, and the board, on such information as was afforded them by the report of the viewers under oath, and by papers attached to their report, acted upon the matters of fact within their jurisdiction to determine. *Held*, that the complainant was estopped from contesting the sufficiency of such evidence.

Commissioners' decision. Department 1. Appeal from the superior court, Humboldt county; JOHN J. DE HAVEN, Judge.

Humboldt county instituted an action under Code Civil Proc. Cal. pt. 3, tit. 7, for the condemnation of a strip of land belonging to J. O. Dinsmore, the defendant, alleged to be necessary for the establishing of a highway. Judgment for the plaintiff. Defendant appeals.

*E. W. Wilson* and *Wallace Dinsmore*, for appellant. *J. D. Chamberlain* and *Geo. W. Hunter*, Dist. Atty., for respondent.

FOOTE, C. This action was instituted under title 7 of part 3 of the Code of Civil Procedure, for the condemnation of a strip of land belonging to Dinsmore, the appellant, alleged to be necessary for and to be used as a public highway. Judgment was made and entered for the plaintiff, and from that and an order refusing him a new trial the defendant has appealed, the case coming here upon the judgment roll and a bill of exceptions.

It is claimed that the trial court erred in admitting in evidence the petition for the road, (1) because it did not show that the proposed road was in the road-district in which the petitioners reside, or that it was in the state of California; (2) that it did not describe particularly the road to be constructed, but only a surveyed line over the general route thereof; (3) that the petition does not show over what land the proposed road will run. In this connection it may be stated that on the trial it was admitted by the appellant that the persons who signed the petition were freeholders within road-district No. 6. Section 2682 of the Political Code, which defines what must be the character of such a petition, is in this language: "Petition must set forth and describe particularly the road to be abandoned, discontinued, altered, or constructed; and, if the road is to be altered, laid out, or constructed, the general route thereof, over what lands, who the owners thereof are, whether such of them as can be found consent thereto, and, if not, the probable cost of the right of way where such consent is not had, the necessity for and the advantage of the proposed road." It will be perceived at a glance that the requirements for a proper petition under the statute does not include an allegation that the

signing petitioners are 10 freeholders of the road-district, and taxable therein for road purposes, wherein the proposed road is to be constructed. This was something, therefore, which the board had the jurisdiction to determine as a fact, on the hearing of the matter, from the evidence before them, irrespective of the question as to what the petition may have averred. For this reason the first objection to the introduction of the petition is untenable. It is plain that the road-district was in Humboldt county, and that is a county in the state of California, of which judicial notice is taken. We think the petition sufficiently describes the road to be constructed, and over whose land it was to run.

An objection was made to the introduction in evidence of the bond which the statute requires to accompany the petition, (section 2683, Pol. Code,) that it was never approved by the board of supervisors. The order of the board recognizing the petition and bond as being such as is required by law, and ordering viewers to be appointed, is sufficient evidence of an approval of the bond.

It was also objected to the introduction in evidence of the order last named that the board did not possess the power to act on the petition before determining the fact that it was signed by 10 freeholders of the road-district taxable therein for road purposes; and that the order was void because neither it, nor any of the other proceedings of the board, show that one of the viewers was a surveyor, and because it is not anywhere shown that the viewers were disinterested citizens, but not petitioners. These objections were overruled, and an exception taken. It is undoubtedly true that the board, in order to acquire the right to cause a view and survey of a proposed public road, must first be satisfied that the petition is presented and signed by at least 10 freeholders of the road-district, taxable therein for road purposes, in which the road is to be constructed, and that a valid order for such view and survey must include in the number of viewers a surveyor, and that all such viewers must be disinterested citizens of the county, and not petitioners. But does it follow, in the absence of affirmative proof to the contrary, that all these matters were not rightfully determined by the board of supervisors when they made the order appointing the viewers? Is not their order in the premises conclusive upon the matter, unless the contrary appears by the record? It has been held that the board of supervisors, in determining matters of this kind, exercise judicial functions. *Damrell v. San Joaquin Co.*, 40 Cal. 158. "An inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of facts upon the existence of which its jurisdiction or power depends." *In re Grove St.*, 61 Cal. 453. In *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673, and *Butte Co. v. Boydston*, 11 Pac. Rep. 781, it seems to have been settled as to those matters of fact which the board of supervisors have jurisdiction to determine that their judgment is final and conclusive. Hence we perceive no error in allowing the order of the board appointing the viewers from being introduced in evidence. Besides, upon the point that no surveyor was appointed among the viewers, it affirmatively appears from the record that one was appointed.

It is next objected that the viewers' report was inadmissible upon various grounds, which we will examine. The viewers did notify the defendant of the proposed road, and he was present when the survey was made, and the statute (section 2685, Pol. Code) does not require that notice to be in writing. In section 2686 of the Political Code, which specifies the particular matters which their report shall contain, we do not perceive that the viewers are required to state as a fact that they have ascertained the necessity for the road, or that the same should be opened. Therefore the fact that the report did not contain a finding upon those matters did not deprive the board of supervisors of the power to adjudicate in the premises. *Tehama Co. v. Bryan*, *supra*.

Taking the report of the viewers, and the map of the survey which is re-

turned, and the petition, which is made a part of the report, it is easy to determine with certainty the *termini* and description of the road. There is nothing in the law which requires the survey to appear upon the records of the board; hence the objection taken to its introduction in evidence was untenable. The statute (Pol. Code, § 2685) does not require that the defendant shall have notice in writing of the view; and in this case it appears, as before stated, that he was notified personally, and was present.

The order approving the report of the viewers is claimed to be void, and objected to as evidence, on grounds now to be considered. The defendant, the only complaining party in the court below and here, although present when the order was made, and represented by counsel, made no offer of any evidence against the new road, and therefore the board of supervisors, on such information as was afforded them by the report of the viewers under oath, and papers attached to their report, acted upon matters of fact within their jurisdiction to determine. The sufficiency of that evidence was concluded by the judgment, which cannot be assailed collaterally. *In re Grove St., supra.*

The order of the board of supervisors which approved the report of the viewers was not void, for the reason, as alleged, that it included a declaration that the road should be 60 feet wide. The petition, a part of the report, and the survey show the necessary description of the road and that it was 60 feet wide. Section 2681 of the Political Code declares that public highways of the kind here involved shall be at least 40 feet wide. Hence the board in this instance, if it had the power, as it had, to approve the report of the viewers, had the discretion to make the road 60 feet wide.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(75 Cal. 617)

WUNDERLIN v. CADOGAN. (No. 9,928.)

(*Supreme Court of California.* April 26, 1888.)

1. TRIAL—AUTHORITY TO SET ASIDE FINDINGS—NOTICE TO PARTIES.

A court has no authority to set aside findings filed, and substitute others, without notice to the parties, on the ground that such findings "were made under a misapprehension." The remedy for erroneous findings, unless the error is a mere mispronunciation, is by motion for new trial.

2. SAME—FAILURE OF DEFENDANT TO APPEAR.

That a defendant did not appear at the trial will not justify setting aside findings filed in the case, and substituting others, without notice to such defendant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

W. B. Tyler, for appellant. Matt. I. Sullivan, for respondent.

HAYNE, C. This is an appeal from an order setting aside certain findings, and a judgment which had been entered thereon. It appears that the case was tried, and findings signed and filed. Upon the facts stated in these findings, all of the defendants were entitled to judgment. Subsequently, and upon the consent of certain of the defendants, but without notice to the others, the court set aside the findings first filed, and substituted others in their place. This second set of findings contained the following: "The clerk of said court will not enter judgment upon the original findings herein, filed July 31st, as the same were made under a misapprehension." Judgment was entered upon the last set of findings, in favor of the defendants who consented to the change of the findings, and against those who were not notified

of said change. These latter, after the lapse of more than a year from the entry of the judgment, moved, upon notice, to have the judgment and the second set of findings set aside. This motion was granted, and the appeal is from the order granting the motion.

It is to be observed that what the court did in the first instance was not merely to supply an omission in the findings first filed, or change the direction for judgment, but was to substitute one set of findings of fact for another. This we are inclined to think the court had no power to do. Even under the system of implied findings, where there was an express provision of statute for the supplying of omissions in findings upon exceptions taken, it was held that it was not proper to substitute one finding of fact for another. *Hidden v. Jordan*, 28 Cal. 304, 305; *Cowing v. Rogers*, 34 Cal. 652; *Prince v. Lynch*, 38 Cal. 531. And *a fortiori* would this seem to be so under the present system of findings, where there is no such provision of statute. The remedy for erroneous findings of fact is by motion for new trial; and the relief to be given upon such motion is the awarding of a new trial, to be had in regular course. It is not proper for the court, upon a motion of that kind, to immediately render a contrary decision. *Mitchell v. Hackett*, 14 Cal. 661. These rules rest upon the theory that the modes in which a decision may be reviewed are prescribed by statute, and that the court has no power to substitute other modes in their place. The rules, however, do not prevent the court from correcting mere misprisions, and orders improvidently and unintentionally entered. That a given order is of that unusual character is not to be presumed, but must be affirmatively shown. It will be observed, in this connection, that the second set of findings state that the first set were made "under a misapprehension." It does not clearly appear what the misapprehension consisted in, or whether it was not a mere misapprehension of the effect of evidence, and therefore it is a close question whether the case falls within the rule, or the exception above stated. It is not necessary to determine this question, however; for, if it be assumed that the court had power to set aside the findings as improvidently and unintentionally made, the defendants had a right to be heard upon the question. And the court had no power to proceed to annul the findings in their favor without notice to them. See, generally, *Greehn v. Marker*, 67 Cal. 365, 7 Pac. Rep. 783.

The fact that these defendants did not appear at the trial does not excuse the want of notice above referred to. As is well said by the learned judge of the court below: "The absence of defendant and his legal representatives from the trial does not entitle the plaintiff to take judgment against him as by default. Notwithstanding the failure of defendant to appear at the trial, if his answer contained a denial of any material allegation of the complaint, the plaintiff must make proof of that allegation by at least *prima facie* evidence. The defendant in such cases has a right to have the court pass upon the value of the evidence so offered; and if, in the opinion of the court, it does not amount to *prima facie* evidence of the truth of the controverted allegations, the defendant, although absent, would be entitled to have judgment entered in his favor. Such a judgment would undoubtedly be a judgment rendered in due course of law, and its force and effect would be as full and complete as if the defendant had been present at the trial in person and by counsel." The court therefore had no power to set aside the findings without notice to the parties interested; and its subsequent action was proper. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.



(75 Cal. 610)

## WHITE v. SPRECKELS. (No. 9,921.)

(Supreme Court of California. April 26, 1838.)

## 1. BOUNDARIES—EVIDENCE—SUFFICIENCY OF.

On the trial of an issue as to the ownership of a tract of land lying between a line of stakes claimed by plaintiff as the boundary line, and a fence built by defendant and claimed by him as such line, it appeared that defendant had at one time recognized such line of stakes as the true line. It also appeared, from a diagram attached to a patent under which plaintiff claimed, and from the testimony of the county surveyor, that the line of stakes was the correct boundary line. *Held*, that a finding that plaintiff was the owner of such tract was justified by the evidence, though it appeared that a former owner, when applied to on the subject of the division fence, had told his agent to let defendant "build the fence wherever he desired to build it."

## 2. APPEAL—HARMLESS ERROR—ADMISSION OF INCOMPETENT EVIDENCE.

Where incompetent evidence of a fact is admitted, such fact being fully proved by other competent evidence, the admission of such evidence is harmless error.

## 3. SAME—REVIEW—ADMISSION OF IMPROPER EVIDENCE—WHEN NOT ERROR.

Where improper evidence is admitted against objection, the grounds of such objection not being apparent at the time, and only appearing afterwards by the testimony of other witnesses, the admission of such evidence is not error.

Department 1. Appeal from superior court, Santa Cruz county; J. H. LOGAN, Judge.

Ejectment brought by Edward White against Claus Spreckels. There was a judgment for plaintiff, and defendant appeals.

*Jarboe, Harrison & Goodfellow*, for appellant. *Julius Lee*, for respondent.

SEARLS, J. This is an action of ejectment to recover a strip of land about two and one-eighth miles in length, and of about one hundred feet in width, as well as a certain other piece of land containing about four acres. Plaintiff had judgment for restitution, and for \$86.62, the value of the use and occupation of the premises, and for costs. Defendant appeals from the judgment, and from an order denying a new trial. Plaintiff is the owner of the Calabasas rancho and defendant is the owner of the Aptos rancho, which lies west of and adjoins the former. The question involved relates to the division line between the two ranches. It seems that in 1875 William H. Patterson, who then owned the Calabasas rancho, and defendant, built a division fence, which plaintiff contends wrongfully included the strip of land in question. At the trial, plaintiff introduced in evidence a patent from the United States to the heirs of Felipe Hernandez for the tract of land known as the "Calabasas rancho," bearing date December 8, A. D. 1868; and it was then stipulated in open court that on the 3d day of December, A. D. 1872, William H. Patterson had become vested with the title to all of the land embraced in said patent. The plaintiff then offered in evidence a deed of conveyance of the land described in said patent from William H. Patterson to A. B. Patrick, bearing date August 8, A. D. 1879, and a deed thereof from A. B. Patrick to the plaintiff, bearing date November 1, 1882. It is also shown that the said Calabasas rancho has for its western boundary the eastern boundary of the Aptos rancho, and for its southern boundary the northern boundary of the San Andreas rancho. Accompanying the patent aforesaid, and as a part thereof, is a map of said Calabasas rancho, of which a copy is set out in the transcript. Plaintiff then called as a witness J. J. Lewis, who testified as follows: "I am a surveyor by profession and occupation. About a year ago I examined the premises, and made a map of the Calabasas rancho, including the premises in controversy. I had before me at the time, and copied, the map of said rancho, which is a part of the patent just given in evidence." This map made by the witness was then put in evidence by the plaintiff, and marked "Plaintiff's Exhibit 3," and is set out in the transcript. The witness then testified further as follows: "I found a fence at the westerly portion of said rancho, indicated on said map by the dotted black line. The westerly line of the rancho is in-

licated on the map by the solid black line. I found the southerly end of said fence by running south, 62 deg. west, 7.13 chains from post marked 'S. A. No. 2.' Said post S. A. No. 2 was a surveyor's post, that is, a large, square, redwood post, firmly set in the ground, with surveyor's marks upon it. It had apparently been there a long time,—five, ten, or more years. I also found a fence running across the corner of the Calabasas ranch from said post S. A. No. 2, as indicated in said map. This fence cut off, in a triangular shape, about 2.6 acres, upon which was a large, valuable spring of water. The plaintiff showed me this post, and pointed it out as a corner of the Calabasas ranch." Defendant's counsel objected to this statement of what the plaintiff had said or pointed out to the witness as incompetent, irrelevant, and immaterial, and asked to have the same stricken from the record. The court overruled the objection, and denied the motion, to which ruling the defendant then and there excepted. This ruling is assigned as error.

Post S. A. No. 2 is delineated and its position given upon the map, which is a part of the patent; and its position, whether in existence or not, is capable of being determined by actual survey. The witness found the post upon the ground, marked as in the map specified. The fact that the plaintiff showed him the post, and pointed it out as a corner of the Calabasas ranch, did not militate against it as a physical fact; and the further fact that plaintiff said that it was a corner, etc., was only in corroboration of what was shown by the map accompanying the patent already in evidence. There was also evidence tending to show that post S. A. No. 2 has stood in its present position for at least 10 years. The post in question is not upon the disputed line between plaintiff and defendant, which is designated by post three and four, but, as it turned out later from the testimony of another witness, is a stake on the line dividing plaintiff's ranch from the San Andreas ranch, which lies south of it. The true position of stake No. 2 is fixed by the testimony of Thomas W. Wright, the county surveyor, who explains how he took the calls from the map, and measured the distance from the government section corner, and found the stake S. A. No. 3, etc. It is true, Lewis found the same stake by measuring from stake No. 2, just as he should have done if the latter was in its correct position, but whether it was so or not was not an established fact, except as shown by the result, coupled with the testimony of other witnesses. All of these facts appeared from his cross-examination, and formed a basis upon which a motion to strike out his testimony might have been properly based; but, as these facts were not patent when the objection to his testimony was made, there was no error in the ruling of the court.

Defendant holds under a patent for the Aptos *rancho* from the United States to Rafael Castro, dated April 3, 1860, by virtue of a deed from said Castro dated July 6, 1872. The Aptos ranch lies west of and is bounded on the east by the Calabasas *rancho*, as before stated. The next contention of appellant is that the evidence was insufficient to show that the land sued for was any part of the Calabasas ranch. The evidence tending to support the finding of the court is: (1) That there was a line of stakes, say 20 in all, along what plaintiff claims to be the true line of demarkation of the two ranches, which are shown to be some 80 feet west of and parallel with an old fence. (2) That, when Spreckels and Patterson were about to have a line fence constructed between them, Parker, who was about to build it, applied to Spreckels about making the fence, and the latter "pointed up the valley, and said I would find the surveyor's stakes up the valley, a little this side of an old fence" that was there at that time. This old fence, the witness says, "was about 80 feet east of the survey line that Spreckels pointed me to;" that subsequently Spreckels objected to the new fence being placed on the line of stakes; and that it was built upon the line of the old fence, and about 80 feet from the line of stakes. (3) The witness J. J. Lewis shows by diagram, (Exhibit No. 3,) which he says is a copy of the map found in the patent under which plaintiff holds, the

western boundary of the ranch of plaintiff, and that the fence is east of such boundary, and runs substantially parallel therewith; being 1.23 chains east therefrom at the south end, and 1.37 chains east from such western boundary at the north end. (4) The testimony of Thomas W. Wright, the county surveyor, is to the effect that he ran the line of the Calabasas ranch twice, as far as the country road, once for Castro, and once for defendant. He says it is a section line. He says he took the calls from the map, and set the stake No. 3 for the south-west corner. A reference to the map shows stake No. 3 to be at the south-west corner, and upon the west line as claimed by plaintiff, and upon the section line. The strip of land between this west line and the fence constitutes one of the subjects of the controversy. There was no evidence whatever to contradict that referred to, and we think the court was fully justified in finding as it did, in effect, that the patented west line of the Calabasas ranch was at the line of the stakes spoken of. The patent was in evidence, and, although not set out in the record, must have furnished *data* from which to demonstrate the error, if any, in plaintiff's claim under it.

The testimony of defendant at the trial, after proving title in himself to the Aptos rancho, was confined to showing that in 1875 a fence was built upon the east line of the disputed land, which it is claimed was with the agreement and understanding that it should be so built, and constitute the boundary of their respective tracts of land, and that defendant then entered into possession of and has since as of right retained possession up to such fence. The finding of the court is against this theory, and we see nothing in the testimony to warrant such theories.

Patterson, who then owned the Calabasas ranch, when applied to on the subject of the division fence, told his agent, Ford, "to let Spreckels build the fence wherever he desired to build it." It further appears that it was, at the request of Spreckels, placed upon the line of the old fence, as far as that extended, and continued on the produced line of such old fence north. Where coterminous proprietors of land in good faith agree upon, fix, and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them, and those holding under them, or either of them. *Cooper v. Vierra*, 59 Cal. 282; *Sneed v. Osborn*, 25 Cal. 619; *Moyle v. Connolly*, 50 Cal. 295; *Columbet v. Pacheco*, 48 Cal. 395. Agreements of this character are not subject to the objection that they are within the statute of frauds, because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to the other, but proceed upon the theory that the true line of separation is in dispute, and to some extent unknown, and in such cases the agreement serves to fix the line to which the title of each extends. Tyler, Bound. 254. What are boundaries is a matter of law; but where they are, is a matter of fact. *Bolton v. Lann*, 16 Tex. 96. In the case at bar the evidence failed to show that the site of the fence was fixed and agreed upon as the boundary line between the two tracts of land. Patterson seems to have been quite willing that Spreckels should place the fence where he chose, without reference to the true boundary, and his conduct is wanting in the essential element of an intent and willingness to establish a certain and definite line between his property and that of defendant. We do not find any direct evidence showing that defendant ever occupied the disputed land, or that it was by him so inclosed as to raise a constructive possession. Under such circumstances, we are not warranted in disturbing the findings of the court below. The judgment and order appealed from are affirmed.

We concur: PATERSON, J.; MCKINSTRY, J.

(7 Mont. 439)

## TERRITORY v. HART.

(Supreme Court of Montana. January 24, 1888.)

1. **INDICTMENT—FINDING AND FILING—NUMBER OF GRAND JURY CONCURRING.**  
It is not error for the court to direct that members of the grand jury be interrogated as to whether or not 12 of their number concurred in finding an indictment which the accused has moved to vacate on the ground that 12 grand jurors did not concur in finding it, after the accused has been given an opportunity to interrogate them, and declined to do so. Following *Territory v. Hart*, 14 Pac. Rep. 769.
2. **SAME.**  
When grand jurors are brought into court to testify as to whether 12 of their number, as required by the statute of Montana, concurred in finding an indictment, they do not come in their official character, but as individuals, and it is no objection that some of their number are absent.
3. **JURY—COMPETENCY OF JUROR—ALIENS.**  
During the progress of a trial for murder, the defendant objected that there was an alien upon the jury, and it was found that one of the jurors came to America with his father when two years old, and had taken out no naturalization papers; whereupon opportunity was given by the court, and he was naturalized in proper form, and the trial proceeded. *Held*, that the objection of alienage would not apply.
4. **HOMICIDE—INSANITY AS A DEFENSE—OPINION EVIDENCE.**  
On a trial for murder, non-professional witnesses for the prosecution, after testifying as to their acquaintance with the defendant, and as to his acts, habits, and manners as observed by them, may be permitted to give their opinion as to his sanity.<sup>1</sup>
5. **SAME—MURDER—MALICE AND INTENTION.**  
On a trial for murder, a charge that, "if the life be taken with a deadly weapon, it will be presumed to have been done maliciously and intentionally, as the law presumes every one to intend the legitimate result of his action," given as part of an instruction defining and illustrating the term "malice," is not erroneous.<sup>1</sup>
6. **SAME—CHARACTER OF DEFENDANT—INSTRUCTIONS.**  
On a trial for murder where the accused introduced evidence of his character for peace, an instruction to the jury that it stood as a witness for him, to be given its due weight with all the other evidence, is sufficient unless more explicit instructions are requested by the accused.
7. **SAME—NEW TRIAL—SEPARATION OF JURY.**  
Under Comp. St. Mont. div. 3, § 354, providing for a new trial in criminal cases when the jury has been separated without leave of the court, it is not sufficient cause to require the granting of a new trial that, prior to retiring to consider their verdict, the court permitted the jury to go in charge of an officer to a hotel for supper, and while there they went into the wash-room, and two of their number returned a short time before the others to the hotel office a few feet distant, the entire jury being at all times in the charge of the officer, and no conversation being had by any one with any others in regard to the case.
8. **SAME—MISCONDUCT OF JURY.**  
It is not sufficient misconduct to require the granting of a new trial in a criminal case that upon two occasions while the jury, in charge of the bailiff, were at a hotel to get their meals, some of their number drank intoxicating liquor at their own expense, it not appearing that any of them were in the least intoxicated thereby.

Appeal from district court, Lewis and Clarke county.

For opinion in this case on former appeal, see 14 Pac. Rep. 769.

*Campbell & Duffy* and *J. E. Carne*, for appellant. *W. E. Cullen*, Atty. Gen., for the Territory.

**MCLEARY, J.** The appellant in this case stands charged with the crime of murder in the first degree for the killing of John W. Pitts, which occurred at the town of Boulder, in Jefferson county, Mont., on the 7th day of November, 1885. Indictment was found on the 4th day of May, 1886, by a grand jury of said county. The case came on for trial at the October term, 1886, of the district court of Jefferson county, which resulted in a mistrial, the jury failing

<sup>1</sup>As to the admissibility of the opinions of non-expert witnesses upon the trial of issues involving the sanity of a person, see *State v. Bryant*, (Mo.) 6 S. W. Rep. 102; *State v. Winter*, (Iowa,) 34 N. W. Rep. 475.

<sup>2</sup>See note at end of case.

to agree. The case was afterwards tried by the said court on the 7th day of May, 1887, and the defendant was convicted, and sentenced to death. From this conviction he appealed to this court at the July term, 1887, when the case was reversed and remanded, for errors occurring on the trial in the court below. *Territory v. Hart*, 7 Mont. —, 14 Pac. Rep. 769. On the filing of the *remittitur* at the ensuing term of the court in Jefferson county, a change of venue was ordered to the county of Lewis and Clarke, where the case was tried again on the 22d of November, 1887, and the defendant was again convicted, and sentenced to the death penalty, from which conviction he now prosecutes this appeal. Several errors alleged to have been committed by the court below are relied upon for the reversal of this judgment, and they will be noticed in their order as presented in the brief.

1. The first ground of alleged error is that the court had no authority to compel the defendant to examine the members of the grand jury who found the indictment against him, as to whether or not 12 of their number had concurred in finding such indictment. No such action on the part of the court is apparent from the record. No compulsion was used towards the defendant in the matter of the examination of the grand jurors. This court having held on the former appeal that the indorsement on the indictment was only *prima facie* evidence that the requisite number of grand jurors had concurred in finding the bill; and the appellant having on the former trial, by motion properly made, called into question the *prima facie* case made by the indorsement on the indictment, 14 of the 16 persons who composed the grand jury were brought into court, and the defendant was offered an opportunity of taking their testimony upon the matter put in issue by this motion. He declined to interrogate them, and thereupon, under direction of the court, they were examined by the prosecuting attorney, and each and every one answered that 12 of their number had concurred in the finding of the indictment. This court, on the former appeal, in regard to this question uses the following language: "We are, then, after careful consideration and mature deliberation, of the opinion that the bringing into court of the indictment properly indorsed, and the filing of the same by the clerk in the presence of the grand jury, are only *prima facie* evidence of the concurrence of twelve or more of the grand jurors in the indictment, and that the accused has the right, before pleading thereto, on a motion to vacate the same properly made as in this case, to require the individual grand jurors to be interrogated under oath as to whether or not twelve or more of their number concurred in finding the indictment." *Territory v. Hart*, 14 Pac. Rep. 771. The defendant's counsel seems to misapprehend this language of the court, and to construe it to mean that the grand jury as a body must be brought into court in their official capacity, and before they are discharged to be interrogated by the defendant as to the matter under consideration. Such is not the meaning of the language used. The defendant has the right to require the individual grand jurors to be examined as witnesses to testify to the fact as to whether or not 12 of their number concurred in finding the indictment, and he cannot complain that the court by its authority caused them to be brought forward for his benefit. These persons were not in court as a grand jury, nor as grand jurors, but as individuals in the capacity of witnesses, by one or more of whom the defendant was at liberty to prove that 12 members of the grand jury had not concurred in finding the indictment against him. He had the right to interrogate them, but declined to do so, and he cannot complain of the action of the court in this respect. Neither can he complain that the entire number of persons composing the grand jury were not present. The matter put in issue by his motion was a question of fact which might have been proved by any one or more of the persons who composed the grand jury, and, until such evidence should have been rebutted, it would have been as effective in regard to this matter as the cumulative evidence of the whole 16 persons. The fact that one of the

grand jurors was dead, and another had left the territory, was ample excuse, if any were necessary, why the whole 16 persons were not examined. There is no error of the court upon this point, and it clearly appearing, by the evidence introduced by the prosecution, that 12 of the grand jury had concurred in finding the indictment, the defendant's motion in regard thereto falls to the ground, and requires no further consideration.

2. The position taken that the defendant was put in jeopardy for the second time by this trial in the court below is abandoned by his counsel on the argument in this court. It could not have been maintained if it had been insisted on, and needs no further consideration.

3. The next error assigned in the brief is the alleged alienage of the trial jurors Horsky and Steinbrenner. The record shows that Horsky arrived in this country during his childhood, and his father was duly naturalized before this juror attained his majority. It also appears, from the transcript, that Steinbrenner was a naturalized citizen at the time he was impaneled on the trial jury. During the progress of the trial (it does not appear at what particular stage) counsel for defendant called the attention of the court to the fact that there were one or more persons on the jury who were not citizens of the United States. On examination it appeared that the juror Horsky had come to America with his father when he was about two years old, and had been in this country 32 years, and had never taken out his naturalization papers. Thereupon, being afforded an opportunity by the court, he was naturalized in the proper form, and the trial proceeded. It, then, appears that at the time the jury retired to consider their verdict, and at the time the verdict was rendered, all the members of the jury were citizens of the United States, and the objection of alienage does not apply. But, even if there had been aliens upon the jury, the record does not show that the objection was made by the defendant at the proper time. Upon the former appeal in this case the court used the following language: "The juror Doniothy, who was challenged on account of alienage, was permitted by the defendant to sit in this case through a failure to exercise his right of peremptory challenge, the accused having two peremptory challenges unexhausted when he accepted the jury. He thereby waived the objection of alienage, if it were otherwise a good objection, and there was no error of which he could properly complain. It has been repeatedly decided that alienage is a disqualification of a juror which the defendant may waive, either expressly, or by failure to object at the proper time." *Territory v. Hart*, 14 Pac. Rep. 774. This position was held by the court after thorough investigation and long consideration of the authorities. *Territory v. Harding*, 6 Mont. 326, 12 Pac. Rep. 750; *Lum v. State*, 11 Tex. App. 483; *Presbury v. Com.*, 9 Dana, 203; *State v. Elliott*, 45 Iowa, 487; *Benton v. State*, 30 Ark. 340-344; *Erwin v. State*, 29 Ohio St. 190; *People v. McGungill*, 41 Cal. 430.

4. The next three objections urged by counsel in his brief relate to the admission of certain testimony which was claimed to be incompetent, but they were abandoned in the argument, and require no further notice.

5. The seventh assignment of error made by appellant is that the opinions of certain witnesses who were not medical experts were permitted to be given in evidence to the jury upon the trial of this case. It appears, from the transcript, that non-professional witnesses were examined on the part of the defendant, and after stating their acquaintance with him, and certain actions of his, and other facts upon which their opinions were founded, were permitted to give their opinions as to his sanity. After that, other non-professional witnesses were called in rebuttal by the prosecution, and examined as to their acquaintance with the defendant, and testified as to his different acts, habits, and manners as the same had fallen under their observation, and were thereupon questioned as to their opinions in regard to his sanity, to the giving of which opinions in evidence the defendant, by his counsel, objected. We will

disregard the fact that the evidence objected to was given in rebuttal, and treat it in the same manner as if it had been offered in proving the case on the part of the prosecution before the defendant was permitted to introduce his evidence. The question, then, presented by the record is whether or not non-professional witnesses who are acquainted with the defendant, and have observed his actions and manner of life, may give in evidence their opinions as to his sanity or insanity on a trial for murder. It is certainly one of the fundamental rules of evidence that witnesses are required to testify as to facts, and not allowed to give their individual opinions to the jury. And this rule must always be followed when the facts can be sufficiently and properly detailed, and the circumstances described in such a manner that the jury are able to form correct conclusions for themselves unaided by the opinion, impressions, or judgment of the witness. But there are many cases in which the line between facts and opinions is not very definitely drawn. It is often almost impossible for a witness or ordinary intelligence to state the facts and circumstances of a case, or any particular transaction, to a jury, without indicating his own opinions in regard thereto, and very few persons have sufficient descriptive powers to state any particular matter which has passed under their observation, before a jury, in a perfectly correct light, without intimating the impression that it produced upon their minds at the time in the shape of an opinion more or less fixed. There are certain cases in which nothing but the opinion of the witness will give to the jury a due appreciation of the result of his observations. Judge DOE of New Hampshire gives a very excellent illustration of this in the following language: "In criminal cases it is often a question how nearly a foot-print in earth or snow corresponded to the form of a shoe of the prisoner. A witness who has seen the foot-print and the shoe is allowed to give his opinion on the subject, because a mere description of forms would not be the best evidence. If a plaster cast of the track, or the original impression itself, preserved by freezing, could be produced, this evidence of its form would be more satisfactory than any verbal description. So it is when an impression has been made upon the mind of a witness by the appearance and conduct of the prisoner indicating sanity or insanity; that impression is the best evidence the witness can give on the subject. His description of the appearance and conduct is, in fact, but indirect and imperfect evidence of the impression. When he gives the original impression itself, it is as if the foot-print were brought into court." *Lawson, Exp. Ev.* 493. Testimony in regard to sanity or insanity forms one of the most noted exceptions to the general rule which we have heretofore adverted to. Whatever may have been the rule in former times, it can no longer be regarded as doubtful that "one not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." *Id.* 476, subrule 4. It appears that this has been the generally received doctrine in the English courts, and it is said to have been received without debate in the courts of all the states except those of Massachusetts, Maine, New Hampshire, and Texas. The contrary doctrine has been greatly modified in Massachusetts, as an examination of the cases in that state will show. *Barker v. Comins*, 110 Mass. 477; *Nash v. Hunt*, 116 Mass. 237; *Com. v. Pomeroy*, 117 Mass. 143. In New Hampshire the rule announced had a long struggle for supremacy. It was first enunciated by Judge DOE in an able dissenting opinion in the case of *State v. Pike*, 49 N. H. 401. However, the supreme court of that state in the case of *State v. Jones*, 50 N. H. 369, and *State v. Archer*, 54 N. H. 468, adhered to the original proposition announced in the case of *Hamblett v. Hamblett*, 6 N. H. 333, and *Boardman v. Woodman*, 37 N. H. 143, and disregarded the dissenting opinion of Judge DOE. However, in the case of *Hardy v. Merrill*, 56 N. H. 227, Chief Justice FOSTER, in a very lengthy and able opinion, reviews all the decisions, and coincides with the general American doctrine announced in the rule above quoted. Thus we see that Judge DOE'S

dissenting opinion finally became the recognized rule of law in New Hampshire. What may be the current of opinion at the present time in the state of Maine we have not had leisure to examine. The court of appeals of Texas has overruled the doctrine announced in *Gehrke v. State*, 13 Tex. 572, and now coincides with the general rule laid down by Lawson. Judge WHITE, in a very able opinion, used the following language: "Whatever may have been the rules of evidence heretofore with regard to the character of proof admissible on the subject of insanity, the doctrine that non-professional witnesses should be allowed to state their opinion as to the sanity of the party, derived from their acquaintance with and observation of his conduct, appearance, and actions, has become too well settled to admit of doubt or controversy at this time. *Holcomb v. State*, 41 Tex. 125; *McClaskey v. State*, 5 Tex. App. 320. We are aware that in *Gehrke v. State* our supreme court, following in the wake of the decisions in Massachusetts and New Hampshire, held otherwise. 13 Tex. 568. The subject has, however, of late years been more thoroughly examined and discussed, and in New Hampshire particularly, in the recent case of *Hardy v. Merrill*, FOSTER, C. J., in a most elaborate opinion concurred in by the supreme court, reviews the previous decisions, and overrules them, which places that court in full accord with the English and American doctrine as it now generally obtains on that subject. 56 N. H. 227. The case of *Gehrke v. State*, 13 Tex. 568, has been practically, as we have seen, and will be hereafter considered, as overruled on this point." *Webb v. State*, 5 Tex. App. 608, 609. The rule has also been affirmed in the case of *Mendiola v. State*, 18 Tex. App. 466. The question is discussed to some extent in 1 Whart. Ev. § 451, but it is treated with more fullness and ability, perhaps, in Mr. Lawson's work, to which reference has been made, than in any other book to which we have had access. There can be no doubt that the ruling of the court below in the admission of the testimony objected to by the defendant was correct.

6. The next alleged error complained of by the appellant is in the charge of the court. The following paragraph is selected and claimed to be erroneous, to-wit: "If the life be taken with a deadly weapon, it will be presumed to have been done maliciously and intentionally, as the law presumes every one to intend the legitimate result of his action." In order to properly understand the language of the charge objected to, it is necessary to quote the whole paragraph in which it occurs, which reads as follows: "The first proposition for you to consider is, was the deceased killed in the manner set out in the indictment, and in the county of Jefferson, territory of Montana, before the finding of this indictment? This is called the *corpus delicti*, or body of the offense, and must first be established. This being done, your next inquiry will be, did the defendant do the killing? If he did, was it done with deliberation, premeditation, malice aforethought, and willfully? If so, he is guilty as charged in the indictment, provided he was a person at the time legally responsible for his action. It is always essential to both grades of murder—the first and second degrees—that malice aforethought shall exist. If all four of the ingredients of willfulness, deliberation, premeditation, and malice aforethought exist, it is murder in the first degree; but if any one of them be wanting, except malice aforethought, it is murder in the second degree. Malice means, in law, as already stated, that deliberate intention unlawfully to take the life of a fellow creature, or to do him some harm, without provocation, and without legal excuse or justification. If a person from a wicked and depraved heart inflict a mortal wound upon another, this is said to be done in malice, the term 'malice' having reference to that wicked and depraved spirit which prompts the taking of life, rather than to any grudge, or ill will, or hatred towards the deceased. Nevertheless, if such grudge, hatred, or ill will exists, and is the moving cause of the killing, it is equally malice. If the life be taken with a deadly weapon, it will be presumed to have been done



maliciously and intentionally, as the law presumes every one to intend the legitimate result of his action. But it is always a question for you to determine, from all the circumstances surrounding the case, whether it is done maliciously and willfully." It is a fundamental principle in the construction of all instruments, more especially of a charge given by a court to a jury, that the whole charge must be construed together. A judge is not supposed to give all the law to a jury in one paragraph, or in one sentence. If, then, the whole charge taken together presents the law applicable to the facts of the case correctly, without contradiction or material omission, it must be held, for all practical purposes, to be correct. *Kennon v. Gilmer*, 5 Mont. 270, 271, 5 Pac. Rep. 847; *Territory v. Hart*, *supra*; *People v. Doyell*, 48 Cal. 93; *Thomp. Char. Jur.* 75, § 48. Some authorities are cited by the appellant to sustain his objection to the portion of the charge above quoted. We will notice them briefly. In the case of *Clem v. State*, 31 Ind. 484, the court criticises a charge which is copied from 1 Greenl. Ev. § 18, and reads as follows: "Every sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts, and therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon." This, the court says, is entirely at variance with the principles which have received the uniform sanction of all the courts in this country and Great Britain, and is not sustained by the authorities which the writer cites in its support." We do not deny the correctness of the opinion rendered by the supreme court of Indiana, but the charge given in the *Clem Case* differs very materially from the one given in the case at bar. The court below did not say that the intent to murder is conclusively inferred from the deliberate use of a deadly weapon, but only said that, "if life be taken with a deadly weapon, it will be presumed to be done maliciously and intentionally," which is a very different proposition. Again, a case is cited from the supreme court of Kentucky, in which occurs the following language: "The court instructed the jury that, if homicide be committed by a deadly weapon in the previous possession of the slayer, the law implies malice in the perpetrator. As given without qualification as to how or for what purpose the weapon happened in the perpetrator's possession, or whether, having it for a lawful purpose, he used it in self-defense, or under sudden and provoked heat of passion, this instruction was certainly wrong and misleading." *Smith v. Com.*, 1 Duv. 226. It will be seen that the charge given by the trial court in Kentucky is similar to the one given in the case at bar, but the difference is that in the *Smith Case* the charge was given without qualification, and in the case at bar it was given as an integral part of a lengthy instruction defining and illustrating the legal signification of the term "malice." Again, the supreme court of Kentucky in the case of *Donnellan v. Com.*, 7 Bush, 679, expresses its opinion as follows: "The instruction to the effect that, in any case, the use of a deadly weapon, not in necessary self-defense, whereby death ensues, will constitute murder, was also erroneous. Such use of a deadly weapon is evidence of malice, and may be an essential ingredient in the proof of murder in many cases; but it does not follow that every homicide committed by the use of a deadly weapon, and not in necessary self-defense, is murder." This charge seems to have been copied from Greenleaf in the same manner as in the *Clem Case*, and of course is equally erroneous. But the comments of the court, as quoted above, show the charge which was given by the court below in the case now under consideration to have been correct and proper. The use of a deadly weapon is, when unexplained by other testimony, or unattended by circumstances of justification or excuse, evidence of malice, and that is all that the charge of the court in this case amounted to. But the appellant cites the case of *Bradley v. State*, 31 Ind. 504, to support the proposition that, if an error is committed in one part of a charge, it is not cured by giving a correct instruction at the request of the defendant or the prosecution. An

error in one instruction would certainly not be cured by giving a contradictory instruction, but a portion of a charge which, standing alone and unexplained might be erroneous, may, when taken in connection with other portions of the charge explaining or illustrating or enlarging the proposition announced, be practically correct. Cases cited *supra*. But in this particular case, the proposition taken independently, and unconnected with any other portion of the charge, is a correct proposition of law, and is presumed to be applicable to the facts proved on the trial. So that we cannot hold, in any point of view, that the charge given below and complained of by the appellant was erroneous.

7. Another charge of the court on the question of character is complained of as erroneous "in this, that it was not full enough or sufficient." The portion of the charge complained of in this respect reads as follows: "The defendant has introduced his character for peace. This stands as a witness for him, to be given its due weight with all the other evidence." If the appellant desired any more explicit charge on this point, it was his duty to have asked it; and, not having done so in the court below, he cannot be heard to complain in this court. If there is anything objectionable in the able charge of the court below, taken as a whole, it is that it is too favorable to the accused on the question of insanity, which was his principal, if not his only, defense.

8. The next alleged error complained of by the appellant is the refusal of the court to grant a new trial on account of the separation of the jury, without the consent of the court, during the trial of the cause. This is one of the grounds for which a new trial may be granted under the terms of section 354, div. 3, Comp. St. Mont., which reads as follows: "When the jury has been separated without leave of the court, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case." Comp. St. Mont. div. 5, § 354, par. 3, p. 468. The facts in regard to the alleged separation are about as follows: Prior to retiring for the purpose of considering of their verdict, the court permitted the jury to go, in charge of an officer, to the Cosmopolitan Hotel for the purpose of taking their supper. When they reached the hotel, they went into the wash-room, and two of their number appear to have returned to the hotel office before the others, and thus a partial and temporary separation of a few feet took place. The entire jury was at all times in charge of the officer, and it appears that no one conversed with them during the time, except that some casual remarks were made to them by the counsel for the appellant and two other persons, which had no relation to the case. The separation lasted, one of the jurors says, probably half a minute; certainly, from the evidence of all the parties, not more than five minutes. Is this such a separation as is contemplated by the statute? It is of course of the greatest importance that the jury should be kept together, in accordance with the spirit as well as with the letter, of the law; and, if one bailiff cannot succeed in keeping them from separating, two should be employed for that purpose. And in a capital case, none but experienced and competent men should be allowed to be placed in charge of a jury. But it is not every casual and partial separation of the jury that will be sufficient ground for granting a new trial. In a California case the court uses the following language: "The facts that the jury, after they retired for deliberation, were conducted by the officer having them in charge to the dining-room of a hotel, where they remained together for three-quarters of an hour; that one of the doors of the room was open and accessible to strangers; and that the officer in charge was absent from the room for a few minutes during the period named,—are insufficient to constitute misconduct on the part of the jury, or of the officer, for which a new trial should be granted. The fact that any person entered the room, and conversed with any of the jurors, is emphatically denied by counter affidavits; but, if it were not, a few mere passing remarks between the jurors and strangers would not

furnish ground for a new trial." *People v. Kelly*, 46 Cal. 857. The supreme court of Louisiana in a well-considered case announces the law as follows: "We will not say that because a juror was for a moment out of the presence of the officer under whose charge he was, when it is not shown or alleged that he had any communication with any other person, and it does not appear that he had any opportunity to have had any, it necessarily establishes the presumption of misconduct, and makes it obligatory upon us to set aside the verdict." *State v. Turner*, 25 La. Ann. 574. We are referred by counsel for appellant to the case of *Soria v. State*, 2 Tex. App. 299, in support of his position upon this alleged error. In that case a juror separated himself from his fellows, for a necessary purpose, about 150 yards. Still, Judge WINKLER, delivering the opinion of the court, says: "In this instance, however, it seems that the spirit of the law was not violated by the temporary withdrawal of the juror, for the reason that, during the time, he was under the view of the bailiff of the jury," and the case was affirmed. In a subsequent case the court of appeals of Texas, in commenting on the decision in *Jones v. State*, 13 Tex. 168, says: "In other subsequent decisions our supreme court have held, substantially, that something more than separation, or that one or more of the jurors were seen apart, or standing near outside persons, is required to affect the fairness of a verdict. It must affirmatively appear that there was such misconduct that showed a fair trial was not had,"—citing numerous authorities from the supreme court of that state. *Davis v. State*, 3 Tex. App. 101, 102. Again, the same court in a later case uses the following language: "Our supreme court in a number of cases have held that something more than separation of the jury, such as is forbidden by the Code, is required to affect the fairness of a verdict; that it must affirmatively appear that there was some reason to suppose that wrong or injustice might have resulted from it to the appellant. And the same rule has been followed by this court." *Cox v. State*, 7 Tex. App. 4. Again, the supreme court in the case of *West v. State*, Id. 159, affirms the rule in the *Davis Case*, *supra*, that the separation of the jury before bringing in a verdict in a felony case does not *per se* render the verdict void, but such verdict will be set aside or not, according to the circumstances. Again, in a later case, Judge HURT, delivering the opinion of the same court, says: "There can be but two reasons why a verdict should be set aside when a separation of the jury has taken place—*First*, that the jury have been tampered with, or, *second*, might have been tampered with. Here the record precludes any such supposition." *Russell v. State*, 11 Tex. App. 296. Finally, it would seem that this question was set at rest, in Texas at least, by a decision in which the court, referring to the previous cases, says: "The mere separation of a jury is not cause for a new trial. In addition to the separation in contravention of the law, it must be further made to appear that by reason of such separation probably injustice to the accused has been occasioned." In this case a juror was taken sick during the trial, and was separated from the other jurors for about 12 hours during the night, but remained in charge of a deputy-sheriff, and was not spoken to by any one about the case, and heard no conversation in regard to the same. *Ogle v. State*, 16 Tex. App. 368. We have been thus careful to review the Texas cases, not only on account of the high character of the court of appeals of that state, but because the appellant seems to rely upon the decisions of the courts of that state, and for the reason that the Texas statute is more strict upon this point of the separation of the jury even than our own. Graham and Waterman lay down the following rule: "It is now well settled, without regard to the nature of the trial, that the separation of the jury, even though unauthorized by the court, where no injury has ensued, will not be a ground for setting aside the verdict." 2 *Grah. & W. New Trials*, 502. Numerous cases are cited and quoted from to sustain this proposition. It is not necessary for us to review all the cases discussed in the text-book, or to proceed further in the considera-

tion of this alleged error. No injury to the appellant is apparent from the record. In fact, it appears on the contrary that he was not prejudiced thereby, and for that reason, under the rule quoted, which meets our approval, it is clearly considered that the court below acted properly in refusing to grant a new trial on this ground.

9. The last error complained of by the appellant is the refusal of the court to grant a new trial on account of the alleged misconduct of the jury in drinking spirituous liquors while they had the case under consideration. It appears, from the record, that on two occasions while the jury were in charge of the bailiff, and visiting the hotels for the purpose of taking their meals, some of the jurors drank at the hotel bar at their own expense. It does not appear that they took more than one drink each on either of these occasions, or that any one of them was in the least intoxicated thereby. The drinking of spirituous liquors by jurors after they have been impaneled, especially in a capital case, is worthy of the severest censure, and it should always be punished by an appropriate fine. When the property, the liberty, and even the life of their fellow man rests in the hands of jurors, they cannot be too careful in keeping their heads cool, and their hearts uninflamed by prejudice and passion. On no account ought they to do anything which could pervert their judgment, or arouse their passions. But in modern times the ancient common-law rule of keeping the jury from "meat and drink, fire and candle," until they have agreed, has been in all the states of America relaxed. And, if the jury are permitted to take their dinners, there seems to be no more reason why they should be prohibited from drinking light wines, in moderation, at such meals than there would be in depriving them of coffee or tea. But if the jurors, or any one of them, has so indulged in the use of intoxicating liquor as to be influenced thereby in arriving at his verdict, a new trial should be awarded. It is said that the modern rule is to set aside the "verdict only when the irregularity may have had an influence on the final result." 2 Grah. & W. New Trials, 504. The question of drinking spirituous liquors by the jury is one which has been discussed and decided on numerous occasions by nearly every court of last resort in the United States. We could not attempt a complete review of all the cases upon this point; neither is it necessary so to do. We cannot agree with the doctrine announced in certain cases in Kansas, Iowa, and Arkansas, that a verdict rendered by a drunken jury, or a jury one or more of whose members were during the trial intoxicated, should not be, in any case, allowed to stand. *State v. Tatlow*, 34 Kan. 84, 8 Pac. Rep. 267; *State v. Livingston*, 64 Iowa, 560, 21 N. W. Rep. 34; *Pelham v. Page*, 6 Ark. 535. In an early case in Texas, in a very able opinion delivered by Judge LIPSCOMB, the supreme court reviews the cases theretofore decided, and holds that drinking whisky is ground for reversal. *Jones v. State*, 13 Tex. App. 182. However, this rule is no longer in force in that state. The court of appeals of Texas in 1885 virtually overrules the case of *Jones v. State*, *supra*, and holds the following: "It was very reprehensible for the jury to send for and obtain whisky, and drink the same, during their deliberation upon the case, and such conduct should always be visited with punishment to those guilty of it. But no such immoderate use of intoxicating liquor is shown to have existed in this case as would, in the absence of circumstances tending to show that it had influenced the verdict of the jury, warrant the setting aside of the verdict." *Allen v. State*, 7 Tex. App. 298. In this respect the rule announced by Graham and Waterman, and approved by the cases quoted from above, has been affirmed in numerous decisions, some of which only will be referred to. *Davis v. People*, 19 Ill. 77; *State v. Caulfield*, 23 La. Ann. 149; *Tuttle v. State*, 6 Tex. App. 561; *Wilson v. Abrahams*, 1 Hill, 211. From the facts shown by the record it does not appear that any of the jurors were in the least intoxicated, or that the cause of the defendant was in any manner prejudiced by their indulgence in spirituous

liquors. For this reason, under the rule announced, there was no error in the action of the court below in refusing a new trial on this ground.

10. The attorney general closes his brief with this exhortation to the court: "The appellant in this case, as appears by the record, shot a man to death in open daylight, in the court-house at Jefferson county, in the presence of one or more eye-witnesses. He has had three impartial trials, and been twice convicted of murder in the first degree. The people ought not to be put to further expense in his case unless error has most clearly and manifestly intervened." Both of these appeals being on matters of law only, there is not now, and was not on the former appeal, any statement of the evidence from which this court could know the circumstances of this homicide. And even if it had transpired in the manner detailed by counsel, *dehors* the record, still there may have been, beyond the facts stated, circumstances of excuse or even of justification. In the first trial there was a disagreement of the jury, and, in the second, one of the prisoner's plain, statutory rights was, inadvertently of course, disregarded by the court. The third trial is now under review, and we take occasion to say that no man, however poor and friendless, should ever be permitted to suffer the death penalty, except after a fair public trial by an impartial jury of his countrymen. A strict compliance with all the forms of law, and a due regard to every constitutional or statutory right guaranteed to the prisoner, is essential to the preservation of the liberty of every citizen of the United States. If the legal forms can be disregarded in the case of any man who has, by even the most atrocious crime, incurred the popular displeasure, they may likewise be put aside in the case of some other person who is perhaps innocent of the crime of which he is accused. The forms of law in criminal trials are the bulwarks of human liberty, and any court which would intentionally disregard them, in obedience to a popular clamor for blood and vengeance, is unworthy of the high trust committed to its keeping. We cannot better answer all such suggestions than by a quotation from that great legal philosopher and sage, Montesquieu, who says: "We hear it generally said that justice ought to be administered with us as in Turkey. Is it possible, then, that the most ignorant of all nations should be the most clear-sighted in a point which it most behooves mankind to know? If we examine the set forms of justice with respect to the trouble the subject undergoes in recovering his property, or in obtaining satisfaction for an injury or affront, we shall find them doubtless too numerous; but, if we consider them in the relation they bear to the liberty and security of every individual, we shall often find them too few, and be convinced that the trouble, expense, delays, and even the very dangers, of our judiciary proceedings are the price that each subject pays for his liberty. In Turkey where little regard is shown to the honor, life, or estate of the subject, all causes are speedily decided. The method of determining them is a matter of indifference, provided they be determined. The bashaw, after a quick hearing, orders which party he pleases to be bastinadoed, and then sends them about their business. But in moderate governments, where the life of the meanest subject is deemed precious, no man is stripped of honor or property but after a long inquiry, and no man is bereft of life till his very country has attacked him, an attack that is never made without leaving him all possible means of making his defense. In republics it is plain that as many formalities, at least, are necessary as in monarchies. In both governments they increase in proportion to the value which is set on the honor, fortune, liberty, and life of the subject." 1 Mont. Sp. L. bk. 6, c. 2, pp. 84, 85. It should be borne in mind that this great lawyer wrote these words nearly 150 years ago, under the French monarchy, long before the foundation of this federal republic. How much more earnestly, then, might these thoughts be expressed by a citizen of the freest, strongest, and best government ever designed by the genius of man.

We have searched this record in vain for any material error, and we are

fully satisfied that the defendant has had a fair and impartial trial, in strict conformity with all the forms prescribed by law, and that the judgment of conviction should stand affirmed.

GALBRAITH and BACH, JJ., concurring.

NOTE.

**MALICE.** Malice is defined to be that state of mind or act where one willfully does that which he knows will injure another person or property. *Territory v. Egan*, (Dak.) 13 N. W. Rep. 568. Malice is always to be implied when the circumstances show an abandoned and malignant heart. *People v. McDonald*, (Idahp,) 1 Pac. Rep. 345. When one assaults another with a deadly weapon, likely to produce death, the law presumes malice, in the absence of proof, either direct or by circumstances, to the contrary. *State v. Townsend*, (Iowa,) 24 N. W. Rep. 535; *State v. Hockett*, (Iowa,) 30 N. W. Rep. 742; *State v. Rainsbarger*, (Iowa,) 31 N. W. Rep. 865. When a killing is shown to be without extenuating circumstances, malice is presumed. *People v. Hamblin*, (Cal.) 8 Pac. Rep. 687; *People v. Bush*, (Cal.) 12 Pac. Rep. 781; *People v. Tidwell*, (Utah,) id. 61. The premeditation necessary to show malice does not require any fixed period. *Territory v. Egan*, (Dak.) 13 N. W. Rep. 568. The killing of a human being in the commission of an unlawful act which, in its natural consequences, tends to endanger or destroy life, has the requisite malice to constitute murder. *People v. Mooney*, (Idaho,) 2 Pac. Rep. 876; *State v. Linde*, (Iowa,) 6 N. W. Rep. 168.

(7 Mont. 449)

UPTON *et al.* v. LARKIN *et al.*

(Supreme Court of Montana. January 27, 1888.)

1. MINES AND MINING—DISCOVERY—ADVERSE CLAIMS.

Whether plaintiff's discovery had been made within the patented lines of an adjoining mining claim being in issue, it was proper for plaintiff, in order to fix the place of discovery, to testify that it was 100 feet south of the old lines of such claim, and the defendant could then show, on cross-examination or in defense, that the patented lines of the claim were south of the old lines, and took in the discovery.

2. SAME—DISCOVERY ON ADJOINING CLAIM.

A discovery will sustain a valid location, although a portion of the discovery shaft is upon an adjoining located claim.

3. SAME—LOCATION OF CLAIM—SUFFICIENCY OF NOTICE.

A notice of location of a mining claim, distinctly marked upon the ground, describing the west-end corners as marked by pine trees, while it appears that they were in reality marked by stakes, the notice, however, referring to a permanent monument, to-wit, "the Gambetta lode claim on the east," is a sufficient compliance with Rev. St. U. S. § 2324, providing for a description of a claim in the records of mining claims, to be admissible in evidence.

4. SAME—EVIDENCE OF LOCATION—VALUE OF VEIN.

Evidence of the value of a vein, disclosed after the location, is immaterial to the question of the locator's title, as no discovery after location would make that location valid.

5. SAME—VALIDITY OF LOCATION—REQUISITES.

An instruction that "to make a valid location of a lode mining claim, there must be a discovery, within the limits of the claim, of a vein \* \* \* containing gold, silver, or other valuable mineral deposits, \* \* \*" is proper, when taken in connection with other instructions defining and limiting what is meant by a "discovery."

Appeal from district court, Silver Bow county; GALBRAITH, Judge.

*Knowles & Forbis* and *Thos. L. Napton*, for appellants. *W. W. Dixon* and *Robinson & Stapleton*, for respondents.

BACH, J. This suit was begun under Rev. St. U. S. § 2326, to determine the right of adverse claimants to certain mining property situated in Silver Bow county, Mont. The defendants had filed an application for patent to mining ground, including the ground in controversy, as the owners of the "Smelter Lode Claim;" the plaintiffs "adversed" the application, and thereafter commenced suit as required by the United States statute for adverse claimants, alleging title to the premises under a claim known as the "Comanche Lode Claim." The defendants deny plaintiffs' title, and claim title to the

ground in controversy as part of the "Smelter Lode Claim." Trial was had in the district court, verdict was for the plaintiffs, and judgment was entered accordingly. A motion was made for a new trial, which was denied. The appeal is taken from the judgment, and from the order denying a new trial. We will consider in their order the alleged errors relied upon by the appellants, at least so far as the record will permit.

Counsel for appellants, in their argument, admit that the record contains much useless matter; and after inspection of the record we are free to say that we agree with them. David N. Upton was the first witness called, and he was asked the following questions, to which he made answer: "*Question.* Did you know where the corners and boundary lines of the Shannon lode claim were at that time? [referring to the time of the discovery and location of the Comanche lode claim.] *Answer.* Yes, sir. *Q.* Show where they would be on this map, [referring to a map already in evidence.] *A.* The Shannon is a new location of the old Colusa, located by 200-foot claims. Here, on the line of the Shannon, [now referring to the map] at that time the lines of the Shannon were right up here, [referring to the map.] Objected to by attorney for defendants, on the ground that the Shannon is a patented claim now, and it is not open to any dispute or controversy as to where the boundaries were at that time. Plaintiffs' attorneys say that it does not yet appear that the Shannon is a patented claim. Whereupon defendants' counsel desired to ask the witness if he did not know that the Shannon claim was patented, and offered to introduce then and there the patent to the Shannon claim. The court overruled the defendants' objection; to which ruling the defendants then and there duly excepted. The witness then proceeded to point on the map and testify as to the position of the Shannon corners and boundaries at the time he made the location of the Comanche lode claim, and stated that the position of the Shannon corners at that time would bring the south line of the Shannon about one hundred feet north of the discovery shaft of the Comanche. To the admission of said testimony the defendants then and there objected, but it was allowed to go to the jury, and to which ruling of the court the defendants then and there excepted." The foregoing is contained in bill of exceptions No. 1, and it is the first error noted in the brief of counsel for appellants. It is strange that the map referred to should be entirely omitted from the record, which is so voluminous, and which contains so much that is irrelevant and redundant. It certainly would be in line with the authorities if we refused to consider this error, for we are deprived of much that may have guided the court below. As far as the record shows, we find no error in the ruling of the court below. It was certainly competent for the plaintiffs to prove the discovery upon which they based their claim. They could do this by fixing its distance from any object. Upton swore that the old south lines of the Shannon lode were 100 feet distant north from his discovery. It was not in accordance with the orderly examination of the witness to allow the defendants to interrupt their testimony, and to interject cross-examination in the way proposed. The proper and usual practice was for the defendants to show, by cross-examination or by testimony in defense, that the patented lines of the Shannon lode were south of the old lines, and took in the discovery. That was part of defendants' case.

The second alleged error refers to the admission of the notice of location in evidence. The ground of objection is as follows: The evidence of the plaintiffs having shown that Upton and his co-locator, Turner, discovered a vein, and made a location by putting up stakes at the west-end corners, the defendants objected to the admission of the notice of location, because it was therein declared that the west-end corners were marked by pine trees. The objection was properly overruled. The statutes of the United States do not require the recording of any notice of location. All that is said upon that subject will be found in section 2324, which provides as follows: "The location must be dis-

tinently marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." The Montana statute makes no further requirement in this respect. The statutes of the United States require only "such a description \* \* \* by reference to some natural object or permanent monument," that is, either one or the other; but, whichever is chosen, it must be 'sufficient to' identify the claim." The notice objected to did refer to a permanent monument, to-wit, "the Gambetta lode claim on the east." Such a reference has been held to be sufficient by this court. See *Russell v. Chumaseero*, 4 Mont. 309, 1 Pac. Rep. 719. Whether or not this was such a description as would identify the claim is a question for the jury. See *Russell v. Chumaseero*, *supra*; *Anderson v. Black*, 70 Cal. 226, 11 Pac. Rep. 700. The notice, then, contained a description by reference to a permanent monument. It contained more, also; but the claim itself was distinctly marked on the ground,—so distinctly that "its boundaries can be readily traced," as required by the statute. The location notice contains a declaration that a copy thereof is posted at the discovery shaft, (and the evidence is to the same effect.) It also declares that the claim adjoining it is the Gambetta lode claim on the east; and then it contains the following description of the boundaries of the claim located, as follows: "Beginning at a stake situated 900 feet in a south-easterly direction from discovery shaft, and marked 'South-East Corner of the Comanche Lode Claim'; running thence westerly 1,500 feet, to a pine tree, marked 'South-West Corner of the Comanche Lode Claim'; thence north 600 ft., to a pine tree, marked 'North-West Corner of the Comanche Lode Claim'; thence easterly 1,500 feet, to a stake, marked 'North-East Corner of the Comanche Lode Claim'; thence south 600 feet, to the place of beginning." As we have already stated, there is no statute requiring a description of the claim to be contained in the notice of location. All that is required by the United States statute is that the claim shall be distinctly marked upon the ground, so that its boundaries can be readily traced. The court charged the jury that such was the law, and the jury, by their verdict, have declared that the law was complied with, to-wit, that the claim was marked as by law required. The mining laws are beneficial laws. They should not be, and are not by the United States supreme court, construed technically. The history of the laws shows that they were intended to afford to the miner the most simple method possible of obtaining title to mineral ground. When metal was first discovered in this country, the miners made their own laws, known as "custom of miners," and which may properly be called the common law of mining. These laws received the sanction of the state legislatures and of the courts. Finally, congress, recognizing the vast importance of the mineral wealth of this Western country, as well to the nation as to the individual, and being desirous of encouraging the industry to its fullest extent, wisely took cognizance of the subject, and enacted the mineral land laws, which are as simple as the custom of miners; indeed, the fundamental principles of the one are identical with those of the other, to-wit, discovery, appropriation, and development. In fact, there is little difference between the custom of miners and the mineral laws, as far as the former could go; that is to say, up to that point where the miner seeks to obtain his patent. The law as passed by congress contains no extra condition to the possessory right, (see *Jennison v. Kirk*, 98 U. S. 453;) but it gave to the miner what he had not had before, the right to acquire the absolute title to the land through a United States patent to the same. Congress was enlightened upon this subject by those well versed in the necessity arising from the nature of the mining industry. It recognized that the rules of miners were the result of experience, and the device of fair-minded men. It wisely followed rules which were best suited to those engaged in this indus-



try, which recognized that the vast majority of the miners were not educated, and which were to govern men remote from business circles, where alone legal advice could be had. What are the two chief requirements of the statutes as far as the possessory right is concerned? *First*, discovery; *second*, the marking of the claim upon the ground so that the boundaries can be readily traced. The first requirement is made for the benefit of the United States, so that land cannot be acquired under this law until its character is first ascertained to be mineral; the second is made in order that those going upon the ground may know that others have acquired and claim title thereto. Certainly, these steps are very simple; the intricacies are those found by the courts of the states and territories wherein mineral lands are situated. The supreme court of the United States has, time and again, cleared away a vast amount of technicality sought to be thrown around these laws, as a careful perusal of the decisions of that court will show. Counsel for appellant have cited cases from the state of Colorado upon this point; but those cases depend upon a statute of that state which requires that "such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are towards the claim, and sunk in the ground, to-wit, one at each corner, and one at the center of each side line." We have no statute such as that, or requiring any stake whatever.

The next error specified is that one of the defendants, Larkin, was not allowed to testify as to the width and richness of the vein as shown by work subsequent to the location of the Smelter lode. We think that the objection was properly sustained. Whether or not the defendants were entitled to recover depended upon discovery before location. No discovery made after location would make that location valid. Such would seem to be the rule stated in the opinion delivered upon a former appeal in this case, (see *Upton v. Larkin*, 5 Mont. 600, 6 Pac. Rep. 66;) the present appellants then insisting that such was the rule of law, and, in fact, the appellants requested the court below to charge the jury that such was the law, (see instruction 5 given at defendants' request, as follows: "The discovery upon a quartz claim must be made at the time of the location, and before the record of the claim is made.") The court, upon the former appeal, cited an instruction given by Mr. Justice SAWYER in the case of *Mining Co. v. Mining Co.*, 11 Fed. Rep. 666, and the court adds: "This instruction, if it is the law, would be applicable to a case where a person enters upon the public mineral lands, and discovers what he supposes to be a vein or lode, and makes a location by virtue of such discovery before he has discovered the true vein or lode; and subsequently, and before any other person has acquired any rights, makes such discovery." But in the case at bar the location of the Smelter lode was made on the 23d day of May, 1881; a patent was applied for prior to the 7th day of March, 1882; this action was commenced on the 7th day of March, 1882; and this evidence was offered at the present trial of this cause, in September, 1886. Certainly, the appellants could not obtain a patent upon a discovery made after application. That they cannot show work done after bringing of suit has been held in *Maxon v. Wilkinson*, 2 Mont. 421. The offer made by appellants was not confined as to date, and may as well have been after suit was brought as before. When this offer was made there had been no attempt to deny that appellants had discovered a vein before their location; and the appellants did not seek to introduce it in order to make valid a void location, as referred to in the opinion of the learned judge commenting on the instruction of Mr. Justice STORY, *supra*. The purpose of the offer is evident; it was to enlist the sympathy of the jury. That the defendants did not suffer any wrong by the exclusion of this testimony is further shown by the finding of the jury that the defendants did discover "at the time of his location, within the limits of the Smelter lode, a vein with at least one well-defined wall."

The next error alleged is that the evidence shows that the Shannon lode

claim as patented includes the discovery of the Comanche lode claim; and counsel for appellant cite *Gwillam v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110. In that case the discovery relied upon by the plaintiffs was entirely included within the boundaries of a claim that was patented after the plaintiffs' location; but in the case at bar testimony was introduced by plaintiffs tending to show that only a portion of plaintiffs' discovery shaft is included within the Shannon claim, and that the other portion is included within the line of the Comanche lode claim. The jury was instructed as to the law upon this point, at appellants' request. They were told that the discovery must have been made "upon the claim located; but, if the ground upon which the claim is located is appropriated ground,—that is to say, ground that has been previously located, and is at the time held as a quartz lode claim by others,—then such a discovery will not sustain a location, and any location made by virtue thereof will be void. And if you find in this case that the discovery of the Comanche lode claim was made upon the Shannon lode claim, then you will find that the location of the Comanche lode was void, and the plaintiffs acquired no rights thereunder." And there were other instructions to the jury to the effect that, if the discovery shaft of plaintiff was within the Shannon lode claim as patented, then plaintiffs could not recover. The jury find specifically that a portion of the discovery is south of the south boundary line of the Shannon claim as patented, and within the lines of the Comanche as located. There is evidence to sustain the finding, and such a finding of fact is sufficient to show a valid discovery; therefore the verdict of the jury cannot be disturbed upon that ground.

The next error alleged is that the court erred in instructing the jury as contained in plaintiffs' requests numbered 1 and 2; and appellants claim that these are not the law under any circumstances, and that they are particularly against the law as applied to the facts of this case. Both the plaintiffs and the defendants presented numerous requests to charge, which were given by the court as instructions to the jury. They thus became the directions of the court, and must be construed together. The testimony shows that the Comanche lode claim was located in January, 1879; and, that in June, 1879, the Shannon lode claim, which lies north of the Comanche, was patented. The south line of the Shannon lode, as the testimony shows, runs directly through the discovery shaft of the Comanche, in such a manner that the shaft, with the exception of a strip about 19 inches wide, is included within the Shannon lode. Plaintiffs filed no adverse claim at the time that application was made for said patent. There is testimony showing that the vein upon which the discovery of the Comanche is based, dips from the north to the south. Such are the facts. Instruction No. 1 reads as follows: "To make a valid location of a lode mining claim, there must be (1) a discovery, within the limits of the claim located, of a vein or crevice of quartz or ore, with at least one well-defined wall on a lead, lode, or ledge of rock in place, containing gold, silver, or other valuable mineral deposits; (2) the location must be distinctly marked on the ground, so that its boundaries may be readily traced; (3) a declaratory statement in writing, under oath, describing such discovery and location, with such a description of the claim located," etc. The rest of the instruction is not complained of. No. 2 reads as follows: "If the jury find, from the evidence, that plaintiffs, Upton and Turner, did, on or about the 19th day of January, 1879, make a valid location of the Comanche lode claim, as described in the foregoing instruction, and that plaintiffs, prior to March 7, 1882, acquired the title of said Turner, and that on the 7th day of March, 1882, plaintiffs were in possession of said Comanche lode claim, you will find for plaintiffs." The position of the appellants is that the jury are led to suppose by instruction No. 1 that the original discovery would be sufficient, even though it was upon ground which was afterwards patented to others than the plaintiffs, or those under whom they claim. Turning to instruction No. 8 given

at plaintiffs' request, we find that the word "discovery," which in mining has a technical meaning, is defined to the jury, who are told that "one may discover a vein within the limits of ground claimed; yet, if the top or apex of such vein lies without his claim, he will acquire no right thereto." In another instruction, at defendants' request, the word "apex" is defined to the jury. And again, in No. 6 given at defendants' request, the jury are instructed directly upon the point made by appellants, as follows: "The ownership of or title to a vein is determined by its top or apex; and, although one may discover a vein within the limits of ground claimed, yet, if the top or apex of such vein lies without his claim, he will acquire no right thereto. And in this case, if plaintiffs discovered a vein, the top or apex of which lies within the limits of the Shannon lode claim, as the same is described in the patent issued to Charles X. Larabie, then the plaintiffs can claim no rights by virtue of such discovery, although such vein may so far depart from a perpendicular, in its downward course, as to enter the ground claimed as the Comanche lode claim." We think that the jury are fully instructed upon the law of discovery, as applied to the facts of this case. It is true that plaintiffs' instruction 1, by itself, does not contain all the law as applicable to the case; but, taken in connection with other instructions given, it does state the law fully. It is almost identical with No. 1 given at defendants' request. As to instruction No. 2, it refers to all the issues in the case as fully explained elsewhere, and tells the jury that, if they find all of the issues in favor of the plaintiffs, then the verdict must be for the plaintiffs.

The next alleged error is that the evidence shows that the vein of plaintiffs runs cross-wise of their claim, and not lengthwise. If we could find from the record that such was the fact, it would be doubtful whether or not we could reverse the judgment on that ground. It would seem to be the opinion of the court in *Argentine Co. v. Terrible Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1856, and *Mining Co. v. Tarbet*, 98 U. S. 478, that the only result in such a case is that the so-called end lines become the side lines of the claim, and the side lines become the end lines. But we are not called upon to decide that point. The jury find that the general course of the vein corresponds with the length of the claim; and we submit that it is impossible for us to say that the evidence did not warrant that finding, for the record presents the testimony in such a way that it is impossible for us to discover its meaning. The transcript contains 151 pages of testimony; but counsel on both sides, in their brief, call our attention to specific portions thereof upon all points raised upon this appeal, and it is fair to presume that our attention is thus called to all testimony that is relevant to questions before us. Of these pages there are about 37. Remembering the unnecessary length of this record, and that, as is admitted by counsel for appellants, it contains much that is irrelevant, it is difficult to understand why matters of great importance, and which undoubtedly assisted the judge and jury below, should be omitted from the record entirely. Upon the question of the direction of the vein, we are referred by appellants to the testimony of witness Baker, among others, as found on page 31. We will give a few extracts from this testimony, first stating, however, that the witness was calling the attention of the jury to a map. The witness says: "These little lines represent the bottom. That is where the top of the shaft is now. This line would show somewhere about where it crosses at the present time. This is the opening down at the bottom. This represents the ground plan at the bottom of the shaft. This is a horizontal projection of the bottom of the shaft." And in cross-examination as follows: "This being the south line of the Shannon, and this being the surface, it is about 13 inches from there here. \* \* \* This black line represents it at the last trial, but this is cut clear through the tunnel." There is no map in the transcript. It is impossible for us to know what the witness means by the expressions "this," "these little lines," "these black lines," or to know

where "these little lines" and "this black line" may be in reference to the surface of these conflicting claims. The testimony selected as above may be somewhat more unintelligible than the rest; but in most cases it is a difference of degree, and not of kind. As to the direction of the vein, all that clearly appears from the record is (1) that the notice of location and testimony show that the side lines of the Comanche lode run in an easterly and westerly direction; (2) that there is testimony showing that the vein runs in a similar direction; and (3) that the finding of the jury is that the direction of the vein is south of east and north of west. We do not object to long records when they are necessary to present to this court a full understanding of the case; but we do object to transcripts which counsel, directly and by implication, admit contain irrelevant matter, but omit such an essential as a map from which a witness is testifying.

Judgment and order denying a motion for a new trial are affirmed, with costs.

McCONNELL, C. J., and McLEARY, J., concur.

(5 Utah, 280)

PEOPLE v. McCARTY.

(Supreme Court of Utah. September 2, 1887.)

LARCENY—OWNERSHIP OF PROPERTY STOLEN—HUSBAND AND WIFE.

In an indictment it is proposed to allege that money furnished by a husband for support of his wife, and stolen from her, was the money of the husband, and was stolen from him.

Appeal from district court, First district; before Justice HENDERSON.

The appellant, Richard J. McCarty, was convicted of grand larceny.

*J. N. Kimball*, for appellant. *Geo. S. Peters* and *Ogden Hiles*, for the People.

ZANE, C. J. The defendant has appealed from a judgment of the First district court sentencing him to imprisonment in Utah penitentiary for the term of two years and six months, in consequence of a conviction for the crime of grand larceny. The indictment charges that the property stolen belonged, at the time of the theft, to one Frank Camblos. It appears, from the evidence, that Camblos resided at Portland, Or.; that in September, 1885, he learned of an intimacy between his wife, Tillie Camblos, and the defendant, McCarty, and refused to live with her longer; that they separated in pursuance of an understanding that she would go to her parents in Kansas, and that he would sue for a divorce in Oregon after the requisite time should elapse; that he furnished her with about \$1,000 in bank-bills for her support until that time; that she put the money in a chamois purse suspended about her neck by a ribbon, and concealed beneath her clothing; that she afterwards lived with the defendant, who was a telegraph operator, at different places, until she died at Ogden on the 19th day of December, 1886. It further appears, from the evidence, that Mrs. Camblos' nurse saw the chamois purse, concealed as above stated, while the deceased woman was living with defendant at Ogden; that defendant was with her in her last illness; that after her death he sent her trunk containing her clothing to her father, and departed from Ogden before the funeral, and a short time afterwards was arrested at Denver, Colo.; that at the time of the arrest the purse, containing about \$300 in bills of the same denomination as those furnished to Mrs. Camblos by her husband, was upon his person. Other evidence also tended to show that this was the same money. In view of such evidence the court announced to the jury the following propositions of law, with others: "If Mr. Camblos owned this money, \* \* \* and his wife agreed to go home, and he allowed her to take it to supply her wants and necessities, it would still be his money, and in case of her death he could reclaim it. On the other hand, if he gave it to her \* \* \* intend-

ing to part with the title, and she so understood it, \* \* \* no matter what the form of expression was it became her property. \* \* \* One of the questions you will determine is whether it was put into her hands for the purpose of support, use, and maintenance, or whether it was an absolute gift to her. If it was an absolute gift, it became her property; if not, it remained his." To this portion of the charge defendant excepted, and the giving of it is assigned here as error. The propositions which it contains are—*First*, if the husband furnishes money for the support of his wife, it continues to be his until expended by her; *second*, if he makes an absolute gift of it to her, the money becomes hers.

It is the legal duty of the husband to support his wife, and whether he makes the expenditure for her support himself, or intrusts his means to her for that purpose, the money remains his until the expenditure is made. In one case he pays in person; in the other case, through her agency. The defendant also assigns as error the giving of the following portion of the charge: "If the money belonged to the husband, and his wife had it for the purpose of her support, then it would be constructively in his possession, \* \* \* and it would be proper to charge it as having been stolen from him." If the husband's property is stolen while in the actual possession of his wife, it is proper to allege that it was stolen from him. "When goods in the possession of a married woman are stolen, they must not be described as her property, but as that of her husband, for her possession is his possession, (2 East. P. C. 652;) but where they are the wife's separate property, under 83 & 84 Vict. cc. 5, 9, 11, it is sufficient to allege the property to be her property." *Rosc. Crim. Ev.* (7th Ed.) 660. To the same effect is *Russ. Crimes*, (9th Ed.) 287. Under the statutes of this territory the wife's possession of her separate property is not her husband's possession, and, if such property is stolen while in her possession, the theft should be charged as from her; but her possession of his property is his possession, and its theft while in her possession should be charged as from him. And, in law, the husband's money in his wife's hands, for her use, is in his possession, and a theft thereof while in her hands should be charged as from him. Bishop, in his work on Criminal Law, (volume 2, § 789,) says that "the law recognizes in things personal two kinds of ownership, general and special. Therefore an article may be stolen from one who is either the general or the special owner of it. For instance, goods in the hands of a bailee may ordinarily be described in the indictment as either the bailee's or bailor's, at the election of him who draws it. And articles of clothing worn by an infant may usually be alleged to belong to the infant or the father, according to such election. So goods stolen from a thief may be charged as the goods of either the thief or the true owner." Under this rule the larceny of money furnished by the husband to be expended for maintenance and support which he had undertaken to provide, while in his wife's hands, may properly be alleged to be his.

We find no error in this record, and the judgment of the court below is affirmed.

BOREMAN and HENDERSON, JJ., concur.

(5 Utah, 531)

PEOPLE *ex rel.* PIERCE v. CARRINGTON, Com'r.

(*Supreme Court of Utah*. April 7, 1888.)

UNITED STATES COMMISSIONER—COMMISSIONER OF SUPREME COURT OF TERRITORY—  
POWER TO PUNISH CONTEMPT.

A commissioner of the supreme court of Utah has not jurisdiction to arrest a person for contempt for writing and publishing in a newspaper articles concerning his court, and a writ of prohibition will lie to prevent such arrest.

Original proceeding for a writ of prohibition.

Eli H. Pierce, the plaintiff, was arrested by J. B. Carrington, a commissioner of the supreme court, for contempt, in writing and having published in the Salt Lake Herald certain articles concerning said commissioner's court. Plaintiff applies for writ of prohibition. Defendant demurs.

*Sheeks & Rawlins*, for relator. *O. W. Powers*, for respondent.

BOREMAN, J. This is an application for a writ of prohibition. The applicant for the writ, Eli H. Pierce, was arrested upon a warrant issued by J. B. Carrington, a commissioner of this court, upon a charge of contempt of the commissioner's court, in writing and having published in the Salt Lake Herald certain articles concerning said commissioner's court. No copy of the articles has been furnished to us. Pierce was bound over to answer to said commissioner why he should not be punished as for contempt. Thereupon Pierce applied for the writ of prohibition to prevent said commissioner from proceeding in the matter. An alternative writ was issued, and to this the defendant, Carrington, has demurred, and also filed his answer. The principal ground of the demurrer is that the writ does not state facts sufficient to constitute a cause of action. The arguments of counsel were made upon the demurrer, and upon the whole case. The first objection to which our attention is called is that the applicant for this writ did not apply to the commissioner's court for relief before applying for the writ of prohibition. In support of this objection, we are referred to High, Extr. Rem. §§ 765-773. The cases upon which Mr. High relies have not been furnished us, but from their titles, and from what appears in the text, it would seem that the cases are all civil ones, and in regard to matters other than contempt. Whether they are cases where the lower courts were acting within their general jurisdiction or without it, does not appear. It would seem probable that they were the former. We can well see why, in a common civil action, the party should be required to apply for relief first to the lower court. The different steps to be taken in the case are pointed out, and are consequently in the "ordinary course of law." But it is a wholly different matter where the lower court is acting without authority, and wholly outside of his jurisdiction, in a summary proceeding, and one of at least semi-criminal character, and where the penalty would be of the same nature as that imposed in criminal cases. The later and better practice in England and in this country is different from that urged by the defendant, at least in cases of contempt, where the lower courts were acting wholly outside their general jurisdiction. In the late English case of *Queen v. Lefroy*, 4 Moak, Eng. R. 134, as soon as the party was cited to appear and answer for his contempt, a prohibition was immediately applied for, and thereafter was made absolute. A similar practice was followed in California, in *People v. County Judge*, 27 Cal. 151, and in *Williams v. Drwinelle*, 51 Cal. 442. Any other rule would seem to be unreasonable. The applicant for the writ is by the order of the commissioner required to answer and show cause why he should not be punished as for contempt. He denies the right of the commissioner to require him to answer and make such a showing, and he charges that the commissioner has threatened to proceed in the matter, and to punish him, and this charge is not denied in the answer. Simple justice would say that if the commissioner has no legal authority,—no jurisdiction,—to summon the applicant to answer and show cause why he should not be punished for such alleged contempt, the applicant should not be denied the writ by reason of the fact that before asking for it, he had not applied to the commissioner to dismiss the proceedings.

It is said that the applicant has a complete remedy by way of appeal. An appeal could only be resorted to after judgment. It would not prevent the unjust proceeding prior thereto, the expense, vexation, and annoyance of trial, and an appeal would subject the applicant to the necessity of taking all the preliminary steps therefor, giving undertaking, etc., or of going to jail if un-

able to give the appeal-bond; and he would be required to follow the case into the district court, and take steps there for defense against the proceeding. When he should reach the district court, he would find that he could not have the issues heard and determined there upon which he was tried and condemned by the commissioner. The only question there to be settled would be that the commissioner was acting without authority, and that the proceeding should be dismissed. Such would not be an adequate remedy for the vexations, expense, and probably damaging trial through which he had, against his will, been forced. It is said that the applicant has ample remedy by way of *certiorari*, but *certiorari*, like appeal, has no effect until after action has been had by the commissioner. A *certiorari* can only be issued when the inferior court "has exceeded" its jurisdiction. It looks to the past and not to the future. It then would not prevent the illegal proceedings that should follow. The writ of prohibition is preventive, and not remedial, in its nature, and therefore is the appropriate writ to arrest the unauthorized proceeding, prior to judgment as well as after it, always, however, looking to the future, and not to the past.

Our attention is called to the fact that *habeas corpus* would be available. But it could avail nothing until after the party has been restrained of his liberty. In the present case that would take place after judgment, and when the person had been committed to prison. It would be neither a speedy nor adequate remedy. Therefore, neither appeal, *certiorari*, nor *habeas corpus* would be "a plain, speedy, and adequate remedy" in this case. They would all leave the applicant without relief from vexations, annoyances, injury, and expense of the unauthorized proceedings of the commissioner. No citizen should be subjected to an illegal arrest, trial, or imprisonment. If the proceedings be illegal, and without the jurisdiction of the commissioner, the party should be relieved therefrom at the earliest possible moment. The purpose of the writ of prohibition is to arrest "the proceedings" when they are "without or in excess of the jurisdiction" of the tribunal assuming to exercise them. Laws Utah 1884, p. 326, § 982. If the commissioner was acting simply "in excess" of his jurisdiction, an appeal, or writ of *certiorari* or *habeas corpus*, might be an adequate remedy, as upon the appeal the case would be tried *de novo*, and it or *certiorari* might be the appropriate and ordinary course of law; but where he is acting wholly "without" his jurisdiction, the question is different. The primary object and purpose of a writ of prohibition is to keep the inferior courts within the limits and bounds of their several jurisdictions as prescribed by the laws. 8 Bac. Abr. p. 206, tit. "Prohibition;" High, Extr. Rem. § 765. And the general rule is that the writ issues whenever an inferior court is attempting to exercise a jurisdiction which it does not possess, or, if it does have the jurisdiction, that it is exercising an unauthorized power. 5 Wait, Act. & Def. 250.

The next question for our consideration is whether the defendant, acting as a United States commissioner, had jurisdiction to punish for this alleged contempt. It is contended that the commissioner had the same power in the matter as a justice of the peace would have had, and that a justice of the peace had full power to punish for such contempt. A justice of the peace has no inherent power to commit for contempt. *Queen v. Lefroy*, 4 Moak, Eng. R. 134; *Rhinehart v. Lance*, 43 N. J. Law, 311, 39 Amer. Rep. 59; *Storey v. People*, 79 Ill. 45, 22 Amer. Rep. 158. And it is doubtful whether at common law, justices of the peace were accorded power to punish contempts, except perhaps where they were committed in *facie curiæ*. Rap. Contempt, § 6, note 2. In superior courts the power to punish contempts is inherent and necessary, independent of statutory authority, and such courts may go beyond the power given by statute in order to preserve and enforce constitutional powers when acts in contempt invade them. *Id.* § 1. Although a justice of the peace has no inherent right to commit for contempt, he has the inherent

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right to remove disorderly persons from his presence. Such a power the commissioner undoubtedly has; it is essential to the very existence of the court, and is implied in its creation; but a power to commit is not a necessary incident, and is not granted by implication. A justice of the peace or a commissioner has power not only to remove the party committing the contempt, but has the power also, in a proper case, to require the party to give bail for his appearance to answer to a criminal charge, if acts of a criminal nature take place, and, if he cannot find bail, to commit him in default of bail. A justice of the peace or commissioner, therefore, has not the power by implication to punish such contempt, but if he has it at all, it must be given him by statute. Although a justice may not have any inherent power to punish for contempt, and none was accorded by the common law, except when the contempt was in the presence of the justice while acting officially, yet it is contended that by our statutes justices have the power, and that their powers extend to such a case as the one before us. The territorial enactments for the punishments of contempts by justices of the peace specify five different classes or subdivisions of contempts punishable by justices. Laws 1884, pp. 151, 299. The first and second subdivisions seem to refer to contempts committed in the immediate presence of the justice while acting officially, or in the immediate vicinity, and tending to interrupt the proceedings before him. Subdivisions 3 and 4 have reference to disobedience of orders or process, and the fifth subdivision has reference solely to the rescuing of any person or property held under order or process of such justice's court. There is in none of these subdivisions any sort of authority given to a justice to commit or punish for a contempt out of the presence or immediate vicinity of the justice, except where there is disobedience or resistance to some order or process of the court, or where there is a rescue of some person or property. The case before us does not present one coming under either of the five subdivisions. The alleged contempt matter was a publication in a newspaper, and the circulation thereof. From the argument of counsel it would seem that reliance is placed mainly, if not wholly, upon the first subdivision above stated. That subdivision sets forth as the things that can be punished by a justice of the peace as contempts, the following: "Disorderly, contemptuous, or insolent behavior toward the justice while holding court, tending to interrupt the due course of the trial or other judicial proceeding." This "behavior" must be "toward the justice" and it must be toward him "while holding court." The jurisdiction of the justice, as we have seen, cannot be implied; and the rule being that he has no inherent or common-law jurisdiction to punish contempts, except when in his presence, it follows that the statute must provide in express terms that he could punish for acts committed out of his presence, or he cannot have such power. But this statute, in none of the subdivisions aforesaid, so provides. It follows that he does not have the power.

It is urged that the commissioner had the same jurisdiction as the commissioners of the circuit and district courts of the United States, and that such latter commissioners have the power to punish such contempts, hence the former has the power also. We are referred to no authorities showing that commissioners of the circuit and district courts of the United States have jurisdiction to punish contempts of this character committed out of their immediate presence. Such circuit and district courts have not, since 1831, had any such power, except, of course, in the enforcement of some order, judgment, or process. Rev. St. U. S. p. 137, § 725. They have no power to punish contempts committed by publications in newspapers; and we do not see how they could, except by an express act of congress, grant to their commissioners greater power than they themselves had. The granting of such power to any court is one of extraordinary character, and is only granted to courts of general jurisdiction. And then it is to be exercised with great caution and



prudence, and only in cases of urgent necessity. The tendency of the present day is to narrow, rather than enlarge, the limits for the exercise of such summary power. And it is not the policy of the law to grant such extraordinary powers to inferior courts. It is deemed that such courts, and in a measure the superior courts, are well protected by the criminal statutes, whereby the party alleged to be in contempt for making libelous publications is subject to indictment and punishment. Comp. Laws, pp. 593, 594, §§ 1954-1963.

We think that the commissioner is in this matter acting outside of his jurisdiction, and that the writ of prohibition would be the proper remedy. The demurrer is overruled, and, as the case made by the answer would not change the result, the alternative writ is made absolute.

ZANE, C. J., and HENDERSON, J., concur.

(3 Wash. T. 478)

UNITED STATES v. SMALL.

(*Supreme Court of Washington Territory. January 31, 1888.*)

1. COSTS—TAXATION OF—IN TERRITORIAL COURTS.

Where the United States is the prevailing party in a suit in a territorial court, costs should be taxed as allowed by act of congress, and not according to a territorial statute.

2. WITNESS—MILEAGE—LIMITATION.

A provision in an act of congress that mileage shall not be allowed witnesses for greater distance than 100 miles applies only to witnesses who come from without the territorial limits of a court's jurisdiction.

Appeal from district court, Walla Walla county.

JONES, C. J. We cannot consider the sufficiency of the complaint in this action. A trial has been had, and judgment entered, and the pleading cannot be attacked on this appeal, as no objection thereto is reserved, and it is sufficient to support the judgment. The contention here is as to whether the United States has a right to tax costs under the act of congress, or under the territorial statute. We have no doubt the national act must prevail. The territorial act cannot repeal the federal statutes, and the fees thereby allowed must be taxed when the United States is the prevailing party. Marshals, clerks, jurors, and witnesses have a right to demand and receive pay under that statute, and their fees are necessary disbursements in the action.

It is contended that, under the national law, witness fees for mileage cannot be allowed for a greater distance than 100 miles. This would be true if the witness came from without the district over which the court had jurisdiction, and there are authorities so holding, the word "district" being used with reference to the territorial limits of a district court in one of the states of the Union. The rule in the district courts of the United States does not seem to be uniform, but we think that within the jurisdiction of the court, so far as determined by territorial boundaries, the witness may be compelled to attend without regard to distance, and his compensation ought to be taxed and allowed. If he comes from without the district, the 100-miles limitation applies. The process and jurisdiction of the courts of this territory are co-extensive with their territorial limits, and fees should be allowed to witnesses accordingly.

The court below taxed and allowed costs under the statute of the territory. The cause will be remanded, with instructions to allow them as indicated in this opinion, costs of this court to be taxed against the defendant below.

TURNER and ALLYN, JJ., concur.

(16 Or. 93)

GOVE *et al.* v. ISLAND CITY MERCANTILE & MILLING CO.

(Supreme Court of Oregon. February 29, 1888.)

## 1. CONTRACT—GUARANTY—CONSTRUCTION—IMPROVED MILL MACHINERY.

A firm of contractors entered into a contract to put improved machinery into a mill for the manufacture of flour, and, among other things, stipulated that when the mill had been altered, in accordance with their plans, for the purpose of receiving such machinery, it should have a capacity of a certain amount, and that the quality of the flour made should be equal to that manufactured by "any mill in eastern Oregon." *Held*, that this guaranty was made upon the basis of the water-power previously used in running the mill, and that a failure to comply therewith was a good defense to an action for a deferred payment, to be made upon the completion of the mill, and the acceptance of the same.

## 2. SAME—CONDITION PRECEDENT—WAIVER.

Where a contractor agrees to make alterations in a mill for the purpose of putting in improved machinery, the mill-owner does not, by merely continuing to use the mill, waive the performance of conditions precedent to a payment to be made by him for such services.

## 3. SAME—ACTION ON—DEFENSE—DAMAGES FOR BREACH.

Where one defends an action to recover a deferred payment to be made by him upon the completion of a mill, upon the ground of a failure to comply with the contract under which the mill was constructed, he cannot recover general damages for such failure.

Appeal from circuit court, Union county.

*Rufus Mallory and R. Eakin*, for appellants. *Baker, Shelton & Baker, T. H. Crawford*, and *Ramsey & Bingham*, for respondents.

THAYER, J. It appears from the bill of exceptions herein that the respondents were contractors and builders, engaged in furnishing and putting up what is known as the "Roller Process" for manufacturing flour. The appellants had a flouring-mill at Island City, Union county, Or., and were engaged in operating it. The mill was the old-style "Burr Process;" was run by water-power, the water being conducted in a ditch to the mill from the Grand Ronde river. The respondents, about the last of May or first of June, 1886, visited the appellants at their mill, and after examining it, and the water-power by which it was run, prepared and delivered to appellants a written proposition, of which the following is the substance:

"We hereby agree to furnish you the following specified machinery and furnishings for your flour-mill at Island City, in the county of Union and state of Oregon, to-wit: [Here follows description of articles.] To set up and connect machinery inside of the mill-house and elevator. The following old machinery, said to be in good repair and condition, fit for use, to-wit: One thirty and a half inch Leffel wheel, one Eureka lengthened scourer, together with all old machinery, belting, and material that is good and suitable, now in the mill, and owned by you,—is to be used in connection with the new machinery furnished by us in the construction of the mill. We are to perform all the mill-wright labor necessary to set up and connect said machinery, build the necessary elevators and spoutings, and connect said machinery to the main power-shaft by belt, and place the whole in good running order, and construct the required wheat, flour, and offal bins, etc. We to raise the roof, and inclose the same, putting in the necessary windows, etc. And the mill-wright work is to be done in a thoroughly workman-like manner and substantial manner. No material to be furnished for, or repairs to be made by us upon, the building, except to raise roof to accomodate the machinery. We agree that the machinery and material furnished by us shall be first class of its kind, and suitable for the purpose used. We are to make all necessary plans for the mill; and, when the mill is constructed according to said plans, we guaranty that it shall have a capacity of sixty barrels of flour in twenty-four hours' time; and that the mill, when it is completed, shall be capable of making as good flour, and as much flour per bushel of wheat, as any mill in eastern Ore-

gon, when grinding the same kind of wheat. The mill to be under our control until it is accepted by you. You to furnish wheat, and bear all expenses of operating the mill from the time of starting it; and, when our guaranty is fulfilled, then you are to immediately accept the mill. We agree to furnish and construct as specified for the sum of eight thousand one hundred and thirty-four dollars and twenty-five hundredths, (\$8,134.25,) to be paid by you as hereinafter provided. We agree to prosecute the work as fast as is reasonable, and to have the mill completed ready to run by September 10, 1886, unless prevented by circumstances over which we have no control; and that after the mill is started up, if any changes or alterations are necessary to make it fill the guaranty, by reason of any failure on our part, such changes shall be made at our expense. Should any changes be made at your request or order, the additional costs, if any, over the original amount mentioned, shall be paid by you. The terms of payment are to be as follows: Two hundred dollars in cash upon signing your acceptance of this proposition; three thousand dollars in cash when the specified new machines are delivered; two thousand dollars as called for by us during the process of the work; two thousand nine hundred and thirty-four 25-100 dollars at the time of completion of the mill, and acceptance of the same by you, of the foregoing proposition. We fully bind ourselves to its provisions.

[Signed]

"O. C. GOVE & Co."

The appellants accepted said proposition by written acceptance signed by them, and desired the respondents to ship machinery, and perform labor as specified, binding themselves to all its terms and provisions. The action was to recover the last payment specified in the proposition,—the \$2,934.25 which was to be made at the time of the completion of the mill, and acceptance thereof; the respondents alleging that they had performed all the conditions of the said contract upon their part. The appellants denied the alleged performance of the contract, and averred the non-completion of the work, and set up a claim to damages for an alleged breach of the guaranty. Several questions were raised at the trial in regard to the construction of the contract, the rights of the appellant under the contract for a violation of its terms by the respondents, and concerning the measure of damages they were entitled to on account of such violation.

The contract is clear and explicit, and, in the light of surrounding circumstances, is easily construed. The respondents proposed to substitute for the process the appellants were using in their mill to manufacture flour a new and improved process, the efficiency of which they especially guarantied. The mill was to be under their control, when constructed, until accepted by the appellants. The latter were to furnish wheat, bear the expense of operating the mill from the time of starting it, and, when the guaranty was fulfilled, were immediately to accept it, and were then to make said last payment. The respondents were to demonstrate by a practical test that they had fulfilled their guaranty. The said payment did not mature until that was done; it was a condition precedent to the making of the payment. *Glacius v. Black*, 50 N. Y. 145. The respondent had no right to demand the \$2,934.25 until they had proved by actual trial that the mill had a capacity of 60 barrels of flour in 24 hours' time; and that it was as capable of making as good flour, and as much flour per bushel of wheat, as any mill in eastern Oregon, when grinding the same kind of wheat. This was the respondents' proposition,—the proposition which appellants accepted; thereby making it binding upon both parties. The respondents had no cause of action for the recovery of said payment until they established by proof, not only that they had furnished the material and done the work, but that they had constructed a mill with the capacity to manufacture flour in the quantity and of the quality as expressed in the guaranty. Proof of a substantial performance in the furnishing of the material and constructing the mill would be sufficient. It would not be es-

essential to the maintenance of the action in respect to those matters that there should be an exact performance of the contract in every minute particular; for, as said in 2 Add. Cont. § 864: "Whenever divers acts and things of different degrees of importance are to be done on one side, in return for a stipulated remuneration on the other, a performance of all the things in every minute particular is not, in general, a condition precedent to the liability to make some remuneration; but, if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it; the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract." But the capacity of the mill to manufacture the amount of flour in the given time, and its capacity to make as good flour, and as much flour per bushel of wheat, as any mill in eastern Oregon, from the same kind of wheat, were conditions going to the essence of the contract. The appellants were evidently induced to make the proposed change in their mill in order to secure these results; otherwise, they would not, probably, have accepted the respondents' proposition. If, therefore, the capacity or capability of the mill, when reconstructed, failed in a material particular to comply with the special guaranty, the respondents had no right of action on account of a refusal to pay the deferred payment unless the appellants waived a performance of the condition. According to the evidence, the respondents did not make the required test to ascertain whether the mill possessed the capacity and capability guarantied. They only ran the mill a few days, and only for a few hours at one time. They claim there was not sufficient water to make the test. This might, if the water was at an extreme low stage, have excused them from making it at that time, but not absolutely. The appellants were not responsible for the low stage of water produced from natural causes; the contract was made in view of the existing water-power. It is not true, as the court held, "that the respondents did not agree that the mill should be capable of grinding the specified quantity with the water and head of water then owned by appellants; or that the effect of their agreement was that the mill, with an adequate motive power, should be capable of grinding that quantity of flour." The respondents proposed to put into appellants' mill a new process for manufacturing flour in place of the old one then in use, to put in the requisite machinery, make the necessary connections of the inside works, connect the general apparatus with the power which the appellants were using, and guarantied the result mentioned. They saw what power the appellants had, and their proposition should be deemed to have been made with reference to it. If they had intended to be understood that the mill, "with adequate motive power," would have the capacity and capability guarantied, they ought to have so framed their proposition. Upon the contrary, they said, in terms: "We are to make the necessary plans for the mill, and, when the mill is constructed according to said plans, we guaranty," etc. What could the appellants, under the circumstances, have understood, otherwise than that the mill, when completed, was to be run by the same water-power which they had been using in operating the old mill, and have the efficiency promised that it should possess? Of course, it was not understood that the mill, when the water was so low that the usual head could not be maintained, would make 60 barrels of flour in 24 consecutive hours; but they must have expected that with an ordinary stage of water, such as had been sufficient to operate the old mill, they would be enabled to produce that quantity within that time. Prudent business men would not be likely to subscribe to a scheme involving an expenditure of thousands of dollars, with no assurance that it could be rendered practical without laying out an additional indefinite amount. Nor did the evidence show an acceptance of the mill on the part of the appellants. The new work and materials were so intermixed with the old work that they could not be separated without entirely destroying the utility of the mill. The contract for its construction was entire and

indivisible, and the making of the payment in question was, by its terms, dependent upon its completion; nor did the appellants, by using the mill, waive any right to demand a performance of the condition upon which the payment was to be made. In *Smith v. Brady*, 17 N. Y., Judge COMSTOCK, at pages 188, 189, in speaking of building contracts, said: "The owner of the soil is always in possession. The builder has a right to enter only for the specified purpose of performing his contract. Each material, as it is placed in the work, becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick or stone or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work. The owner, from the nature and necessity of the case, takes the benefit of part performance; and therefore, by merely so doing, does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of the conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance. To be enabled to stand upon the contract, he cannot reasonably be required to tear down and destroy the edifice if he prefers it to remain. As the erection is his by annexation to the soil, he may suffer it to stand, and there is no rule of law against his using it without prejudice to his rights." If such is the rule where a contractor engages to furnish material, and construct a building on the land of another, then *a fortiori* is the rule under contracts of the character of the one in question. Here, the respondents only furnished a part of the material for the mill, and combined it with the other material belonging to the appellants, and the entire structure attached to and became a part of the realty. The right of the appellants to use the property without waiving the condition, it seems to me, is undeniable. Besides, it could not be ascertained by any other mode than an actual use of the mill whether the guaranty had been fulfilled or not. And, again, the appellants could not be required to permit their mill to remain idle, and their business to stop. It was their duty, both to themselves and the respondents, to make the best possible use in their power of the mill; and in so doing they certainly ought not to be chargeable with having waived any condition of the contract, or of having accepted the mill under it.

A considerable discussion was had at the hearing with reference to the measure of damages in this class of cases, but I do not regard the question as important in this case, in view of the real issue herein. If the respondents failed to perform their contract in any material particular, they were not entitled to recover upon it, and the appellants had no claim to general damages in consequence of any such failure. They should not be allowed to refuse to make the last payment to respondents for constructing the mill, and at the same time be allowed general damages for its non-completion. If they repudiate their obligation under the contract upon the ground that the respondents have failed to comply with its terms, they cannot claim such damages on account of the failure. The principle is the same as that which governs in cases of the manufacture of particular articles ordered to be made in a certain manner, and, when finished, are found not to be in accordance with the order, and the party for whom they are manufactured refuses to receive them upon that ground. Such party would be entitled to recover back any money he had advanced upon the articles, and to recover any special damages he had suffered; but he has no claim to damages such as arise upon a breach of warranty in the sale and delivery of personal property. If the appellants had commenced an action to recover damages for not constructing the mill in accordance with the contract, and proved their cause of action, their measure of damages would have been the difference between the actual value of the mill as constructed and what its value would have been had it been constructed as provided by

the contract. 2 Suth. Dam. 429; *Edwards v. Collson*, 5 Lans. 324; *Ladd v. Lord*, 36 Vt. 194; *Merrill v. Nightingale*, 39 Wis. 247. Or, if the appellants in this case had set up said matter by way of counter-claim, in the nature of recoupment, they would have been enabled to cut off from the respondents' claim the amount of the damages, measured by the rule suggested: but they have no right to plead the failure of respondents to comply with the contract, and overthrow their claim, and also be allowed such damages. I do not see that the question of damages, as bearing upon the alleged failure of the respondents to comply with their said guaranty, need be considered in the trial of the action. If the said guaranty has not been fulfilled, then, as has already been stated, the respondents have no right of action for the non-payment of the last installment named in the contract; and, if it has been fulfilled, the appellants are not entitled to any damages on account thereof.

Upon the question of substantial compliance with the contract, and of the appellants being entitled to the deduction to enable them to complete the work in exact accordance with it, the circuit court seems to have entertained the correct view, except that a distinction must be made between the furnishing of the material, and doing the work, in constructing the mill, and the guaranty as to the capacity and capability of the mill when completed. The former matter is comparatively unimportant. A defect in the material or work can be easily remedied; but a lack of capacity or capability of the mill is a vital defect, and is irremediable. The fault, however, must be tangible; it it were so slight that it would not affect the utility of the mill, it should be disregarded.

The rule as to the allowance of damages for the loss of earnings and profits, in such a case, is correctly stated in *Griffin v. Colver*, 16 N. Y. 489. That case furnishes all the necessary information requisite upon that subject.

The judgment must be reversed, principally upon the error alluded to in regard to the contract having been made with reference to the water-power the appellants were using to operate their mill when the proposition to enter into it was made. The case will be remanded for a new trial in accordance with the principles of this opinion.

(16 Or. 105)

#### STATE v. NORTAN.

(*Supreme Court of Oregon.* February 29, 1888.)

#### INDICTMENT AND INFORMATION—DATED ON SUNDAY—ARREST OF JUDGMENT.

In Oregon the fact that an indictment is dated on Sunday is not a defect that can be taken advantage of on motion in arrest of judgment.

Appeal from circuit court, Multnomah county.

Indictment against Edward Nortan for burglary. There was a conviction, and defendant appeals.

*W. L. Nutting* and *R. J. Eaton*, for appellant. *Henry E. McGinn*, for the State.

LORD, C. J. The defendant was indicted, tried, and convicted of the crime of burglary. A motion in arrest of judgment was filed, and, after argument, denied by the court, and the defendant sentenced to imprisonment in the penitentiary for the period of three years. The indictment states all the facts material to be alleged to constitute the offense with which the defendant is charged, and ends in this wise, stating such facts: "Dated at Portland, the county aforesaid, this 30th day of January, 1887." The 30th day of January, 1887, was Sunday, and the objection raised is that the indictment is void, because dated on Sunday. In the press of business, it is probable that the district attorney availed himself of that day to draw this, and perhaps other indictments, and inadvertently dated it on that day, or it may have been done by mistake. However that may be, it is of little consequence. By the Code

of Criminal Procedure, the date is made no part of, nor is it a fact necessary to be stated to make a valid indictment. The time and place, etc., in the charging part of the indictment are specified, and every other material fact necessary to be alleged to make out the crime of burglary. The date when the indictment purports to have been drawn is of no significance, as it shows itself by indorsement that it was not presented and filed until the 5th day of February, 1887. It is made the duty of this court to give judgment without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. Hill's Code, § 1449; *State v. O'Neil*, 13 Or. 183, 9 Pac. Rep. 284. The date, being no fact necessary to be stated to constitute the offense, could not operate to affect any right of the accused, or prevent him from having a fair and impartial trial. At most, if at all, the defect is only formal, and waived if not taken advantage of by motion before trial. Merely technical errors or defects which could not have affected the guilt or innocence of the accused, or have prevented an impartial trial, cannot be made the basis of a new trial, much less for arrest of the judgment. If we may give it that importance, it requires something more than a mere defect in form to authorize a court to grant a motion in arrest of judgment. To do that it must appear (1) that the grand jury which found the indictment had no legal authority to inquire into the crime charged, because the same is not triable within the county; and (2) that the facts stated in the indictment do not constitute a crime. As the date referred to here constitutes no part of the facts necessary to be stated to constitute the offense charged, the motion was properly denied, and, there being no error, the judgment must be affirmed.

(16 Or. 121)

## WOODS v. COURTNEY.

*(Supreme Court of Oregon. March 6, 1888.)*

## 1. APPEAL—REVIEW OF EVIDENCE—BILL OF EXCEPTIONS.

Unless it affirmatively appears from the bill of exceptions that it contains all the evidence offered upon the trial, this court will not review the action of the trial court in refusing to order a nonsuit.

## 2. SAME—PRESUMPTIONS—EVIDENCE TO SUPPORT VERDICT.

Unless the contrary is made to appear affirmatively, this court is bound to presume there was evidence sufficient to authorize the verdict.

## 3. TRIAL—VERDICT—EFFECT.

A verdict conclusively settles every issue in favor of the party in whose favor it is rendered.

*(Syllabus by the Court.)*

Appeal from circuit court, Wasco county.

Action for malicious prosecution, brought by Anson Woods against W. F. Courtney. Judgment for plaintiff, and defendant appeals.

*H. Y. Thompson*, for appellant. *Bennett & Wilson* and *O. F. Paxton*, for respondent.

STRAHAN, J. This is an action for malicious prosecution. The plaintiff had a verdict for \$150, upon which judgment was entered, from which this appeal is taken. We have carefully examined the record, and are unable to find that the court below committed any error that is reviewable on this appeal. At the conclusion of plaintiff's evidence, the defendant moved for a nonsuit, which was refused, and this is assigned for error. In looking through the bill of exceptions, it is difficult to find any evidence which would sustain or justify a verdict for the plaintiff, but all the evidence is not in the bill of exceptions, or at least it nowhere appears from the record that the evidence given upon the trial accompanies it. We are therefore unable to review the action of the court, in refusing to grant a nonsuit. Unless the contrary is made to affirmatively appear by the record, we are bound to presume that there was evidence sufficient to authorize the verdict. The verdict conclusively settled

all the issues made by the pleadings in favor of the plaintiff, and this court cannot review the findings of the jury upon those questions.

2. The appellant's counsel relies upon his exception to the charge of the court to the effect that the testimony of Anson Woods was not material, and therefore, in law, could not be perjury. The evidence which is in the bill of exceptions to which the instruction is supposed to refer, is presented in such a manner that it is impossible for us to say whether it was material or not. It does not relate to any issue in the case, and, if material, could only become so on some collateral inquiry. Whether it did become material in that way it is impossible for us to determine on the record before us.

The court fully and correctly instructed the jury as to the law on every point in the case, and while we might differ with the jury as to their conclusions of fact, we have no power to disturb the verdict for that reason. Let the judgment of the court below be affirmed.

(2 Idaho [Hasb.] 386)

UNITED STATES *v.* ALEXANDER *et al.*

(*Supreme Court of Idaho.* February 18, 1888.)

1. PLEADING—ANSWER—GENERAL AND SPECIFIC DENIAL.

Under our practice generally, where the complaint is not verified, a general denial by defendant puts in issue the substantive allegations of the complaint; but where the action is brought upon a written instrument, and a copy of such instrument is set out, or annexed to the complaint, the genuineness and due execution of the instrument are deemed admitted unless the answer specifically denies the same, and is verified.

2. EXCEPTIONS, BILL OF—SETTLEMENT AND SIGNING—SUFFICIENCY.

A bill of exceptions, settled and signed by the trial judge, will be treated as such, although it is called a statement on motion for a new trial.

3. APPEAL—REVIEW—PRESUMPTION.

Where the record shows that a general demurrer was filed, but is silent as to any disposition of the same, the presumption will be indulged, on appeal, that the demurrer was overruled or abandoned.

4. SAME—HARMLESS ERROR.

An offer of oral proof being made and rejected, and exception duly taken, the appellate court must be satisfied, from the record, that the offered evidence was material, or tended to support some issue involved, before it will be treated as error.

5. JURY—CHALLENGE FOR CAUSE—DISCRETION OF COURT.

Great latitude of discretion is allowed to the court in the trial of challenges for cause, and where, on examination for cause, a juror states, in substance, that he has an opinion in favor of the defendant, but in spite of that opinion he could act upon the evidence and law of the case, and the juror was rejected, this court will not interfere with the discretion of the trial court, even though the members of this court should believe, from the record, that the juror so excluded was competent.

6. SAME—NUMBER OF PEREMPTORY CHALLENGES—SEVERAL PARTIES.

The legislature did not intend, when in an action there are several parties on either side, that each individual should have four peremptory challenges, but that they should join, and have one set on either side.

7. SAME—EXAMINATION FOR CAUSE—NEW TRIAL.

Where the record shows that a party was precluded from examining a juror for cause, and no examination of the juror was had, but he was allowed to serve, *held*, that a substantial right of the party was denied, for which a new trial will be granted.

(*Syllabus by the Court.*)

Appeal from district court, Nez Perces county.

This is an action against Joseph Alexander and others, sureties on the official bond of Isaac N. Hibbs, to recover a certain sum which it is alleged Hibbs, as postmaster, received from the United States, and for which he failed and refused to account. Judgment was rendered for the United States for the sum demanded, and, the defendants' motion for a new trial having been overruled, they appeal.

Winston & Reid, for appellants. James H. Hawley, U. S. Atty., for respondent.



BRODERICK, J. This action was commenced against the sureties on the official bond of Isaac N. Hibbs, late postmaster at Lewiston, to recover the sum of \$10,000, alleged to have been received from the United States by said Hibbs, as postmaster, and which he failed and refused to account for. The complaint is in the usual form, is not verified, but a copy of the bond is annexed thereto, and made a part of the complaint. The cause was tried at the December, 1886, term of said court, and resulted in a judgment against the defendants for the sum demanded. The defendants moved for a new trial. The motion was overruled, and from the judgment, and the order overruling the motion for a new trial, the defendants appealed.

The record consists of the judgment roll, and what purports to be a statement on motion for a new trial. Upon the argument here, counsel for respondent contended that the statement was not properly made and should be disregarded. Under our statutes as construed by this court, there is no substantial difference between a statement and bill of exceptions. The name given to the document is of little consequence. If it brings here the rulings or decisions of the court below, the objections and exceptions thereto, and is duly certified, it should be treated for what it is, and not for what it may have been called. In this case it is clearly a bill of exceptions, is certified as such, and must be so considered. *Bradbury v. Improvement Co.*, 10 Pac. Rep. 620; *Schults v. Keeler*, 13 Pac. Rep. 481.

The first assignment of error which we shall notice is the decision of the court in striking out, on motion, all the answer except the first paragraph thereof. This paragraph is, in substance, a general denial. Counsel for appellants argued at the bar that the several allegations of the answer, except the general denial, were stricken out on general demurrer, and that as the answer contained a denial, and was good thus far, the demurrer should have been overruled. We were "almost persuaded" that this point was well taken. It was a good argument, and well put, but the record is at variance with the argument. The transcript shows that a part of the answer was stricken out on motion, and not on demurrer. It is true a demurrer was filed, and the record is silent as to what disposition was made of it. In such case, on appeal it will be presumed that the demurrer was either abandoned or overruled. *Guthrie v. Phelan*, 6 Pac. Rep. 108. After the motion to strike out was disposed of, the defendants had left a general denial of the allegations of the complaint, and a trial was had of the issues thus joined. The answer was not verified, and hence did not put in issue the execution of the bond sued on. Section 4200 of the Code of Civil Procedure provides that "when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the answer denying the same is verified." To have put in issue the execution or genuineness of the instrument, a specific, verified denial was necessary. This disposes of the objections raised to the introduction of the original bond. Its execution and genuineness having been admitted by the answer, it would seem unnecessary to have offered it in evidence unless for the purpose of having it placed among the files, and hence no objection would lie to its reception.

Under the pleadings, the issues to be tried were whether Hibbs had, as postmaster, received this amount of money from the government, and had failed and refused to account for the same, or any part thereof, and whether demand had been duly made. In this state of the case the plaintiff was put to the proof of these allegations, and the defendants, under their general denial, could have introduced evidence to negative each and all of these averments. In other words, we understand that, under our practice generally, where a complaint is not verified, a general denial puts the plaintiff to the proof of the substantive allegations upon which his right of recovery depends, and that plaintiff's *prima facie* case, when made, may be controverted and overcome by de-

fendant. But this is not so when the action is brought upon a written instrument, and a copy is set out, or annexed to the complaint, and the defendant questions the instrument itself; nor is a general denial sufficient where a defendant has an affirmative defense in the nature of an avoidance. Bliss, Code Pl. § 324; *Lattimer v. Ryan*, 20 Cal. 628. In this case there was clearly nothing in the paragraphs of the answer stricken out that would warrant or allow any evidence which could not have been introduced under the general denial, and hence there was no error in this ruling.

Appellants complain of the ruling of the court in excluding the offer to prove, by one Kress, the meaning of certain letters and figures indorsed on the original bond. The record does not show that any question was propounded, but the witness was produced, and counsel offered to prove by him what the letters "M," "O," and "P," and the figures "\$6,000" and "\$4,000," meant. An objection was interposed to this offer, and was sustained by the court. We understand the rule to be that, where an offer of oral proof is made, the court must be satisfied of the good faith of the offer, and of the materiality of the evidence, otherwise it may properly be excluded. In this case there is nothing in the transcript to show or indicate that it was relevant to any issue involved, or would in any manner have aided the defense. If it appeared in any view of the case to be relevant, or if counsel had stated, in connection with the offer, that they intended to follow it up with other evidence which would make it material, then we think it would have been proper to have allowed it to go to the jury; but the bare offer to explain the letters and figures that had at some time been written on the back of the bond, without a pretense that it was material to the issues, has nothing to commend it, and we think was properly excluded. *Scotland Co. v. Hill*, 112 U. S. 186, 5 Sup. Ct. Rep. 98; *Schmidt v. Pfeil*, 24 Wis. 321; *Wilson v. Noonan*, 35 Wis. 360.

While impaneling the jury, one juror stated that he had "formed an opinion in favor of the defendants, but in spite of that opinion he could render a verdict according to law and the evidence in the case." This juror was challenged for cause, the challenge sustained, and to this ruling the defendants excepted. Great latitude of discretion must necessarily be allowed to the court in the trial of challenges for cause, and the rule is now well settled that the decision of the court on challenges for cause will not be disturbed unless it clearly appears that there was an abuse of discretion. The reason for this rule is obvious. The judge who tries the cause, sees the person called as a juror, hears his answers, and observes his manner and demeanor in the jury-box, can much better judge of his fitness and qualifications than can an appellate court from an examination of the record. But, if the ruling in the case at bar was erroneous, we think it would still devolve upon the appellants to show prejudice, and this they have not attempted to do. It has been well stated, in treating of this subject, that "neither party can be said to have a vested interest in any juror; therefore, although in impaneling a jury one competent person has been rejected, yet, if another equally competent person has been substituted in his stead, no injury has been done." *Thomp. & M. Jur.* § 251, and cases there cited. Applying these rules to the question under consideration, we see nothing in the ruling on this point of which appellants can complain.

In impaneling the jury the defendants were restricted by the court to four peremptory challenges, and of this they complain. The number of peremptory challenges is fixed by the statute, which provides in civil cases that each party is entitled to four, and, where there are several parties on either side, they must join in a challenge before it can be made. We do not think the legislature intended that, where there are several parties on either side, each individual should have four challenges, but that they should join, and have one set on either side. *Abb. Tr. Ev.* 23.

There is but one other question in the record we think deserves consideration. The bill of exceptions shows that when one of the jurors was called into the box, and sworn to answer as to his qualifications, he was asked by defendants' counsel the following question: "Have you formed or expressed the opinion that there is due the government any money from the bondsmen of I. N. Hibbs by reason of his defalcation?" This question was objected to, the objection sustained, and an exception taken. The record does not disclose the ground of the objection, nor does it indicate that any other question was propounded to the juror, or that any evidence was received as to his qualifications. All that is shown is the one interrogatory, the objection, the decision thereon, the exception, and that the juror served. It further appears that the defendants had, at this stage of the trial, exercised four peremptory challenges, and interposed another which was denied. The right given to challenge for cause carries with it the right to examine for cause, or have the court do so. While the court should control the examination, and may restrict it to the statutory grounds, yet the right of a party to know whether a juror is qualified and competent is a substantial right that cannot, under our law, be denied. This seems to be conceded, but it is suggested that, as the record is silent as to any other or further interrogation of this juror, we must presume that his competency was shown. We have held that the document in the transcript, denominated a statement, is in reality a bill of exceptions. Since this is so, we must presume that it contains all the evidence and other matters material to the exceptions. This presumption will always be indulged unless the contrary affirmatively appears from the record. *Hayne*, New Trials & App. § 258; *People v. English*, 52 Cal. 211; *Schults v. Keeler*, *supra*. Under the facts of this case as disclosed by the record, we think the court erred in sustaining the objection to the question propounded to the juror. The judgment is therefore reversed, and cause remanded for a new trial.

HAYS, C. J., and BUCK, J., concurring.

(2 Idaho [Hasb.] 378)

#### M'GUIRE v. LAMB.

(*Supreme Court of Idaho*. February 6, 1888.)

#### 1. SET-OFF AND COUNTER CLAIM—WHEN ALLOWABLE—JOINT DEBTS.

A counter-claim alleging a debt due defendant and a former partner, or stranger to the suit, *held* to be bad, and a demurrer thereto properly sustained.

#### 2. SAME—PLEADING—SUFFICIENCY.

A counter-claim which fails to allege that the debt existed at the commencement of the action, but alleged that it is now due, *held* to be bad, and a demurrer thereto properly sustained.

#### 3. APPEAL—REVIEW—FINDINGS BY THE COURT.

Where the findings are responsive to all the material issues raised by the pleadings, and they support the judgment, judgment will be affirmed.

(*Syllabus by the Court*.)

Appeal from district court, Ada county.

Action upon a promissory note, brought by Robert McGuire against John M. Lamb. Judgment was rendered in favor of plaintiff, and defendant appeals. *J. Brumback*, for appellant. *Huston & Gray*, for respondent.

HAYS, C. J. This was an action brought by plaintiff against defendant upon a promissory note given by defendant to plaintiff. The defendant did not deny the cause of action set out in the complaint, but set up three counter-claims. The plaintiff demurred to each of the counter-claims. The demurrer was sustained as to the first and third, but overruled as to the second. The defendant duly excepted to the ruling of the court, and now assigns the same as errors.

The first counter-claim is as follows: "That from July 1, 1884, to June 15, 1885, this defendant and one H. E. Prickett were partners in the practice of law, doing business under the firm name of Prickett & Lamb; that during said time said H. E. Prickett and this defendant were each attorneys and counselors at law, practicing as such in the various courts of Idaho territory; that on the 15th day of June, 1885, said H. E. Prickett deceased, leaving this defendant the surviving partner; that between the 1st day of December, 1884, and the 1st day of June, 1885, this defendant, as such partner, counseled and advised plaintiff, at his request, in and about certain matters and difficulties between said plaintiff and one Nora Gess, since become the wife of plaintiff, and in attending in and about the said business of the plaintiff; that said services were reasonably worth the sum of two hundred dollars, no part of which has been paid." The statutes provide that a counter-claim must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action. It seems to be well settled that the defendant cannot set up and maintain as a valid counter-claim a right of action subsisting in favor of another person. The test is whether the defendant could have maintained an independent action upon the demand. If it exists in favor of defendant and a stranger to the suit, it cannot be set up. *Hook v. White*, 36 Cal. 299; *Weil v. Jones*, 70 Mo. 560; 7 Wait, Act. & Def. p. 540, § 4, and cases there cited. Pomeroy, in his work on Remedies and Remedial Rights, § 751, says: "Where a party is sued, a demand in favor of himself and a former partner, not a party to the suit, is inadmissible as a counter-claim." This seems to be abundantly sustained by the authorities. It follows, therefore, that the demurrer to the first counter-claim was properly sustained.

The third counter-claim is as follows: "That from the 1st day of June, 1884, up to the 1st day of July, 1886, the plaintiff and this defendant were partners in the manufacture and sale of lumber and shingles in Idaho territory, under the firm name of Lamb & McGuire; that the interest of plaintiff in said partnership was one-third, and the interest of defendant was two-thirds; that the plaintiff and defendant, as such partners, during said time, engaged in the business of manufacturing and of selling and disposing of the same in Idaho territory; that the books of said partnership were kept by one George M. King and one J. C. Shainwald; that this defendant is informed and believes that the liabilities and losses of said partnership have been about twenty-five thousand dollars, all of which have been paid by this defendant; that this defendant is informed and believes that there is now due and owing to this defendant from said plaintiff for and on account of said partnership the sum of eight thousand three hundred and thirty-three dollars, no part of which has been paid." Did the court err in sustaining the demurrer to the third counter-claim? Clearly not, for, from an examination of the transcript before us, we find the action was commenced on the 7th day of September, 1886, and the answer was sworn to on the 11th day of April, 1887; and the defendant nowhere says that he had paid the liabilities and losses of the partnership before or at the commencement of this action. Again, the defendant says that there is now due and owing to this defendant from said plaintiff for and on account of said partnership the sum of \$8,333, no part of which has been paid. He does not say or claim that this demand existed at the commencement of this action. Not having alleged this, the demurrer was properly sustained. *Rice v. O'Connor*, 10 Abb. Pr. 362; *Chambers v. Lewis*, 11 Abb. Pr. 210. The third counter-claim of the answer may be true, and yet the defendant have no claim against the plaintiff at the commencement of the

action, for he says it is now due. We think he should have stated that at the commencement of the suit the claim was due, or words to that effect. We think there is a marked difference between the case at bar and the cases of *Gage v. Angell*, 8 How. Pr. 335, and *Waddell v. Darling*, 51 N. Y. 327, cited and relied upon by defendant. In the former case the counter-claim alleges the partnership had been dissolved prior to the commencement of the action; and on page 337 of said case the learned judge says: "Counter-claims, to be available as a defense to an action, must arise upon contract, and must exist at the commencement of the action." In *Waddell v. Darling*, the defendant alleged the dissolution of the partnership at a time that was doubtless before the commencement of the action, and also asked for an accounting, and the application of the balance found due; while in the case at bar the dissolution of the partnership is not alleged, nor is any accounting asked for.

The case was tried upon the issues formed by the second counter-claim, before the court without a jury. Findings of fact and conclusions of law filed, and judgment entered thereon. After entry of judgment, exceptions were taken thereto, and during the term in which the case was tried the judge filed further and amended findings, to which defendant excepted. The object of an exception is to call the attention of the judge to the particular point complained of, so that he may have an opportunity to correct the same, and thus relieve the party objecting from the operations of the supposed error. To hold that the judge has no power to amend his findings after exceptions had been taken thereto would be to hold that the judge had no power to correct the error complained of, and would deprive the party complaining of the right which the exception was intended to give him. Of the right to amend findings before judgment we have no doubt. *Hayes v. Wetherbee*, 60 Cal. 396, and cases there cited; *Hayne*, New Trials & App. § 347. That they could not do so after an appeal from the judgment had been taken we think equally clear; but whether the judge can amend or file new findings after entry of judgment, and before appeal is taken, is a query which we deem it unnecessary to discuss or decide at this time, for we think the findings, as entered before judgment, were responsive to all the material issues raised by the pleadings, and that they were sufficient to support the judgment.

We have carefully examined all the points discussed by appellant, and, finding no error, the judgment is affirmed.

BUCK and BRODERICK, JJ., concurring.

(20 Nev. 106)

ROSINA v. TROWBRIDGE. (No. 1,247.)

(Supreme Court of Nevada. March 17, 1888.)

1. MINES AND MINING—MINERS' LIENS—PLEADING.

In an action to enforce a lien for labor performed upon a mine, defendant was a partner who held the legal title in trust for the benefit of the firm, and he pleaded this fact in his answer, alleging knowledge thereof by plaintiff. *Held*, that such portion of the answer was properly stricken out, the other members of the firm not being necessary parties.

2. SAME—ENFORCEMENT OF LIEN—OWNERSHIP OF MINE—EVIDENCE.

In an action against a partner who held the legal title to a mine for the benefit of the firm, to enforce a lien for labor performed thereon, plaintiff was asked if he then knew that the parties who comprised the firm owned the mine. *Held*, that it was immaterial what plaintiff then knew in regard to the ownership of the mine, and that ownership in the other members of the firm of an interest in the mine did not affect defendant's liability.

3. SAME—CONTRACT FOR LABOR—ERROR WITHOUT PREJUDICE.

Plaintiff worked on defendant's mine under a contractor, who by written contract with defendant was to pay employes a certain *per diem*. Plaintiff had knowledge of such contract, and worked thereunder. Defendant offered in evidence the written contract, which was excluded, but was afterwards permitted to give oral testimony as to the amount the contractor was to pay. Plaintiff's objections to the oral

testimony were sustained, but it was not stricken out, and the jury found in accordance with defendant's testimony. *Held*, that the exclusion of the written contract did not prejudice defendant.

4. **SAME—NOTICE TO MINERS—LIABILITY OF OWNER.**

Gen. St. Nev. § 3816, provides that the owner of lands seeking to escape the effect of a lien for work thereon shall, after knowledge that the work is being done, post a notice on the premises that he will not be responsible for the same. *Held*, that personal notice, without that required by the statute, is of no effect.

5. **SAME—CONTROL OF MINE—CONTRACTOR AS AGENT.**

Under Gen. St. Nev. § 3808, in relation to liens, providing that, for the purposes of that act, contractors having control of and running a mining claim shall be the owner's agent, findings of the jury, in an action to enforce a lien for labor, (1) that R. entered into a contract with T. & Co. to take out ore from the latter's mine upon certain terms, and (2) that, while so engaged, R. was the agent of T. & Co. in the management of the mine, are not inconsistent.

6. **SAME—JUDGMENT—LIABILITY OF TRUSTEE.**

In an action against a partner who held the legal title to a mine in trust for the benefit of the firm, to enforce a lien for labor performed thereon, where judgment is rendered against him, only his interest in the mine can be sold to satisfy such lien.

7. **SAME—NEW TRIAL—MODIFICATION OF FINDINGS.**

In an action to enforce a lien for labor performed upon defendant's mine, the evidence showed that defendant had a contract with his contractor to pay employees a certain *per diem*. The court, on motion for new trial, found that a finding of the jury that plaintiff was ignorant of such contract, and did not work under it, was wrong. *Held*, that the court either should have given a new trial for the error, or, with plaintiff's consent, rendered judgment for the amount shown to be actually due.

8. **SAME—APPEAL—GROUNDS OF OBJECTION NOT STATED.**

In an action to enforce a lien for labor performed upon defendant's mine, the statement on appeal contained the following: "*Question*. 'What was the work reasonably worth?' Objected to by defendant. Overruled and excepted to." The statement did not show the grounds of objection. *Held*, that the appellate court must presume that no grounds were stated for such objection, and it cannot be reviewed.

Appeal from district court, Nye county; D. C. McKENNY, Presiding Judge. Action by Rosina against N. S. Trowbridge to enforce a lien for labor performed upon a mine. Judgment for plaintiff, and defendant appeals. *David S. Truman*, for appellant. *Curler & Bowler*, for respondent.

LEONARD, C. J. Action to enforce a lien for labor performed by plaintiff upon the "Two G." mine described in the complaint. Appeal from judgment and order overruling defendant's motion for a new trial. The following facts are undisputed: When plaintiff performed the work, and up to and including the time of trial, defendant was the owner of the legal title to the premises in question, the same having been conveyed to him by sheriff's deed. Before plaintiff commenced work, Henry Roddick entered into a contract with N. S. Trowbridge & Co., whereby the latter agreed to furnish the Two G. mine for the use of the former, who undertook to extract ores upon certain agreed terms. Roddick worked the mine under the contract. He had charge of the mine and work; employed and discharged the men, including plaintiff. Defendant and the other members of the firm had knowledge of the contract, and of the work and improvements being done on the mine, but no notice was ever posted as required by section 9 of the lien law, (Gen. St. § 3816.) In the lien claim filed, and in the complaint, it was stated and alleged that defendant, N. S. Trowbridge, was the owner, and that plaintiff was employed by Roddick as the agent of defendant. In his answer defendant denied that he was owner, or that Roddick was his agent, or the agent of N. S. Trowbridge & Co., or that plaintiff performed any work for him or the firm, in or upon said mine, or that he was employed by either; but he admitted that Roddick, having charge and control of the mine under the agreement, employed plaintiff upon certain terms stated, and that plaintiff performed the labor for Roddick. He alleged that plaintiff was employed by Roddick to work for him, and not for defendant or the firm, and that plaintiff so understood his con-

tract of employment, and that he performed his work knowing that Roddick was not the agent of defendant or of the firm. In addition to the above, defendant alleges, in substance, as follows: That, at the times mentioned in the complaint, N. S. Trowbridge, Morton C. Fisher, and J. M. English were partners carrying on mercantile business under the firm name of N. S. Trowbridge & Co.; that, prior to the execution of said contract between the firm and Roddick, N. S. Trowbridge & Co. purchased said property at sheriff's sale, and, before plaintiff had concluded his work, received a deed therefor, duly executed and delivered by the sheriff; that ever since said time said firm has owned, and now owns, said property; that defendant now holds, and at all times has held, the title to said property in his name, in trust for the firm of N. S. Trowbridge & Co., and that plaintiff knew the same; that said property was purchased at sheriff's sale with, and paid for out of, the partnership funds of N. S. Trowbridge & Co., and for partnership uses and purposes. The answer showed that at the time the lien was filed the partnership no longer existed, the period during which it was to continue having passed. There is no allegation or proof of any partnership indebtedness.

1. On motion of plaintiff the court struck out the portion of the answer alleging the partnership, the ownership of the mine by the firm, the holding of the title by defendant in trust for the partnership, and the knowledge thereof by plaintiff, on the ground that the same constituted no defense to the action. The action is against defendant, one of the alleged partners, for the purpose of enforcing the lien against defendant's interest in the premises described. True, a personal judgment against defendant, in case of deficiency, was prayed for in the complaint, and granted by the court in the original judgment; but the personal judgment is not contained in the judgment as modified from which the appeal is taken. Would proof of the allegations struck out have defeated plaintiff's action, in whole or part, or did the expunging of those allegations deprive defendant of any material defense that he was entitled to make? We shall not stop to inquire whether defendant, being in the situation stated, is such a representative of the other persons named, his former partners, as that a decree against him, and a sale thereunder, would be binding upon them as well as himself. That question is not in the case. In *Gould v. Wise*, 18 Nev. 258, 3 Pac. Rep. 30, it was decided that, under section 9 of the lien law, (Gen. St. § 3816,) the interests of owners of reduction works may be subjected to lien claims for labor performed in running the works for a lessee, if, knowing the labor is being performed, the owners fail to give the notice required by the statute. It cannot be doubted that according to the doctrines of that decision the interests of the owner or owners of the Two G. mine were chargeable with a lien for plaintiff's labor, for it is not pretended that any notice was posted. It is equally clear that the entire interests of the three persons named were subject to the lien. In other words, it cannot be doubted that plaintiff might have subjected the entire property to the influences of his lien claim, if he had stated, in his claim filed, that defendant was the owner of the legal title, but that he and the two other persons named were the owners of the equitable title; and had otherwise complied with the lien law, and had brought his action against the three. But he did not do so. He stated, in his lien claim, that defendant was the owner, and reputed owner, and, in his complaint, that defendant was the owner, and made such alleged owner the only defendant, praying for judgment directing a sale of the premises described, to the extent of defendant's rights therein at the time the work was commenced, and the lien filed, in satisfaction of his claim and costs. In discussing the question before us we must consider it true that the property was held and owned as stated in the answer, and that plaintiff was cognizant of the fact. The record does not show that defendant asked the court to make his former partners parties to the action; but he did plead the facts stated, and, if from those facts they were necessary parties, they ought to have been brought in. Did not plaintiff

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have the right to bring his action against defendant alone, and sue his interest in the property, if he was content to do so? It is certain that his former partners were not necessary parties in order to pass the legal title. *In re Smith*, 4 Nev. 263; *Kay v. Whittaker*, 44 N. Y. 572; *Fire Co. v. Lent*, 6 Paige, 637; *Bank v. Goldman*, 75 N. Y. 131; *Green v. Dixon*, 9 Wis. 537; Pom. Rem. & Rem. Rights, § 342. And all the authorities hold that persons not made parties are not affected by the judgment. In *Miller v. Faulk*, 47 Mo. 264, the court say: "\* \* \* But the plaintiffs aver that the legal title to the premises is in certain parties who are not joined as defendants. The title is held in trust, as the petition avers, for the use and benefit of the 'members of the Presbyterian Church of Jefferson City, Mo.' What effect these proceedings will have upon the rights of members of the church who are not joined as defendants it is not necessary to decide." And see *Planting Mill v. Church*, 54 Mo. 521. In that case the contractor and trustees of the church were made defendants. The latter were alleged to be trustees and owners of the church building upon which plaintiff claimed his lien. The trustees filed an answer in which, after denying all the material allegations in the petition, they averred as follows: "That they are only trustees of the Presbyterian Church, \* \* \* which said church is a corporation, by that name duly incorporated under the laws of this state; and that as such incorporation it held the legal and equitable interest in the lot and building described in the petition; and that said defendants are only the trustees of said church and corporation, and have no title or interest in the said premises as such trustees. The defendants further aver that said church, so incorporated as aforesaid, has an equitable interest in said lot and premises, \* \* \* and which is sought to be charged with said lien; and that the plaintiff had knowledge of said equitable interest at the date of its alleged contract with said Faulk, and of the filing of its supposed lien; and that said church and corporation is not made a party defendant to this action; wherefore it is averred that said church or corporation cannot be made liable under a judgment obtained in this form; and that these are not proper parties defendants to the record; and that said suit should be dismissed;" etc. Said the court: "It is further insisted by the defendants in this case that the evidence of the witnesses shows that the Presbyterian Church is a corporation, and should have been made a party to the suit, as it had an equitable interest in the property to be effected. \* \* \* The defendants sued were the persons who made the contract for the building, and who held the legal estate in the premises to be charged. They being proper parties, if other parties in interest were not also made parties, that fact would not defeat the action. The only effect that could result would be that the judgment in the case might not, and in some cases would not, affect the interests of those who were not made parties."

Our lien law makes no provision concerning parties. It only provides that "said liens may be enforced by an action in any court of competent jurisdiction on setting out in the complaint the particulars of the demand, with a description of the premises to be charged with the lien;" but the provisions of the civil practice act are applicable to actions of this kind, as they are in cases for the foreclosure of mortgages. A mechanic's lien is a charge on real estate, created by law, in the nature of a mortgage, to secure the payment of money due for work done thereon, or materials furnished therefor. *Otis v. City of Boston*, 12 Cush. 44. The foreclosure of a mechanic's lien is subject to the same rules as foreclosure of a mortgage, as respects parties. *Whitney v. Higgins*, 10 Cal. 547. In his work on Remedies, etc., Mr. Pomeroy says, at section 329: "In all equitable actions a broad and most important distinction must be made between two classes of parties defendant, namely, (1) those who are 'necessary,' and (2) those who are 'proper.' Necessary parties, when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause. Proper parties



are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation. Confusion has frequently arisen from a neglect by text-writers, and even judges, to observe this plain distinction. Parties are sometimes spoken of as necessary when they are merely proper.

\* \* \* In an action to foreclose a mortgage, the owner of the land covered by it is a necessary defendant, because without his presence no decree can be made for the sale of the land,—in other words, no effective decree at all,—and the suit would be an empty show of litigation. The holders of subsequent mortgages, judgments, and other liens upon the same land are not necessary parties in order to the rendition of an effective judgment, because the land can be sold without their presence, and without cutting off their liens. If, however, the plaintiff desires to settle all the questions involved, in one controversy, and to determine the rights of all the persons who have any interest in the land, he must bring in all these holders of subsequent liens, so that a judgment may be given which shall foreclose their rights. To accomplish this end these persons must be made defendants, and in that respect they are necessary parties, that is, necessary in order to attain the particular result desired. They are not, however, necessary to the decision of the main issues involved in the suit, and to the granting of a decree. \* \* \* A practical test will at once fix the class into which any given person interested in an equitable litigation must fall. If the person is a necessary defendant, a demurrer for defect of necessary parties on account of his non-joinder will be sustained; and, conversely, if the demurrer will be sustained, the person is a necessary party. If the given person is merely a proper party, such a demurrer will not be sustained on account of his non-joinder, although the court may, undoubtedly, in the exercise of its discretion, order him to be brought in." In *Re Smith*, 4 Nev. 258, it is said: "It is not, we think, questioned but that a title to real estate derived from a sale under a decree of a competent court having jurisdiction over the subject-matter and the parties before it is good, provided any of the parties before the court when the decree was made had the title. \* \* \* If the owner of the legal title is in court, we apprehend the title will pass under a decree and sale, although all the proper parties to a suit in equity may not be in court." And on rehearing the court said: "In our former opinion we held, in effect, that in the proceedings of *Green v. Chedic and Milne*, he had made all the parties defendants whom it was necessary to make such in order to pass the legal title, but he had not all the proper parties before the court; consequently the sale and passage of the title did not divest Curry's lien. \* \* \* Under this rule, then, Green had a right to foreclose, making only Chedic and Milne parties. Under such proceedings he could divest them of their legal title, and vest the same in himself, or any other person who might purchase it at the sale under the decree." See, also, *Pom. Rem. & Rem. Rights*, § 336; *Douglass v. Bishop*, 27 Iowa, 216. There are many cases wherein it was held that the *cestui que trust* should have been made defendant in suits for the foreclosure of mortgages and mechanics' liens, and wherein the judgments were reversed because he was not made so; but in all such we think it will appear, either that, in whole or part, it was the object or result of the suit, or both, to conclude by judicial decree the *cestui que trust*, without giving him his day in court. That is not the case here, because, as before stated, this suit was brought for the purpose of enforcing the lien against defendant's interest only. The decree cannot, and will not be allowed to, effect the rights of his former partners, if any they have. *McDonald v. Backus*, 45 Cal. 265, is cited by counsel for defendant in support of his claim of error in this connection. Backers was the person for whom the house charged with the lien was built, and Froment & Co., a partnership composed of Froment, Veuve, and Swain, were the contractors who employed McDonald, the plaintiff, to do the

work for which the lien was claimed. The contractors were personally liable to McDonald. The fifth subdivision of section 10 of the lien law then in force (St. 1867-68, p. 592) provided that "in all suits to enforce any lien created by this act, all persons personally liable, and all lienholders whose claims have been filed for record under the provisions of section five of this act \* \* \* shall be made parties." Plaintiff was employed by Swain, one of the partners; but, since his act of employment of McDonald bound his copartners as well as himself, the court held that under the statute there was a non-joinder of necessary parties defendant. That decision is undoubtedly correct under the mandatory statute referred to, but it is not applicable to this case, under our statute.

Our opinion is that defendant's former partners were not necessary parties defendant in this action to enforce plaintiff's lien against defendant's interest, and that proof that other persons were equitable owners would not have defeated the action. Defendant was the "owner" of the entire legal title, and the "owner," in law and equity, to the extent of his interest in the partnership; and plaintiff had the right to enforce his claim against such interest if he was satisfied to do so. *Garrett v. Stevenson*, 3 Gilman, 280; *Miller v. Faulk*, 47 Mo. 264; *Planting Mill v. Church*, 54 Mo. 525; *Spare v. Waltz*, 15 Phila. 263; *Smith v. Johnson*, 2 McArthur, 483; *Sill's Appeal*, 1 Grant, Cas. 235; *Anderson v. Dillaye*, 47 N. Y. 678; *Jones v. Shawhan*, 4 Watts & S. 262; *Chambers v. Benoit*, 25 Mo. App. 523; Phil. Mech. Liens, § 81. Although we think it would have been better practice to have made the other persons alleged to have been partners parties defendant, we are unable to see that defendant was deprived of any material defense by the action of the court in this connection, and consequently we must hold that the court did not err in striking out the portion of the answer under consideration.

2. The statute provides that when the notice designates, as the ground upon which the motion for a new trial will be made, insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient, and that, if no such specification be made, the statement shall be disregarded. Civil Proc. Act, § 197. The authorities are uniform to the effect that, under this statute, the statement must particularly specify the errors relied on, and wherein the evidence is insufficient, and that only the points so specified can be considered on appeal. Outside of the authorities this must be as stated, because the statute also provides that "the statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points thus specified, and no more." This is so even though the statement contains all the evidence, as in this case. *Brumagin v. Bradshaw*, 39 Cal. 33. It is so, too, where there are no express findings, and findings necessary to support the judgment are to be implied. *Hixon v. Brodie*, 45 Cal. 277; *Mahon v. Turnpike Road Co.*, 49 Cal. 272. And see *More v. Lott*, 13 Nev. 381. "It must be presumed that the verdict or decision is sustained by the evidence in all respects, except in those particulars in which the statement specifies the evidence to be insufficient. For these reasons we can only consider the particulars thus specified." *Hidden v. Jordon*, 28 Cal. 313; Hayne, New Trials & App. § 151. The only specifications of insufficiency in this case are as follows: "The defendant \* \* \* specifies the following particulars in which the evidence is insufficient to support the findings of the jury adopted by the court, and the findings and decisions of the court made in addition thereto: *First*. Findings number one (of the jury) and two (of the court) are inconsistent and contradictory in themselves, and cannot be sustained in this, to-wit: (1) They find that H. Roddick and N. S. Trowbridge & Co. entered into a contract, with the terms thereof as testified to by N. S. Trowbridge, and contained in the evidence set forth above; and they further find (No. 2) that at the dates above mentioned one Henry Roddick was the agent of the defend-

ant in the management of said mine; (2) the evidence undisputed shows that H. Roddick performed all the work he did in the mine, under the contract; (3) the uncontradicted evidence shows that H. Roddick never had any authority from Trowbridge or the firm to employ the plaintiff to work for him or them, or on his or their behalf. *Second*. Findings number two and three of the jury are not supported by the evidence, and are against law, (for the preponderance of testimony shows that the plaintiff had knowledge of the contract between Roddick and Trowbridge & Co., and is bound by the terms thereof,) and not within the issues made by the pleadings." The only findings embodied in the statement are the three special findings of fact found by the jury and adopted by the court, in substance as follows: "*First*, (requested by plaintiff.) That defendant was indebted to plaintiff, as a balance due for said work, two hundred, fifty-six, 28-100 dollars. *Second*, (requested by defendant.) That N. S. Trowbridge & Co. made and entered into a contract with Roddick, with terms as testified by defendant. *Third*. That plaintiff was not informed of such contract, and that he did not work thereunder in the Two G. mine." There are in the transcript what purport to be other findings and conclusions of law by the court, but they are not embodied in the statement on motion for new trial, and cannot, therefore, be considered on appeal. *Nesbitt v. Chisholm*, 16 Nev. 39; *Simpson v. Ogg*, 18 Nev. 28, 1 Pac. Rep. 827. Nor does the fact that they were referred to and used on the hearing of the motion for new trial change the rule. *Boyd v. Anderson*, 18 Nev. 348, 4 Pac. Rep. 497. But, in the absence of express findings, we must presume there were such implied findings as are necessary to support the judgment. *More v. Lott*, 13 Nev. 380; *Hayne*, New Trials & App. § 339.

Referring now to the first specification of insufficiency of evidence, and admitting, for the sake of the argument, that in order to sustain the decision the court must have found as a fact that "Henry Roddick was the agent of defendant in the management of the mine," still the two findings are not inconsistent or contradictory. The facts stated in both findings are (1) that Roddick and Trowbridge & Co. entered into the contract testified to by defendant, that is to say, Roddick agreed, upon certain terms, to take out ore, and deliver it to Trowbridge & Co.; and (2) that, while so engaged, he was agent of defendant in the management of the Two G. mine. It is not denied that the first finding just referred to is correct. It is what defendant sought to establish. But the claim is that the second one is not correct, and is inconsistent with the first. The first is the result of undisputed testimony without reference to the statute; and the second results from the fact, also undisputed, that plaintiff performed his labor at the instance, and under the employment, of Roddick, who had charge and control of the mine, and whom, for that reason, section 1 of the statute made the owner's agent. Roddick did perform all his work under the contract, but, so far as plaintiff is concerned in the matter of the lien, he was the agent of any and all owners of the mine. Roddick did not have authority to employ plaintiff for Trowbridge & Co. directly; but he had power to complete the employment for himself, and thereby bind the interest of all owners and claimants if they did not post the notice provided by section 9 of the lien law.

Finding No. 2 of the jury is supported by uncontradicted evidence. As to No. 3 there was a conflict. But on the hearing of the motion for a new trial the court was of the opinion that that finding was wrong; that plaintiff was informed of the contract, and that he did perform his work thereunder. To correct the result of the error the court proposed to grant a new trial, unless plaintiff consented to a modification of the judgment so as to allow him three dollars a day, that being the amount plaintiff was entitled to receive according to the court's construction of the Roddick contract. Plaintiff consented to this modification and to the striking out of the personal judgment against defendant, in case of deficiency, and thereupon a new trial was denied. It is

claimed that the judgment as modified is not correct, that plaintiff was entitled to receive only \$2.79 a day. We think this view is correct, and will dispose of the matter further on.

Our conclusion is that none of the assignments of error on the ground of insufficiency of evidence, etc., are well taken except as to No. 3, and it follows that we must presume in all other respects there was sufficient evidence to support all findings that, under the pleadings, must be implied in order to support the decision.

3. It is next urged that, for certain reasons given, the court erred in permitting plaintiff to testify as to the value of his services. The statement contains the following record: "*Question*: What was the work reasonably worth? Objected to by defendant. Overruled, and excepted to." The statement also shows that "the grounds of all the exceptions of the defendant taken upon the trial are contained in the assignment of errors herein." It is by no means certain that an objection to this question should have been sustained, even though it had been properly taken, (*Parker v. Mining Co.*, 61 Cal. 348; *Wilkins v. Stidger*, 22 Cal. 236; *Abadie v. Carrillo*, 32 Cal. 175; *De la Guerra v. Newhall*, 55 Cal. 22; *Sussdorff v. Schmidt*, 55 N. Y. 324; *Abb. Tr. Ev.* 367;) but this question we do not decide. So far as the record shows, there was an objection, (but no grounds of objection were stated,) and an exception was taken to the ruling admitting the evidence. The statement informs us of the grounds of exception only. We must presume, then, that no grounds of objection were stated. That objections thus made will not be reviewed on appeal has been established by a series of uniform adjudications of this and other courts. The same facts appear in relation to the testimony of other witnesses upon the question of the value of plaintiff's services, and the admission in evidence of plaintiff's notice of lien, and the same result follows.

4. The court did not err in striking out the following question asked plaintiff on cross-examination, together with his answer thereto: "Do you not know for a fact that the same parties who comprised the firm of N. S. Trowbridge & Co., at the time you worked, owned the Two G. mine? Yes." In the first place it was immaterial that plaintiff then knew the fact to be as stated. That would not have tended to show that he knew it when he did the work, or when he filed his claim of lien, or when he brought suit. But if our conclusions are correct in relation to the court's order striking out a portion of the answer, it must follow that it was not error to strike out this question and answer also, or to refuse to allow defendant to answer the question, "Who are the owners of the Two G. mine?"

5. In view of the order we shall make touching the amount due plaintiff, and for which he may have a lien against defendant's interest, it is unnecessary to consider the errors of law specified in defendant's sixth assignment.

6. Defendant offered in evidence the written contract between N. S. Trowbridge & Co. and Roddick referred to above, but the court refused to admit it. In view of the allegations in defendant's amended answer, and of his claim that plaintiff's *per diem* was to be governed by that contract, we think the court erred. But the record shows that subsequently, without objection at the time, defendant testified to the terms of the contract,—the same as those set forth in the written contract; that thereupon plaintiff objected to this testimony, and the objection was sustained. But there was no motion made to strike out the oral testimony of the terms of the written contract, nor was it stricken out. The record also shows that one of the questions submitted to the jury was, "Did N. S. Trowbridge & Co. make and enter into a contract with one Henry Roddick with the terms as testified by the defendant, N. S. Trowbridge? Yes." Thus it is shown that the oral testimony of defendant was considered by the jury, that they found in favor of defendant upon the question, and that the court adopted the finding of the jury. The defendant could not have been injured by the rejection of the

written contract. *Richardson v. Hoole*, 13 Nev. 498; *Mining Co. v. Boles*, 24 Cal. 368; *Hayne*, New Trials & App. § 103.

7. The court did not err in refusing to permit Roddick and Brown to testify to the effect that they gave plaintiff personal notice that neither the defendant nor N. S. Trowbridge & Co. would be responsible for any indebtedness contracted or accruing for work done under the Roddick contract. It is said if such notice was given it was not necessary to post written notice on the mine, as required by section 9 of the lien law, and that, if plaintiff continued work after receiving personal notice, he waived his lien. We do not think so. The statute declares that the interest of every owner or claimant shall be subject to any lien filed in accordance with its provisions, unless such owner or claimant, after obtaining knowledge, etc., shall, within a certain time, post a certain notice in a place specified. The legislature has seen fit to limit persons owning or claiming any interest in property mentioned in section 9, to one method of giving notice if they wish to escape the effect of liens. We cannot supply others. This question has been decided in many cases, and, so far as we know, against the views of counsel for defendant. *Gay v. Hervey*, 41 N. J. Law, 48; *Shaw v. Thompson*, 105 Mass. 350; *Moore v. Jackson*, 49 Cal. 109; *Thompson v. Shepard*, 85 Ind. 356; *Gould v. Wise*, 18 Nev. 253, 3 Pac. Rep. 30; *Nellis v. Bellinger*, 6 Hun, 560.

8. Acting in accordance with the provisions of section 198 of the practice act, which requires the court or judge granting or refusing a new trial to state, in writing, generally, the grounds upon which a new trial is refused or granted, the court stated as follows: "I think, as matter of law and fact, plaintiff knew of the contract between N. S. Trowbridge & Co. and H. Roddick, and performed the work herein under such contract, and thereby became entitled to his lien for such labor rendered, as was proven in this case, to-wit, one hundred and thirty-one and one-half days at three dollars per day, the same being the amount that N. S. Trowbridge & Co. were to pay the employes of H. Roddick who worked and performed labor in extracting ore from the Two G. mine." This opinion, or these reasons, given by the court, are in no sense findings. The court had no power at that time to change its findings. But it had the right, and such was its duty, to grant a new trial for any material error committed at the trial, or, by plaintiff's consent, to modify the judgment so as to remove all possible injurious effects of the error. *Hawkins v. Reichert*, 28 Cal. 538; *Dickey v. Davis*, 39 Cal. 569; *Carpentier v. Gardiner*, 29 Cal. 164; *Phillipotts v. Blasdel*, 8 Nev. 76.

The court undertook to modify the judgment as to the amount plaintiff was entitled to receive according to the terms of the Roddick contract, but it did so in part only. According to that, and the uncontradicted testimony as to the amount and value of the ore taken out by Roddick, plaintiff was entitled to receive only \$2.79 a day. The court reduced the judgment from \$256.28 to \$190.88, when, from the court's view of the facts, it should have been reduced to \$156.28.

9. It is urged that the court, in its decree, should have limited plaintiff's lien to defendant's interest in the property, and that only such interest should have been ordered sold to satisfy the judgment. It is certain that plaintiff is not entitled to a sale of anything beyond defendant's interest in the property described. It does not seem that, under the statute, (Gen. St. §§ 3253, 3882,) any interests other than defendant's can be sold, or that the purchaser can acquire anything beyond the "right, title, interest, and claim" of the judgment debtor, (*McCormack v. Phillips*, 34 N. W. Rep. 60;) but it is best to remove all doubts in the premises.

It is ordered that plaintiff have 15 days within which to file, in the court below, consent, in writing to a modification of the judgment appealed from, as hereinbefore expressed; and, upon such consent being filed, the court below is directed to modify the judgment accordingly, and, also, in the decree

and order of sale to limit the property to be sold to the right, title, interest, and claim of defendant, N. S. Trowbridge; but, in default of filing such consent, that the judgment of the court below, and the order denying a new trial, be reversed, and a new trial granted, defendant to recover his costs in either event.

HAWLEY, J. I concur in the judgment.

BELKNAP, J. I concur in the opinion, except the portions relating to the question of sufficiency of the notice to remove the property from the operation of the lien law. This question I do not consider presented, and upon it express no opinion.

(11 Colo. 223)

LITTLE PITTSBURG CON. MIN. CO. v. LITTLE CHIEF CON. MIN. CO.

(*Supreme Court of Colorado*. April 3, 1888.)

1. TRESPASS—DAMAGES—TRESPASS ON SUCCESSIVE OWNERS—BURDEN OF PROOF.

A company, having trespassed upon the mines of another company without the latter's knowledge, cannot protect itself against a recovery on the ground that the ore was taken partly from the owner's grantor and partly from the owner, and that the owner, having failed to show the exact amount of ore taken since the transfer, cannot recover; but the burden of proving what portion of the ore was taken before the transfer is upon the trespasser; and this, though the ore was taken by the superintendent of the trespassing company without the latter's knowledge.

2. SAME—PLEADING—ISSUES.

Appellant, charged with entering upon appellee's mining property, and converting ore, having denied such entry and conversion *in toto*, failed upon the trial to sustain this position, and then attempted to show that the entry was made before the appellee owned the mine. *Held*, there being evidence to show that the appellant had full knowledge of the offense with which it was charged, it cannot demand a new trial on the ground that there was no issue formed by the pleading on the fact that the entry was made before the appellee owned the mine.

3. REFERENCE—EXCEPTIONS TO REPORT—DISREGARDING REFEREE'S FINDINGS—PRESUMPTION.

A court of general jurisdiction, in passing upon the findings of law and fact contained in a referee's report in a case of trespass, sustained exceptions to several conclusions of law therein contained, and also sustained a motion to enter such a judgment as the facts proven and the law warrant. *Held*, that there was nothing in these facts, or the language used, to show that the court disregarded the findings of fact by the referee, and proceeded on its own findings, thereby exceeding its jurisdiction.

Commissioners' decision. Appeal from district court, Lake county.

*Markham, Patterson & Thomas*, for appellant. *Clinton Reed* and *Samuel P. Rose*, for appellee.

MACON, C. The facts, as found by the referee and reported to the court in this case, which are material to this opinion, are these: That the appellee, some time during the year 1880, entered into and upon the premises of appellant, and extracted therefrom, and converted to appellee's use, ore amounting in value to something over \$19,000; and that some time during the latter part of 1879, and the early part of 1880, appellant entered into and upon the mining premises known as the "Little Chief Mining Claim," and extracted therefrom, and converted to its own use, ore of the value of over \$37,000. The referee also found as a fact that a portion of the trespass committed by appellant upon the premises aforesaid was done while the premises were the property of appellee's immediate grantor, and a part was committed after the acquisition of title to said premises by appellee; but how much was taken from the grantor of appellee, and how much from the latter, was not shown. Upon this state of the case, the referee concluded, as matter of law, that appellee could recover nothing for the ore taken by appellant after the acquisition of title to the premises by the appellee, because of a failure of proof as to the exact ex-

tent of its loss. Upon the filing of the report, appellant moved for judgment thereon, and appellee filed exceptions as to the whole report, and moved for such judgment as the facts and the law of the case warranted. The court sustained the exceptions to the report as to the first, fourth, fifth, sixth, and eighth conclusions of law, and entered judgment in favor of appellee in the sum of \$23,589.73. Exceptions were then filed by appellant to the finding of the referee to the effect that appellant had entered in and upon the mining premises known as the "Little Chief," and extracted therefrom ore to the value of \$37,125, which being overruled, appellant filed its motion for a new trial, which also being overruled, appellant appealed to this court.

One of the assignments of error relied on by appellant is that the court sustained the exceptions of appellee to the report of the referee *in toto*, and retried the case upon the evidence found in the report; thus disregarding the facts found by the referee, and putting itself in the place of the referee, usurping the province of a jury. This view is accepted by the majority of my associates, and upon that ground they hold that the judgment should be reversed. In this opinion I cannot concur. The majority opinion rests upon the construction of the language of the motion of appellee for judgment, and upon that of the court in the order for judgment. The language of the motion is "to enter such judgment in the cause as the facts proven and the law warrant." The language of the court is: "Now, this day comes the plaintiff herein, by Messrs. Thomas and Lyles, its attorneys, and comes the defendant herein, by Clinton Reed, Esq., its attorney; and the court, having had under advisement the exceptions of said defendant heretofore filed herein to the report of the referee in this cause, as well as its motion to vacate and set the same aside, and to hold the same for naught, and to enter such judgment in this case as the facts proven and the law warrants, and having duly considered the same, and being well advised in the premises, now sustains said exceptions as to the first, fourth, fifth, sixth, and eighth conclusions of law as found by said referee, and also sustains said motion to enter such judgment in this cause as the facts proven and the law warrants." It is supposed that counsel for appellee misunderstood the practice in cases referred, and called upon the court to exercise jurisdiction to disregard the findings of fact by the referee, and to find such facts as in its opinion the referee should have found upon the whole evidence, and thereupon to render such judgment as the law of such facts warranted, and that the court fell into the same error, and usurped jurisdiction to that extent. It may be admitted that the language of the motion justifies this inference as to the counsel for appellee; but I can find no warrant for the opinion that the court mistook the law, and adopted the view of the counsel, and thereby exceeded its jurisdiction in the premises. In the first place, it is a familiar rule that courts of general jurisdiction are never presumed to have transcended their jurisdiction, and he who urges excess in this particular must show it. If the record plainly shows the fact, that is the end of the controversy as to that question; but, if the record entry is capable of a construction consistent with the presumption of jurisdiction, that construction will be adopted. In my opinion, it is impossible to find in the order any support for the position that the court accepted the supposed erroneous views of counsel for appellee, and disregarded the findings of fact by the referee, and proceeded on its own findings. The report of the referee is not set aside and held for naught as a whole; for only the first, fourth, fifth, sixth, and eighth conclusions of law are set aside in terms. It seems impossible to say that that part of the report not expressly set aside was not left untouched by the court. The words, "being well advised in the premises, now sustains said exceptions as to the first, fourth, fifth, sixth, and eighth conclusions of law as found by said referee," in the connection in which they are found, are to my mind as conclusive that all of the other exceptions, both as to the law and the facts reported, were left undisturbed, as if the words

"the other exceptions are overruled" had been added. A judgment is the conclusion of law in a particular case announced by the court; and, while the language used by courts in pronouncing judgments is in many instances identical, yet there is no legally prescribed verbal formula which must be used for that purpose. If, in the record entry of what purports to be the judgment, enough is found upon which it can be seen that the court intended to render judgment, it will not be set aside because it is not couched in artificial and technical phraseology. But I can find in this entry of judgment no fault with the language used by the court. The clause, "and also sustains said motion to enter such judgment in the cause as the facts proven and the law warrants," does not mean any acceptance of the supposed views of counsel as to the jurisdiction of the court to find the facts, but is simply used for the purpose of identifying the motion ruled upon. It is also supposed that the clause found in this entry, to-wit, "and it appearing to the court from the facts contained in the referee's report, aforesaid, that said defendant should have judgment against said plaintiff for the sum of \$23,589.73, it is now by the court considered," etc., goes to show the usurpation of jurisdiction by the court below; that, in using the term "facts contained in the referee's report," the court intended such facts as, in its opinion, the testimony given at the hearing before the referee established, and not such facts as found by the referee. There is nothing to show that the court did not use this expression as synonymous with the term "facts found," but a great deal to show that, in the mind of the court, the two forms of expression were one and the same in meaning; for it is undeniable that the court accepted every finding of fact reported by the referee, and upon them founded its judgment,—the fact that each party had mined in the premises of the other, and converted large quantities of ore taken therefrom, the value of such ore so taken and converted, the date of the actual acquisition of the Little Chief premises by the appellee, the fact that a portion of the ore taken by appellant was taken before the acquisition of appellee's title to the premises, and, in short, all the facts on which the referee rested his conclusions of law. It certainly does not appear, in that clear and unequivocal way in which it should to support the view of the majority, that the court disregarded a single fact found by the referee; and in this state of the case the presumption that the court did not transcend its jurisdiction should be allowed its full force.

If, however, the court did set aside some of the facts found by the referee, if enough were left to authorize the judgment rendered, it should stand, unless there were error in applying the law to such facts. It cannot be denied that, so far as the facts found by the referee, and unquestionably accepted by the court, go, they are sufficient to justify the judgment, unless, as already said, the court erred in the application of the law thereto. It is true that, in the opinion by the court stating the grounds of its judgment, some dissent was expressed with the finding by the referee as a fact that the plaintiff was duly incorporated under the laws of New York, and by a compliance with the laws of Colorado, authorized to do business in this state; but this dissent was rested upon the ground of such finding, and not upon the finding itself; for the court held the stipulation entered into between the parties before the referee, and reported by him, waived or rather admitted such incorporation, and made it unnecessary to offer evidence to that point. But if it were conceded that the court below did review the entire case, and find facts not found by the referee, upon which, as well as those found by the referee, its judgment was based, and that, without such supplemental facts thus found by the court, it would have given judgment for the appellant, the judgment should not then be reversed, if it appears that the facts reported by the referee were sufficient to have justified the judgment. Such action on the part of the court would be error without prejudice only. It is clear that there were sufficient facts reported by the referee, as found by him, to warrant the judgment, without



any additional facts, if the law is as I think it is. Then, did the court err in applying the law to the facts reported by the referee?

In the examination of that question, I shall express no opinion upon the ruling of the court below upon the doctrine of relation, and as to the effect of the stipulation of the parties made before the referee; because, if the court erred in its opinion as to these, and still held correctly as to the duty of appellant to make out the fact that a part of the ore taken by it from the Little Chief premises did not belong to appellee, and to show how much belonged to its grantor, such errors will not reverse the judgment. A correct conclusion is not overthrown because it is reached by illogical reasoning, or upon some grounds which are false. The ruling of the court on this point is supported by a principle which has very frequently been applied in adjudged cases, and after diligent search I have been unable to find one case in which it has not been applied in the same way as in this, upon facts of the same class and nature as those of this case. In the American note to the leading case of *Armory v. Delamirie*, 1 Smith, Lead. Cas. pt. 1, 679, the doctrine is broadly stated thus: "When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrong-doer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the person whom he has injured. A man who willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole if his share cannot be distinguished, or responding in damages for the highest value at which the property in question can reasonably be estimated;" citing *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Ryder v. Hathaway*, 21 Pick. 298; *Clark v. Miller*, 4 Wend. 628; *Bailey v. Shaw*, 4 Fost. (N. H.) 297; *Preston v. Leighton*, 6 Md. 88. Here the appellant clandestinely entered into the Little Chief mining claim, under circumstances and in a way which made it practically impossible for the owner thereof to know that fact, and removed therefrom, and converted to its own use, property to the value of \$37,125. It is said that part—a large part—of this property was taken from the grantor of the appellee, and a part from the appellee, (which, upon the facts of this case, must be admitted;) and that, as appellee affirms such wrongful taking of its property, the burden of proof of that fact is on it to show exactly how much of the ore belonged to the appellee, and that, in the absence of such exact proof, the appellant is relieved from all responsibility. In *Suydam v. Jenkins*, Sedg. Lead. Cas. 566, Dyer, J., speaking for the court, says: "Unless we are greatly mistaken, there are certain indisputable rules, or, more correctly, principles of natural justice, by the application of which the amount that the injured party ought to recover may in all cases be readily and certainly determined. Setting aside the exceptional cases in which exemplary damages may be justly claimed and given, and confining ourselves to those in which the remedy sought is simply pecuniary, the principles which, as it seems to us, are manifestly just and universal in their application, are that the owner to whom compensation is due must be fully indemnified, and that the wrong-doer must not be permitted to derive any benefit or advantage whatever from his wrongful act. \* \* \* An indemnity must always be given to the injured party; but it is not in all cases the measure of damages which the wrong-doer ought to pay." If the doctrine announced in the authorities above referred to is law, then it is clear that this position of appellant has no foundation on which to stand. The practical result of the rule contended for in this case is that a wrong-doer, by so committing his wrongs upon property held by two or more persons successively in point of time that no one of such persons can show with certainty what he

has suffered, is to be permitted to defeat a recovery by either, and to be exempted from all responsibility for his wrongs. Such a doctrine is equally shocking to legal as to moral justice, and I believe no case can be found which supports it.

The case of *Dean v. Thwaite*, 21 Beav. 621, is exactly in point, there being no fact in that case upon which it is possible to distinguish the principle to be applied from this. There the plaintiff brought his suit for an accounting against defendant in the year 1855, alleging an injury upon his colliery by the defendant, and a continuous working therein, and the extraction of coal therefrom since 1840. One defense, among others set up in that case, was that a large part of the coal taken by the defendant was subject to the bar of the statute of limitations; and, though the report of the case does not expressly show that defendant insisted that plaintiff must show with certainty how much coal was taken by defendant within the statute of limitations before he could recover for anything, it is obvious from an examination of the case that such defense was made and contested by the plaintiff. But, whether this be true or not, the rule adopted by the court is so clear, and so entirely applicable to the facts of this case, that it may well be inserted here. After the first argument of the case, the master of rolls said: "The question of liability with respect to the working of minerals under ground, which cannot be perceived in the same way as operations upon the surface, stands, in my opinion, in a very peculiar light; and it is very important to consider upon whom the burden of proof lies in a case of this description. In my opinion, the burden of proof lies upon the wrong-doer to show that the coal has not been taken from the plaintiff's property within the time during which this court would make him accountable for it. It was impossible for the plaintiff to ascertain that fact; it was solely within the knowledge of the defendants and their workmen. I think that the plaintiff has made out his right for an account of the coal which has been taken from his ground, subject to the question of the statute of limitations, upon which I should wish to hear a reply." It appears that argument was heard upon that question, and the master of rolls then used the following language: "I will state my opinion to-morrow. If I should be of opinion that the account should be limited to six years before the filing of the bill, which is my present impression, the course I should probably take is this: I should direct some competent person to ascertain the amount of coal which has been taken from the plaintiff's land, and then require the defendant to show what part has not been taken within the last six years." On the next day the court delivered the final opinion thus: "I retain the opinion which I expressed yesterday, that an account ought to be directed, but that it must be confined to the coal gotten within six years before the filing of the bill. \* \* \* There are, besides, some indications on the evidence, which weigh with me on this question, that the plaintiff was put upon inquiry, and that various circumstances existed which might have led him to take proceedings at an earlier period than he actually did, for the purpose of ascertaining the state of the works below the surface of the earth, and whether they trenched on his property. I am of opinion, therefore, that in this case the account must be confined to six years before the filing of the bill. The way I intend to deal with the account is this: I shall see if the parties themselves can agree as to the amount and extent of those workings. If they cannot, then I shall probably appoint, under the powers intrusted to me by the act of parliament, (which I think extends to cases of this description,) some coal agent who is perfectly well acquainted with matters of this description, to examine and make a report as to the state of the works, and as to what coal has been taken from under certain plats of land of the plaintiff, which will be specified, and to take all proper measurements for that purpose. Suppose he finds that a certain quantity, say 1,000 tons, has been taken. I shall then call on the defendant to show what portion of that coal has been taken prior to the six

years. I think the burden of proof ought to rest on the defendant, for this reason: I assimilate this to the case, which I have frequently had occasion to refer to, of the chimney sweep who found the diamond ring, (*Armory v. Delamirie*,) and governed by the principle, which I have constantly acted upon, that the case will be taken most strongly against a person who keeps back and destroys evidence. I apply that principle to a person whose duty it was to keep strict evidence of what workings there were in other persons' lands, and shall charge a person working the coal mines on the adjoining land with the full amount raised; unless he can prove it was not taken within the time during which the court directs the account. On taking that account, I shall certainly not treat this as a case of fraud, but shall act on any reasonable evidence I can get to ascertain at what time the coal was worked. This is the view I take with respect to the mode of taking the account of the coal worked."

This case calls more loudly for the application of the doctrine that the wrong-doer must suffer from the confusion he has created, or the want of evidence which he has made it impossible for his victim to produce, than did the case just quoted; because, in the latter case, there were some facts indicating that plaintiff had notice of the trespass complained of, and might have made such examination as to have discovered the extent of the wrong, and brought his suit earlier, but here there is no pretense even that appellee or its grantor had the remotest suspicion of the trespass of appellant. The fallacy of the opinion of the majority is in confounding the distinction between the burden of proof and the weight of evidence. The former is a rule of law; the latter of fact. The one belongs to the court; the other to the jury. Whether the burden of proof as to a certain fact is on the plaintiff or defendant, the court will determine upon the settled rules of judicial evidence, one of which is that the burden of maintaining any issue of fact rests upon him who from the nature and character of the fact has or might have peculiar information thereon. It is thought that the ruling of the court on this point rested on the fact that appellant withheld evidence it might have produced; and that, as it was not shown by appellee that appellant had knowledge as to how much ore it took from the grantor of appellee, the ruling was erroneous, and the judgment ought not to stand. This is a mistaken view, arising from a failure to discriminate between the case where one party actually has evidence he will not produce, and that where, from the nature of the fact in question, one party might and ought to know of the circumstances, and the other cannot be supposed to have any definite knowledge thereof. Here the law presumes that the appellee cannot know how much ore appellant had extracted from the Little Chief mining premises before the former acquired the title thereto, because the trespass was committed under ground, in the dark, and secretly; while the law does presume that appellant does know that fact, because it might and it is its duty to know it. It is upon the consideration of the relative situation of the parties, disclosed by the character and nature of the transaction, that the rule is adopted; and it is not set aside because the wrong-doer in any particular case may show that he does not in fact know more of the matter than the sufferer. The same doctrine was enforced in *Mortimer v. Craddock*, 12 Law J. C. P. 166, cited in 1 Add. Torts, 561, the facts of which were that a diamond necklace of the value of £500 had been stolen, and a portion of the stones were soon afterwards found in defendant's possession. A verdict against him for the value of the whole article was sustained. The whole doctrine grows out of the maxim that no man shall take advantage of his own wrong, and is administered in various ways. A familiar example is found in the confusion of goods; and in cases of tort where one tort-feasor is made to bear the burden of the whole loss, though in fact he may have received none of the fruits of the wrong.

My associates seem also to think that the fact that the appellant the Little

Pittsburg Consolidated Mining Company, as a company, did not know of or sanction this wrong committed by its superintendent, has such force and bearing in the case as to relieve it from the necessity imposed upon it by the court. Such fact was not found by the referee, and does not appear in the record; but, if it did, it would not affect the question. A principal is bound to know what his agent does in the course of his employment, and particularly so when the profits of the conduct of such agent go in the pockets of the principal. In *Dean v. Thwaite, supra*, the defendant denied, under oath, her knowledge that she was trespassing upon the property of the plaintiff, and the court accepted her statement as true, and said, "I shall certainly not treat this as a case of fraud;" and yet enforced the rule against the defendant.

It is thought that the willfulness of the wrong committed by Bearce, appellant's superintendent, and the ignorance of the appellant of the fact until after its consummation, relieves it from the rule of evidence insisted on above; and the doctrine upon which this view is based is that, where the act of the agent is one done by him outside of the scope of his employment, for his own gratification or profit, the principal cannot be held liable for the consequences of such act. As a general proposition, this may be conceded. In support of this position, many cases are cited; but, as I view the law, they are inapplicable to the question under discussion. They establish the exemption of the principal from all liability to the injured party where the agent is found to have acted outside of his authority, express or implied. But here it is conceded that appellant is liable to appellee for so much of the ore as the latter may be able to show itself entitled to. The cases cited in the majority opinion hold that the principal is liable upon the ground that the servant did the wrong complained of within the scope of his employment; or that the master is not liable because the servant acted beyond the scope of his employment. All the cases and text-books cited on this subject go upon the ground that the act which is the cause of action results in no pecuniary profit to the principal; but no case can be found which holds that where the agent, upon his own motion, illegally takes the property of one, and gives it to his principal, the principal is not liable for such property or its value. If, then, the appellant is liable to appellee for the act of its superintendent in the premises, does the mere fact of its receiving and converting the ore, or its value, in ignorance of the true ownership thereof, change the rule of evidence on the facts of this case? I think not, for the following reasons:

*First.* The fact is found by the referee that appellant took and converted this ore; and that finding this court is bound to accept, because appellant accepted such finding in moving for judgment on the report, and because the evidence before the referee supports the finding.

*Second.* The superintendent, Bearce, in mining and milling the ore, acted for the appellant, and within the scope of his employment. He did not act for himself, nor for a stranger, and it is impossible that one should act for no one. Nor does it appear that he committed the wrong from any spirit of actual malice or hostility towards appellee or its grantor, but solely in the interest of appellant. In all that was done by him, he used the means, machinery, appliances, and workmen of appellant. Everything was done in its name. His salary, if he was paid for his services, was paid by the appellant, and the entire profits of his operations went into the coffers of his employer. The scope of an agent's employment is said in *Kingsley v. Fitts*, 51 Vt. 416, "to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction."

*Third.* Bearce was appellant's mining superintendent, and was clothed with the general management and control of its mining operations, with power to direct when and how the workmen in the mine should work; or he was, in this department, subject to the orders and directions of appellant.

If he occupied the first position, then, as to those under his control and as to strangers he was the principal, and his acts were its acts, and his wrongs its wrongs. He was the representative of the company, as much so as would have been the president and all the other directors of the company had they exercised the same powers as the superintendent. In *Malone v. Hathaway*, 64 N. Y. 5, in discussing the doctrine of responsibility of employers, whether corporations or natural persons, for the acts and omissions of their superintendents, ALLEN, J., says: "Corporations necessarily acting by and through agents, thus having the superintendence of various departments, with delegated authority to employ and discharge laborers and employes, provide materials and machinery for the services of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within the limit of the delegated authority of the acting principal. These acts are in such cases the acts of the corporation; and the corporation, within adjudged cases, must respond as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care. A person thus placed by a corporation in such a position and authority may be fairly considered as its representative *pro hac vice*." In *Corcoran v. Holbrook*, 59 N. Y. 517, the rule is thus expressed: "It is evident that this general agent was not a mere fellow-servant of the plaintiff. He was not a common hand in the mill; but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and defendants could not, by absenting themselves from the mill, and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exonerate themselves from those duties, or from the consequences of a failure to perform them. \* \* \* As to acts which a master or principal is bound, as such, to perform towards his employes, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner in which they are performed." These cases were brought by servants to recover of their employers for injuries caused by the negligence of superintendents; and the question decided was that of the right of such employes to recover for the negligence of the vice-principal; but the legal consequences of such authority in the agent are as applicable to cases where strangers are injured by such agent as in those of servants. The liability of the principal arises out of the representative character of the servant, whose act or omission has caused damage. Occupying such a position, and vested with such authority, he is bound to do or prevent the doing of all acts which will protect in the one case, or injure in the other, both the employes of his principal and strangers. If he violates his duty to his principal, and is guilty of a wrong to a stranger, whereby the employer is directly and pecuniarily benefited, such wrong is in point of law the wrong of the latter, and he stands in the same legal situation as the agent would occupy were he sued for the injury. It cannot be denied that it was the duty of appellant, in mining its own territory, to respect that of its neighbors, and restrain its workmen and servants from trespassing upon such neighbors. Having delegated the entire control of its mine and miners to a superintendent, withdrawing from all control and supervision itself, it cannot be heard to say that it was not present when the wrongs complained of were committed, and knew not of their commission. But if Bearce was not vested with this general authority, and was under the control and direction of appellant, through its board of directors or other agent, then the company is certainly bound to know what its servants were doing, and to control them.

*Fourth.* Because appellant cannot be heard to say it did not know that its

superintendent was trespassing upon the premises of another. To repeat: If Bearce had such authority in the premises as to make him appellant's superintendent, then, by the rule of law which holds him to be the principal as to third persons, the question of notice is excluded from the case; but if he was less than a representative, and was directed and controlled by his principal, the latter is estopped to say it did not know that which its agent knew. The law is thoroughly settled that, as between the principal and a stranger, the former does know whatever his agent knows, learned while acting for such principal in the particular transaction. Many cases, among which are *Hart v. Bank*, 33 Vt. 252; *Dresser v. Norwood*, 17 C. B. (N. S.) 466, and *The Distilled Spirits*, 11 Wall. 356, hold that notice possessed by an agent, even though it may have been acquired prior to his agency, or in another transaction, which he is at liberty to communicate to his principal, will bind the latter. But many of the courts of this country decline to carry the doctrine to this extent, and limit its application to cases where the knowledge or notice possessed by the agent was acquired during his particular agency, and in the course of the same transaction. In *Sooy v. State*, 41 N. J. Law, 400, the court, in its discussion of the doctrine of the cases just cited, says: "The more just principle would seem to be one that aimed to award to each the benefits and burdens which would have arisen if the business had been transacted by both in person. Such a result would follow if the rule to be adopted were that whenever the principal, if acting in the matter for himself, would have received the notice, the knowledge of his agent shall be chargeable to him." If we apply this rule to the facts of this case, it is at once manifest that, had the appellant done its own work in the mine, dispensing with agents and superintendents, it must have known when it crossed its boundary line, and entered the Little Chief territory. Here, also, the knowledge of the superintendent, with which the appellant is chargeable, was obtained in and by the very transaction constituting the cause of action.

*Fifth.* Because, if the appellant, by its whole body of directors, had worked in its mine, and ignorantly crossed into the Little Chief ground, and taken and appropriated the proceeds of this ore, it would be liable therefor to the owner thereof, and would be bound to show how much of it did not belong to appellee. The entry in such case would be wrongful, though done unwittingly; and appellant, being a wrong-doer, would be subject to the rule cited above: that what is one's duty to know the law holds him to know. Neither in legal nor natural reason can there be any difference between taking the ore ignorantly, and taking the value thereof without knowledge of the place from which the ore was taken; and if, in the first instance, the burden of proof would be upon appellant, it would in the last. Over the superintendent of appellant, appellee had no control; with him it had no connection; between them there was no privity, and no channel of communication; while he was the mere creature of appellant. It was his legal and moral duty to keep out of the premises of appellee. If he would not, but, for the direct and sole benefit of his employer, he would take the property of appellee, his duty to know how much he took is undeniable; and it is but simple justice and reason that his employer should exact of him the observance of this duty, and, failing so to do, be held to the same obligation. Appellant is as much bound to know where the money it received came from as it would have been to know from whose ground the ore producing the money came from, had it done the mining. For this position I rely upon the case of *Dean v. Thwaite*, 21 Beav. *supra*. It is thought by my associates that the judgment of the master of rolls in that case proceeded on the notion of withholding evidence; but this is clearly a mistaken view. There, the defendant, a woman, positively denied in her answer, under oath, any knowledge that her workmen and agents had entered the land of the plaintiff, and there was no proof to overthrow this denial. Her denial was accepted as true by the court, and the master of rolls said: "I

shall certainly not treat this as a case of fraud. Still, her morally honest ignorance of the fact that her servants had been taking the coal of Dean, for her benefit, did not relieve her from the duty of showing just how much of the whole mass was taken during the time covered, and excluded from the account by the statute of limitations." If this ruling is good law, why should it not be applied to this case? It is true that the master of rolls said that he assimilated the cases to that of *Armory v. Delamirie*, which was a case in which the defendant kept back evidence; but the analogy between the two cases arose, not out of the fact that Mrs. Thwaite actually had, as the jeweler had, the evidence which she could produce, but had out of the legal duty resting upon her to know the boundaries of her own land, and to know when she crossed them; from which followed the legal duty, flowing from such legally imputed knowledge, to keep "strict evidence of what workings there were in other persons' lands." Certainly, our law requires every one to know the boundaries of his own land; and in an action *quare clavum fregit* against him for passing his boundaries, and entering the land of his neighbor, he could not defend by showing his ignorance of such boundary lines. And whether he, or his servant acting within his employment, committed the trespass, is immaterial. Hence in this case, Bearce, being the principal, was bound to know, and in fact did know, when he left appellant's premises, and he, as much as appellant, was bound to keep the evidence of his trespass for the benefit of the suffering neighbor.

*Sixth.* The burden of proof is upon appellant, upon the plain and well-understood rules of evidence, outside of the question of wrong-doing. It is said that the burden of proof of any fact is upon him who affirms it. This is true, in a general sense. It was certainly incumbent on appellee to show, to make good its claim against appellant, that the latter had unlawfully entered upon its mining premises, and removed therefrom ore. This it did. It showed that from January 2, 1880, it had been in possession of the Little Chief mining claim, under claim of ownership in fee, and that from January 10, 1880, it had the absolute fee-simple title to the property; further, that appellant had excavated in the said claim a certain area, and taken therefrom ore of the net value of \$37,125, and rested. To meet and avoid the force of this proof, appellant did what in pleading would be denominated "confessing and avoiding;" that is, it showed that, notwithstanding it took all of this ore, appellee was not the owner of all of it, but that a "large part" was the property of appellee's grantor. This was clearly an affirmative defense, which appellant was bound to make good, by showing, not only that some of the ore did not belong to appellee, but how much. To illustrate: Suppose appellant, instead of denying in his replication the taking of any ore from appellee, had admitted it, setting up that a large part thereof was taken from the appellee's grantor, and that for such part it had procured from such grantor a release of damages, would appellant not have been called on to show accurately how much of the ore this release covered? In other words, would not such release have been an affirmative defense; and, if so, is it any more so than the defense upon which appellant now relies?

The opinion that a new trial should be granted, because the amount of ore taken from the grantor of appellee by appellant was not made an issue in the case by the pleadings, it seems to me, is quite novel, and inconsistent with the settled rules of practice. It is said that appellant, by its replication, denied the taking of any ore from the Little Chief premises, and produced considerable evidence to sustain this denial; and that as the fact that appellant had mined in the Little Chief ground, and converted ore therefrom, as well as that a part of the trespass was against appellee's grantor, was developed by the evidence before the referee, and as neither party has had an opportunity to get evidence upon this fact, both should be admitted to reopen the case so far as to produce what evidence they may upon the point. I fail to see what

bearing the character or form of appellant's pleading has upon the question. By appellee's answer appellant was charged with entering upon, and removing from the Little Chief mining claim a large quantity of valuable ore. Instead of confessing such trespass in part, and avoiding it so far as the ore belonging, at the time of its commission, to appellee's grantor went, appellant saw fit to deny *in toto* such entry and conversion, and sought to make this denial good, first, by showing it had not entered the Little Chief premises at all, and then, when that position became untenable, by showing that such entry was made before appellee owned the mine. The form of the pleading adopted by appellant certainly did not in the least affect or limit it in making its defense before the referee; for it made by its evidence the very same case it would have made, had it pleaded in confession and avoidance, as above suggested. Upon the form of the issue as to this fact, chosen by appellant, there can be no right to a new trial of that fact. If, however, it is supposed that the pleading shows that appellant had no notice of the wrongs charged in and by the answer in the case until the trial, when it was testified to by witnesses, and that it was taken by surprise, it is answered that such assumption has no basis in the theory of pleading, nor in the experience of practice. It is good pleading to deny wholly the wrong with which one is charged, putting the party alleging it to the proof, relying upon his inability to make any proof, or proof of the whole wrong; and it is the almost invariable practice to do so. But the fact that the complaining party does succeed in proving a part or all the wrongs alleged, is no evidence that the defendant is surprised in either fact or law. The answer in this case was sufficiently distinct as to dates and amounts, and in every other particular, to fully apprise appellant of the charge against it, and to enable it to prepare its defense. Nor, if we look away from the pleadings to the course of the trial before the referee, do we find any support for the notion that appellant was surprised, or was in any way unprepared to meet the trespass charged against it. The case was commenced in September, 1880, the answer was filed on the 1st day of March, 1881, and the report of the referee filed in July, 1883. Thus more than two years passed after appellant was, by the answer, plainly notified that it was charged with this wrong, before the report was filed. All of this time, appellant had to inquire whether its agents or workmen had passed the boundaries of its premises, and entered those of appellee, or its grantor; and from the array of witnesses it marshaled at the trial, and examined on this fact, it is evident that it was diligent. To say it could not discover at once, by a mere inspection of its mine on the side adjoining the Little Chief claim, the fact that it had entered and mined in the latter premises, is to ignore the evidence of the witnesses before the referee; and to assume it did not at once institute such inquiry, is to charge it with a degree of negligence that would deprive it of any right to a new trial. Besides, the witnesses examined by appellant upon this branch of the case were the men who did the very work of which appellee complains, or, at least, many of them were; and why it should be supposed that others can be found who will speak more definitely on this point it is difficult to understand. Further, the appellant never asked, during the progress of the examination before the referee, for a continuance on account of absent witnesses, nor for a new trial on the ground of surprise or newly-discovered evidence. In the elaborate argument of appellant's counsel, there is no hint or suggestion that a new trial for the purpose of making a better showing as to the ore taken from appellee's grantor was desired, or would be of any benefit to either party. But appellant is content to leave the fact in its present state of uncertainty, if this court will hold the law to be that appellee must show definitely how much of this wrong was perpetrated upon it, in order to a recovery of anything. Now that appellee's principal witness is dead, it would be unjust to send this case back for a retrial; because, though his testimony may be used in such trial, it will



not have the same effect as his oral testimony would have. In my opinion, the judgment in this case should be affirmed.

PER CURIAM. The referee's report was divided into separate findings of fact and of law. The findings of fact were numbered from 1 to 6, inclusive. By reference to the original transcript, we discover that, immediately following these findings, the referee uses this language: "As conclusions of law I find." Then he adds eight or ten distinct conclusions of law, but leaves them unnumbered. In view of these circumstances, we agree with Commissioner MACON that the court intended to set aside the conclusions of law only, leaving undisturbed the referee's findings of fact. The action of the district court in designating the legal conclusions of the referee by number does not avoid this inference. The language used in the judgment, as well as the circumstance that there is no eighth finding of fact, satisfies us that the learned commissioner's view is correct. We may admit that one or more of the conclusions of law set aside by the court were technically right. Yet, if they were not essential to the judgment, and if the judgment is fairly supported by the facts found, under established legal principles, no reversible error was committed. With this explanation, we adopt the conclusion reached by Commissioner MACON in the foregoing opinion; and the judgment of the district court is accordingly affirmed.

(11 Colo. 210)

CROSS *et al.* v. MOFFAT.

(*Supreme Court of Colorado.* April 3, 1888.)

1. JUDGMENT—BY CONFESSION UNDER POWER—SETTING ASIDE.

A judgment against the maker of a note, by confession under a warrant of attorney in the note, expressly waiving errors in procedure, will not be set aside because such judgment was obtained more than six years after the date of the power or maturity of the note; there being no presumption that the power has been revoked.

2. ERROR, WRIT OF—WHEN LIES—PROCEEDINGS HAD AFTER FINAL JUDGMENT.

Error predicated on a refusal to vacate a judgment, being a proceeding subsequent to final judgment, cannot be reviewed on a writ of error, under the Colorado practice.

Error to superior court of Denver.

David H. Moffat recovered judgment on a note against Lewis Cross and John M. Cross, by confession under a warrant of attorney in the note. Subsequently the makers' motion to set aside the judgment was overruled, and defendants bring error.

*Tilford, Gilmore & Rhodes*, for plaintiffs in error. *L. B. France*, for defendant in error.

PER CURIAM. Under the present practice, we cannot review, by writ of error, proceedings that have taken place subsequent to final judgment. *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. Rep. 216. This disposes of the alleged errors predicated upon the court's action in refusing to vacate the judgment.

The fact that no summons was issued is unimportant. If Clise acted within the authority conferred by the warrant of attorney, and if the judgment can be sustained in other respects, his appearance for plaintiffs in error constituted a waiver of the issuance and service of process. This suggestion answers the argument relating to jurisdiction over the persons of plaintiffs in error. In our judgment, the challenge of the court's jurisdiction over the subject-matter rests upon no better ground.

But one question is presented requiring extended consideration. It is claimed that the final judgment rendered should be set aside, because the instrument did not authorize the confession as made in Clise's *cognovit* at the time the proceeding took place. There is nothing in our statutes that pro-

hibits the procedure adopted in this case. It is fully recognized and generally pursued at common law; and the sections of the Code providing a mode for obtaining judgments without action do not inhibit pursuing this common-law method when authorized by contract of the parties themselves. There is, in fact, an action pending, and the *cognovit* may appropriately be regarded as an answer to the complaint, the filing of which constitutes a waiver of the issue and service of process. But it is insisted that, after the lapse of so long a period from the date of the instrument as here appears, a legal presumption should be indulged against the authority of one presuming to act under the warrant as attorney for an absent defendant. A certain rule in England, adopted by the courts of king's bench and common pleas, is confidently relied upon by plaintiffs in error to support their position in the foregoing regard. This rule prohibits judgment by confession on a warrant of attorney where more than a year and a day had expired from the date of such warrant, except upon affidavit stating that the instrument is genuine, that the whole or some portion of the debt is yet due, and that the debtor is still alive. The warrant of attorney in the case at bar was over six years old when judgment was entered, and the affidavit filed does not state that the parties were alive, or that the debt remained unpaid. We shall decline to be governed by the English practice mentioned. It rests upon a special rule, originating in the court of king's bench, and not recognized by statute. Some of the controlling reasons leading to the adoption of this rule in England can hardly be considered applicable to this state at the present time. Why should we select the arbitrary period of a year and a day, and say that after that time the instrument shall not have the same force and effect as before? There is nothing in the arrangement of our terms of court calling for such a rule; we have no statute of limitations fixing this period in connection with actions or recoveries; and there is no legal presumption that, after a year and a day, the debtor is dead, or the obligation discharged. It will be observed that the time begins to run under the rule from the date of the warrant of attorney, not from the maturity of the debt. Yet with us such warrants of attorney are frequently given in connection with promissory notes to run for two or three or even a greater number of years. It is exceedingly doubtful if instruments such as the one before us were in contemplation when the English rule was adopted.

But it is asserted that our six-year statute of limitations had run against the note here sued on, and therefore the judgment by confession should be set aside, so that plaintiffs in error may plead this defense. In the *first* place, the complaint avers, and a copy of the note set out therein shows, that payments were made within the time mentioned. Hence it appears by the pleadings that the bar of the statute did not apply. *Secondly*, this statute is a personal privilege, to be relied upon or not as the debtor may choose. There is no legal presumption that he will elect to plead it. And, *thirdly*, for this court to hold that after six years a warrant of attorney, embodied in the solemn contract of the parties, shall be void, would, to say the least, savor strongly of judicial legislation. The part payment upon the note operated as a redelivery thereof. *Buckingham v. Orr*, 6 Colo. 587. The warrant of attorney was security; and, like any other security, remained valid. When the note was negotiated to defendant in error, the transfer carried with it this security, just as much as it would have done had there been a valid mortgage or deed of trust.

In response to the suggestion that it is dangerous to permit the entry of judgment, after the lapse of a considerable period, upon warrants of attorney like the one before us, we have this to say: The contract itself expressly waives all of the ordinary errors in procedure; and if the debt has been paid, if the statute of limitation has run, and defendant could be permitted to rely upon it, if the instrument is void because procured by fraud, or if any other available defense exists, the debtor may have relief through a suit in

equity. *Lake v. Cook*, 15 Ill. 354. There is, therefore, a remedy by which the hardships not contemplated by the contract, that might otherwise sometimes result, may be avoided.

There seems to have been a mistake in the computation of interest. The judgment is too large by \$128.65. It will therefore be reversed, and the cause remanded, with direction that the court below, if plaintiff elect to remit the amount named, enter judgment for the sum remaining due.

(11 Colo. 122)

CONNER v. ROOT, (O'DONNELL, Intervenor.)

(Supreme Court of Colorado. March 16, 1888.)

1. GIFT—DONATIO MORTIS CAUSA—CERTIFICATE OF DEPOSIT.  
A certificate of deposit may be the subject of gift *causa mortis*, and if delivered by the donor during her last illness, in anticipation of death, to a third person for the use of the donee, the title passes upon her death, though the certificate is payable to the donor's order, and has not been indorsed by her.<sup>1</sup>
2. SAME—DONATIO MORTIS CAUSA—EVIDENCE.  
Where there is evidence that a married woman made a gift *causa mortis* to a person other than her husband, evidence that her illness was caused by her husband's ill treatment of her is admissible as tending to show a motive and a reason for making the gift, and so preventing the property from descending to her husband.
3. SAME—DONATIO MORTIS CAUSA—BY MARRIED WOMAN.  
Under the Colorado statutes a married woman is under no disability as to making a gift *causa mortis* by reason of coverture.
4. EXECUTORS AND ADMINISTRATORS—ACTION BY—COMPETENCY OF DECEDENT'S HUSBAND TO TESTIFY.  
In an action between the administrator of a deceased woman and one claiming certain property as a gift *causa mortis* from her, the subject of the litigation being the validity of the gift, the husband and heir of deceased is not a competent witness on behalf of the administrator as to matters occurring before his wife's death, under Gen. St. Colo. 1883, c. 116, § 1, which provides that no party to an action, or person directly interested in the event thereof, shall testify therein of his own motion when any adverse party sues or defends as the executor or administrator of any deceased person.

Commissioners' decision. Error to superior court of Denver.

This was an action commenced by Charles Conner October 5, 1888, against Amos H. Root, upon an agreement in writing, as follows: "DENVER, COLORADO, May 11, 1882. Whereas, Charles Conner did, on the 18th day of January, 1882, deliver and indorse over to me one certain certificate of deposit issued by the Colorado National Bank of Denver to one Annie Reardon, for the sum of \$948.40, and dated December 23, 1881; and whereas, said certificate of deposit showed on the back of the same an indorsement, appearing to be the indorsement of the said Annie Reardon; and whereas, I did write my name on the back of said certificate of deposit under a written guaranty of the genuineness of the signature of indorsement thereon, and did on said guaranty receive the said money from the said bank; and, whereas, the said Charles Conner claims that the said money rightfully and legally belongs to

<sup>1</sup>To constitute a valid gift *causa mortis*, it must be made during some illness or peril of the donor, and in contemplation or expectation of death from that illness, or peril, and death must also ensue therefrom. *Parcher v. Bank*, (Me.) 7 Atl. Rep. 266. Actual delivery by the donor in his life-time is necessary, or, if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. *Emery v. Clough*, (N. H.) 4 Atl. Rep. 796, and note. There must be as complete a delivery as the nature of the property will admit of. *Gano v. Fisk*, (Ohio,) 3 N. E. Rep. 532, and note. See *Vandor v. Roach*, (Cal.) 15 Pac. Rep. 354; *Henschel v. Maurer*, (Wis.) 34 N. W. Rep. 926; *Woodburn v. Woodburn*, (Ill.) 14 N. E. Rep. 58. To sustain a gift, the intention of the donor must be established by clear and precise evidence. *Appeal of Maderia*, (Pa.) 4 Atl. Rep. 908. And a gift *causa mortis* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent. *Basket v. Hassell*, 2 Sup. Ct. Rep. 415; *Shackleford v. Brown*, (Mo.) 1 S. W. Rep. 390.

him, and desires me to pay the same over to him; therefore, I agree that whenever the said Charles Conner shall show that he is legally and justly entitled to the said money, and does legally and fully secure me from all liability of loss or legal complication by reason of paying the said money over to him, I will then pay to him the said money, with interest thereon at the rate of ten per cent. per annum, reckoned from the said date of his delivery to me of the said certificate of deposit. [Signed] A. H. Root." The Annie Reardon named in the certificate referred to was married to one Hennessey, January 1, 1882, and died early in the morning of the 18th day of the same month. Thomas J. O'Donnell was administrator *de bonis non* of her estate, and as intervenor in this action recovered judgment for the amount named in said certificate. Conner, the plaintiff, moved for a new trial, for reasons among which were the following: "The court erred in allowing Hennessey, the husband and heir at law of Johanna Hennessey, deceased, to testify as a witness." "The court erred in rejecting evidence as to the motives which actuated Mrs. Johanna Hennessey in giving her property to Mrs. Maggie Hunt,"—which motion was denied. When the deposit was made, the depositor wrote her name in a book of the bank kept for such purpose. To that signature the cashier of the bank noted in the book at the time that she had a sore finger. On the 17th day of January, 1882, said Conner had this certificate of deposit at the bank with the name of the depositor indorsed thereon; the bank declined payment thereon for the reason that the indorsement did not appear to be like the signature written in the book. On the next day the said Root went with the said Conner to the bank, and guaranteed the genuineness of the indorsement, and the bank then paid the money upon it. The trial was to the court. It seems that the contest was over the genuineness of the indorsement. Several experts gave their opinion in evidence, that the indorsement had not been made by the said depositor. The claim of Conner, the plaintiff, was that the title to said certificate had been legally transferred to him by the said depositor, the payee therein named, by gift *causa mortis*; that the same was accordingly given and delivered to him during the last sickness of said payee in contemplation of death, for the payment of her debts, and the residue thereof for Maggie Hunt; and in the argument here it is claimed upon his part that the evidence clearly establishes such gift, and that there was no conflict in the evidence touching the same; that no indorsement of the certificate was necessary in the premises; that the court erred in giving judgment for the said intervenor. The said Conner, the plaintiff, and the said Maggie Hunt were married after the death, and before the trial. The evidence touching the gift was as follows: "Dr. Blickensderfer testified that he had attended the deceased professionally during her last sickness; that he called upon her on the 12th day of January; that her mental condition was then good,—that she knew what she was saying and doing; he had called on the 8th day of January,—that she was suffering with pain and fever. The doctor was asked what was the cause of her illness. Objection was made to this evidence for that it was immaterial, which objection was sustained by the court; whereupon the plaintiff offered to show by the witness that the illness of the deceased had been caused by the brutal treatment of her husband on the first night of their marriage; that she regarded him with horror; that she called upon the neighbors to keep him from her presence; that he had come into her room and used abusive language towards her, and nearly turned her out of bed looking for keys; and that she was in perfect health when married,—all of which was objected to for the same reason, and the objection sustained. Thomas Dooley testified that he was brother to Maggie Hunt; was acquainted with deceased in her life-time, and saw her during her last sickness; that his sister, Maggie Hunt, was nursing her; that he was at her room on the 12th day of January, when she was in bed sick; his sister asked him to stay while she went down street for a bed-pan, which he did. Conner, the plaintiff,

came in while he was there. Deceased said she was glad to see him, and asked him to come over to the bed; that she took from under her pillow some keys, picked out one in the bunch, and gave it to Conner, and directed him to go and open a trunk in the room, get a pocket-book rolled up in a cloth there, and bring it to her, which Conner did. She opened it and got out a certificate on the bank, and handed it to Conner and said: 'There is a certificate on a bank. I want you to go and draw that money, pay up what I owe you, and the remainder I want you to give to Maggie.' Conner turned it over and looked at the back, and said he could not draw the money without her name on the back, and reminded her that a while previous she had given him a bank certificate, and he could not get the money on it for the reason she had not put her name on the back. She then asked for a pen. There being no pen there, Conner gave him the key to his room, and asked him to go there and get pen and ink, which witness did. Conner then got a book and laid it down on the bed and gave her the pen, when she asked him to raise her up. He did so. She took the pen and tried to write her name on the certificate, then threw the pen down and said she could not sign it. He said he could not get the money on it then. Then she asked him to go around behind her and hold her hand; that she thought she could then write her name. He did so, and took hold of her hand with the pen, and wrote the name on the certificate. She then gave it to him and said: 'I want you to get that money so Hennessey shall never get any of it. He robbed me of \$140 or \$150. When I get well I am going to get a bill of divorce from him. Charlie says he would. To-morrow or next day I want you to go down and fetch up a lawyer. I have got some property in St. Louis; I want to will that too.' About that time his sister, Maggie Hunt, returned, and the doctor came, and the witness went away. Upon cross-examination the witness stated that the deceased said she would get a divorce if she got well, and said that was the way he had stated it in his examination in chief. Maria Clark testified that she was acquainted with the deceased in her life-time; that she and Maggie Hunt nursed and cared for her during her last sickness; that the husband, Mr. Hennessey, came there sometimes. The deceased said to her that he had not treated her right; had robbed her the first night of their marriage—robbed her of one hundred and some dollars; had ruined her for life; had murdered her; and said she didn't want him to enter her room at all. Saw Hennessey in the room turning up the pillows, and turned her over in the bed. Had a conversation with the deceased during her sickness, in which she said she had made an assignment of her bank certificate to Charles Conner, to pay her debts, and after that the remainder was to go to Maggie Hunt; that she didn't want her money to go to Hennessey, because he had robbed her, and almost killed her, and that she wanted her funeral expenses paid out of the certificate. Charles H. Miller testified that he knew the deceased in her life-time; had known her from October, 1881; that she and Maggie Hunt kept a restaurant on Larimer street. Called to see her about four days before her death. Maggie Hunt was there. He sat down at the bedside of the deceased, and shook hands with her. She said: 'Oh, Mr. Miller, I made a terrible mistake. I thought I had married a man, but I married a brute.' She said that she had given Conner a certificate of deposit,—money she had in bank,—that he had spent money for her, and he was to pay himself, and pay the necessary expenses, and, if she died, the funeral expenses, and the rest to go to Maggie; that he asked her if she had indorsed the certificate, and she said she made out to. On cross-examination the witness testified that he was a lawyer by profession; was then engaged as a newspaper correspondent. Mrs. Conner, formerly Maggie Hunt, the donee, offered as a witness, but held by the court incompetent under our statutes. Charles K. McHatton, the undertaker, testified that he buried the deceased, and that Conner, the plaintiff, had paid him the expenses thereof. Sarah Stowell testified that she was acquainted with

the deceased in her life-time, and the plaintiff offered to prove by this witness the aversion of the deceased for her husband, and what the deceased had stated to her concerning the same; but the court sustained the objection thereto. Fred Fishback testified that he was acquainted with the deceased during her last illness, and that she said she had given what she had in the bank to Charlie Conner, and that Maggie Hunt had been with her so long, and had worked with her, and that she was to have it. Hennessey testified that about six days before the death of his wife, he was in the room where she was, when she threw a pitcher at Maggie Hunt, and charged that she and Conner were robbing her; that Maggie Hunt then said she was raving. Mrs. Kennedy testified for the intervenor, that she was not acquainted with the deceased; that she had been in her room once while she was sick, at which time no one was there with her, except the husband, Hennessey; that she heard the deceased say to her husband that the keys were under her pillow, or else in the trunk; to take care of them,—that Maggie and Conner would rob her,—had done it partly; that she had \$150, and it was nearly gone."

*L. C. Rockwell*, for plaintiff in error. *T. J. O'Donnell* and *O. S. Wilson*, for defendants in error.

STALLCUP, C., (*after stating the facts as above.*) We cannot agree with counsel for appellant that the evidence is all one way, and against the finding of the court. If the gift and delivery were made during the last sickness of the donor, in anticipation of death therefrom, the donation became complete upon such death; and a certificate of deposit may be the subject of such gift without indorsement. Upon this subject the law is stated in section 1148, 3 Pom. Eq. Jur. as follows: "All kinds of personal property, using the word in its broad mercantile sense as equivalent to assets, which are capable of manual delivery, of which the title, either legal or equitable, can be transferred by delivery, may be the subject-matter of a valid donation *causa mortis*. That all actual chattels, including money, either coin or bank-notes, may be donated, has never been questioned. Whatever doubt may have once been entertained, the rule is now well established that all things in action which consist of the promise or undertakings of third persons, not the donor himself, of which the legal or equitable title can pass by delivery, may be the subject of a valid gift, including promissory notes, bills of exchange, checks, bonds, mortgages, savings bank pass-books, certificates of deposit, policies of insurance, and the like; and it is settled by the recent cases that a valid donation of negotiable instruments may thus be made without indorsement." The delivery may be made to the donee, or to another for the donee's use. Section 1149. Under our statutes, in the making of such gift of such property, a married woman is under no disability by reason of her marriage. Though courts do not lean against gifts *causa mortis*, the evidence to establish them should be clear and unequivocal. Section 1146.

The deceased was attended to the last by Conner and the donee, and the funeral expenses were paid by Conner. Had the deceased feelings of aversion against her husband calculated to prompt her to make the donation as claimed by plaintiff? Wrecked, as she was, upon the threshold of her wedded life, if the cause thereof was according to the evidence offered, it seems but natural and reasonable that she should turn, as it is said she did, from him who was her husband to her who seemed kind and constant, and, as best she could, divert from him to her, what little of property and money she would have left after her death and burial. There being a controversy as to the donation, evidence upon this point was in corroboration of the other evidence in support of the donation, and was therefore admissible. While there was some evidence on this question, it appears that the court regarded it improper, and sustained the objections whenever made against its admission. The court erred in rejecting this evidence offered to show the nature and cause of this

illness of deceased, and the conduct of her husband touching the same, as the same was of a character to show the motives and reasons for making the gift of the certificate to another, and so diverting it from her husband, to whom the same would have descended. *Gilham v. French*, 6 Colo. 196. And the court erred in denying the motion of the plaintiff for a new trial. Under chapter 66, Gen. St., the said Conner, Hunt, and Hennessey were under like restrictions as to the right to testify in the case, and such right is limited to facts occurring after the death of the deceased, except as specified therein. The judgment should be reversed.

RISING and DE FRANCE, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the superior court is reversed, and the cause remanded for a new trial.

(11 Colo. 247)

DENVER & S. F. R. Co. *et al.* v. DOMKE *et al.*

DOMKE *et al.* v. DENVER & S. F. R. Co. *et al.*

(*Supreme Court of Colorado*. April 19, 1888.)

1. MUNICIPAL CORPORATIONS—LICENSE TO RAILROAD COMPANY—VALIDITY OF ORDINANCE.

Under Const. Colo. art. 15, § 4, providing that any railroad company may construct a railroad between any designated points in the state, and the Denver city charter of 1877, § 40, which provides that the city council may regulate the location of railroad tracks, the use of locomotives, the construction of public crossings, and the speed of trains, an ordinance granting the right of way to a railroad company through streets designated is not invalid for want of legislative authority,—such use of the streets being clearly contemplated; and the ordinance constitutes a valid license to use the streets designated.

2. SAME—RIGHT OF RAILROAD COMPANY TO CHANGE GRADE.

Where, under legislative authority, a city, by its ordinance, grants to a railroad company, its successors, etc., a right of way for its track, through certain streets, and there is nothing in the ordinance as to the width of the tracks, and no imputation of fraud in procuring the ordinance, the company holding the corporate franchise will not be enjoined, at the suit of the owner of the abutting property, from changing its track from a narrow to a standard gauge.

Appeal from superior court of Denver.

In November, 1880, the Denver Circle Railroad Company was organized as a corporation under and by virtue of the laws of the state of Colorado. In January, 1881, it procured the passage of an ordinance by the city council, granting authority to locate, construct, maintain, and operate a single or double track railway and telegraph line through certain streets of the city, including Willow lane and Clark street. It thereupon proceeded to construct a narrow gauge railway through the streets above named, among others, and during the same year completed and commenced operating the road through said streets. The business thus inaugurated has been carried on down to the present time. The Circle Company becoming financially embarrassed in the operation of the road, judicial proceedings were instituted, and a receiver appointed, who took possession thereof. In the course of time a decree was entered by the circuit court of the United States, under which the road, its rolling stock, and all its rights and franchises were sold. In 1887 the Denver & Santa Fe Railroad Company was organized under and in pursuance of the corporation laws of Colorado. The parties organizing this company had previously bought the capital stock, mortgage bonds, and evidences of indebtedness issued by the receiver of the Circle Company. The Denver & Santa Fe Company, upon its organization, became the owner of the property thus purchased. The latter company proceeded with the operation of the Circle road as constructed, and also prepared to put down a third rail upon the ties already

laid, for the purpose of operating thereon standard gauge trains, and carrying on the business of a standard gauge road. The company connected directly, at Pueblo, with the Atchison, Topeka & Santa Fe Company, a through line from Kansas City to Pueblo. Plaintiffs, Herman Domke and others, are the owners of lots abutting on the two streets mentioned. They brought this suit in equity in the superior court for the purpose—*First*, of permanently enjoining the further operation of the narrow gauge Circle Railroad as now constructed; and *secondly*, for the purpose of perpetually enjoining the laying of the third rail, and the operating of standard gauge trains. The cause was tried to the court sitting as a chancellor. The first kind of relief thus sought was denied, but an injunction was granted under the second demand or prayer, staying the projected changes until the Denver & Santa Fe Company had first proceeded, under the eminent domain statute, to condemn the right of way, in connection with the alleged additional burden, and have the damages to result to the plaintiffs' abutting property assessed. From the portion of the decree denying the injunction to restrain the continued operation of the Circle road, as now constructed, plaintiffs below appealed to this court. From the portion of the decree allowing the injunction restraining the laying of the third rail, etc., defendants below took their appeal. By agreement the two appeals are consolidated, and the errors assigned by both parties are considered and disposed of in one decision. The remaining essential facts, together with the constitutional and statutory provisions involved, sufficiently appear in the opinion.

*Patterson & Thomas*, for plaintiffs. *C. E. Gast* and *Edw. L. Johnson*, for defendants.

HELM, J., (*after stating the facts as above.*) The constitution (article 15, § 4) declares, *inter alia*, that "any association or corporation organized for the purpose shall have a right to construct and operate a railroad between any designated points within the state." It may happen that one of the "designated points" is within the corporate limits of some city or town, and can only be reached through a street. The legislature, by the act in force when the Circle Company ordinance was passed, authorized the city council of Denver "to regulate and prohibit the use of locomotive engines, to direct and control the location of railroad tracks, to require railroad companies to construct, at their own expense, such bridges, tunnels, or other conveniences at public crossings as the city council may deem necessary, and to regulate the speed of all railroad trains." Charter 1877, § 40, subd. 45. See, also, Charter 1874. This statute clearly contemplates the use of streets by ordinary railroads. Unless such use was in the legislative mind, its provisions are meaningless. Other provisions of the same act show conclusively that the clause in question does not refer to local street railways. But it is held that the fee to streets in Denver, covered by statutory dedications, is vested in the city in trust for the use of the public. *Railroad Co. v. Nestor*, 10 Colo. —, 15 Pac. Rep. 714; *City v. Clements*, 3 Colo. 472. The legislature has delegated the exclusive control of the streets to the municipal authorities, subject only to its own paramount dominion. We think the authority of the city council to permit the construction and operation of an ordinary railroad through the street rests upon clearly implied, if not express, legislative sanction. This question is practically *res adjudicata*. "It was within the contemplation of the legislature that they [ordinary railroads] might enter and pass through the city." *Railroad Co. v. Nestor*, *supra*; *Railroad Co. v. Mollandin*, 4 Colo. 154. It is hardly necessary to say that we regard the several additions referred to in this case as having been platted and recorded substantially in compliance with the statutory requirements, and hence treat them as statutory dedications. The statute does not, however, make this a usual or ordinary use. It recognizes the importance of allowing such railroads ingress and egress into and out



of the city, and the necessity of laying their tracks and operating their lines along some of the streets; but the use remains an unusual and extraordinary use. It is not one of the uses to which every street is necessarily and primarily dedicated. The authority of the council to permit this use is correctly termed a "special power." This power will naturally be exercised in connection with but few of the streets; and, while all dedications or grants are subject to the exercise of the power, as a matter of fact it is very rarely contemplated in the act of dedication. There is, therefore, no difficulty in distinguishing between the abutting owner's right to compensation for injuries occasioned by the use, and his claim where the injury complained of results from a reasonable and careful grading or other improvement of the street for local convenience and travel. Upon this subject, see the following opinions, and cases there cited: *Railroad Co. v. Nestor, supra*; *City v. Verina*, 8 Colo. 399, 8 Pac. Rep. 656; *City v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6. The ordinance before us, granting a right of way to the Circle road, is therefore not invalid for the want of legislative authority in the premises. So far as this objection is concerned, the ordinance constitutes a valid license from the proper authorities to use a portion of the streets designated, and the Circle Company was not a mere trespasser *ab initio*.

The superior court did not err in refusing to enjoin the operating of the Circle road. It is sufficient, upon this objection, to say—*First*, that some of the plaintiffs below obtained their title after the company, acting under the municipal license above mentioned, had constructed its road, and the same was in operation; *second*, that the rest of the plaintiffs, all of whom were owners prior to the occupation of the street under such license, quietly stood by, permitting the expenditure of a large sum of money in construction, and waited more than six years after such construction before entering a protest by instituting these legal proceedings; and that neither class of plaintiffs, thus situated, is in position to ask of a chancellor injunctive relief against the operation of the road as now constructed. If, by this use of the street, the market value of plaintiffs' abutting property, for any use to which it may reasonably be put, has, since they become the owners thereof, been diminished, and by laches or otherwise they have not forfeited their right to compensation, they may bring an action at law and recover. But, under the circumstances here presented, a court of equity will not, through the extraordinary writ invoked, lay its strong hand upon the company, and stay the carrying on of its lawful business.

Did the court below err in enjoining the Denver & Santa Fe Company from laying a third rail, and operating standard gauge trains upon the road-bed originally constructed by the Circle Company, until it had proceeded under the eminent domain statute, to condemn a right of way through the two streets mentioned in the pleadings? This is not an action directly against defendants for the unlawful usurpation or exercise of a corporate franchise, nor for the illegal appropriation or use of a public or *quasi* public license. Neither the public, nor the city of Denver, nor any one acting or professing to act in behalf of the public or city, is here complaining. The suit is instituted by private property owners along the two streets in question, in their private capacity, and to prevent by injunction the continuation of one alleged private injury, and the perpetration of another private injury alleged to be threatened. Turning to the ordinance granting the Circle Company permission to use the streets named, we find that the company was "authorized to locate, construct, maintain, and operate a single or double track railway and telegraph line, with the necessary turn-outs and switches," also, that authority was given "to operate said railroad by steam-power;" further, that the privileges conferred were to "be used for the purpose herein set forth, and none other." Nothing is said in this ordinance about the width of the gauge, size of the cars, or character or amount of traffic to be carried on. It is only by going back of the or-

dinance, and examining the articles of incorporation of the Circle Company, that a controversy in these respects is introduced. Plaintiffs allege that the city council was deceived by the statements as to gauge in those articles, and by the verbal representations of those who originated the enterprise; that the council adopted the ordinance, with the understanding that the track would be of "three-foot or narrow gauge" width, and the trains would be operated only by the use of "dummy and noiseless engines." No such understanding is embodied in the ordinance. It describes an ordinary railway, with leave to use "steam-power" in operating its trains. The courts cannot, at the suit of a private party, the city remaining silent, and no fraud being imputed to the municipal authorities, in a collateral proceeding, ignore, annul, or reconstruct the ordinance on the ground of mistake or deception connected with its original adoption. For the purposes of this suit, we must accept the ordinance as it reads, and construe the privileges granted as broad enough to include a standard gauge track, with standard gauge rolling stock. It should, perhaps, be observed, in passing, that, while the Circle Company's articles of incorporation specify the gauge, the incorporation law, under which they were framed, contains no such requirement.

A clause in the ordinance provides that the Circle Company "shall not grant to any other railroad company the right to use any part of said right of way." Whatever may have been the purpose of this provision, it is clear that there was no intention to prevent the passing into other hands of the company's property, including the license granted; for another clause declares "that said company, its successors and assigns, are authorized," etc. And it is equally clear that the Denver & Santa Fe Company, through the purchase at the receiver's sale, succeeded to the rights and interests of the Circle Company under the ordinance. The former company is, therefore, the owner of the franchise, together with the license in question. It is also in possession of the property, and entitled to operate the road as now constructed.

We shall assume, without, however, determining the matter, that the laying of the third rail, and doing the business of a standard gauge trunk line, is an additional burden or servitude imposed upon the street; also, that those acts may result in injury to the abutting lot-owner, for which, under the constitution, he is entitled to compensation. Should a court of equity, at his suit, in view of the facts of this case, grant an injunction forbidding the acts in question? As we have already seen, the fee to Willow lane and Clark street is by law vested in the city in trust for the use of the public. It is not, and never was, in the present plaintiffs, who are purchasers of lots subsequent to the dedication of the streets. There is no evidence to show that the grants to them included the reversionary interest or reserved rights, if any such interest or rights there be, of the dedicator in this fee. If the street should be abandoned by the municipality, or for any other reason the trust should fail, and the fee pass out of the city, it would not revert to plaintiffs. *Gebhardt v. Reeves*, 75 Ill. 301. It follows, therefore, that the increased burden mentioned would not constitute an actual taking of plaintiffs' property, though their peculiar interest in the street as abutting owners might entitle them to compensation for injuries inflicted. Besides, it is suggested that, where such a qualified fee in the city as we are now considering exists, "the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value, or to be regarded as property, which, under the constitution, is required to be paid for when its use is appropriated by the public." *Spencer v. Railroad Co.*, 23 W. Va. 406, and cases cited. But where the fee of an individual is not sought to be taken, though an abutting lot-owner, he cannot enjoin the construction and operation of a railroad, merely because the damages to his premises are not compensated in advance: provided the company act under sufficient legislative and municipal authority. 1 High Inj. (2d Ed.) § 637.

It is contended that this doctrine ought not to be held applicable here, because of the peculiar phraseology of our constitution. True, this instrument declares that private property shall not be "damaged" without compensation. It does not, however, require that the damages, where property is not "taken," shall be computed and paid before the injuries complained of are inflicted. It provides that "property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested," till remuneration be made. The proprietary rights of plaintiffs in the land are not divested, because such rights do not exist. There may be a disturbance of the easements connected with the use or enjoyment of their abutting lots; but needful disturbances of property may take place without prior compensation. *McClain v. People*, 9 Colo. 190, 11 Pac. Rep. 85. The city council, by adopting the right-of-way ordinance, determined conclusively, so far as the general public is concerned, including all interests of the plaintiffs common to the general public, that the anticipated disturbances were needful. But the disturbances mentioned in the constitution are, in our judgment, disturbances of property sought to be taken, or, at least, property of the same owner out of which that desired is to be carved. We do not think that the clause in question was intended to require the prior assessment and payment of probable damages for disturbances, to take place in the future, of an easement connected with the property of a party, no part of which is taken, near or adjacent to the land condemned.

The authority for injunctive relief in cases like the one at bar must therefore be found, if it exist at all, in the eminent domain statute. Under a statute similar to ours in this respect, and with a constitutional provision in force substantially the same as ours, with the exception of the clause last above construed, the supreme court of Illinois denied this relief to abutting owners. It is held by that court that the corresponding statutory expression directing an assessment in condemnation proceedings, or compensation for damages to property not taken, must be construed as referring "to contiguous lands of the same owner not actually taken." *Stetson v. Railroad Co.*, 75 Ill. 74; *Patterson v. Railroad Co.*, Id. 588; *Railroad Co. v. Schertz*, 84 Ill. 136. The reasoning of these opinions on this point is satisfactory. We shall not repeat it, nor attempt to enlarge upon it or add to its force. The dissenting views in the *Schertz Case* are based upon a peculiar expression of the ordinance there under consideration, and the insolvency of the defendant company, neither of which matters appears in the case at bar. No inconsistency exists in this respect, as counsel for appellees seem to think, between those cases and the later case of *Rigney v. City*, 102 Ill. 64. The *Rigney Case* was an action at law by the abutting owner for injuries that had already been inflicted. And the *Stetson*, *Patterson* and *Schertz Cases*, while denying injunctive relief, recognize the right of recovery invoked and allowed in the *Rigney Case*. We mention the fact that there is no averment or proof, in the case before us, that the Denver & Santa Fe Company are insolvent, or unable to respond in damages in actions at law for all actionable injuries that may be inflicted, though the existence of such insolvency is not deemed sufficient by a majority of the supreme court of Illinois to warrant interference by injunction prior to the assessment of damages in a legal action. If a judgment at law has been obtained, and for any reason, not the fault of plaintiff, it cannot be collected, he may appeal to equity for appropriate relief. *Railroad Co. v. Schertz*, *supra*. See, further, upon this branch of the discussion, the following cases: *Spencer v. Railroad Co.*, *supra*; *Railroad Co. v. Reinhackle*, 15 Neb. 279, 18 N. W. Rep. 69; *Protzman v. Railroad Co.*, 9 Ind. 467. In England, statutes exist containing provisions substantially similar to those we are now considering, constitutional as well as statutory; and the courts of that country adhere, in effect, to the foregoing rule, denying injunctive relief in cases like the one before us. *Hutton v. Railway Co.*, 7 Hare, 259; *Lister v. Lobley*, 7 Adol. & E. (N. S.) 124.

Our statute (section 242, Civil Code) seems to contemplate that the commissioners or jury shall determine the necessity for the taking of private property, though they are not required to return a specific finding upon this question. The ordinance granted the Circle Company the privilege of constructing and operating a standard gauge railway; and we must, in the present suit, presume that it was adopted by the city council after full and careful investigation of the subject. Since the fee is not in plaintiffs, and the council possessed authority to grant the privilege in question, their action must be considered decisive as to the necessity for the taking, in so far as the license to use a street for this purpose can be considered a "taking" of private property. Besides, this provision of the statute does not refer to the damaging of property. If, therefore, there be no taking of the land, the consequential injuries resulting to an abutting lot-owner, through interference with certain easements, do not entitle him, by virtue of the statute, to interpose the objection that the use of the street is not necessary.

The decree of the superior court will be reversed, and the cause remanded.

(11 Colo. 258)

#### KEARNEY v. PEOPLE.

(*Supreme Court of Colorado.* April 21, 1888.)

##### 1. HOMICIDE—MURDER—FAILURE TO FIND DEGREE OF GUILT.

On an indictment for murder, a verdict finding "defendant guilty in manner and form as charged in the indictment," but failing to find whether defendant is guilty in the first or second degree, as required by Laws Colo. 1883, P. 150, is insufficient.

##### 2. SAME—TRIAL—INSTRUCTIONS.

On a trial for murder it is error to charge that "if you believe from the evidence that defendant fired the shot that caused the death of the deceased, and that at the time of the controversy defendant was in such a mental condition as to distinguish the difference between right and wrong, then he was responsible for his act, and you must convict;" such charge not stating a complete legal proposition.

Error to district court, Pitkin county.

*Aaron Heims, E. M. Collins, Porter Plumb, and Wilson & Stimson*, for plaintiff in error. *Atty. Gen. Alvin Marsh*, for the People.

BECK, C. J. The plaintiff in error was indicted at the November term, 1887, of the Pitkin county district court, for the murder of one John J. Burt. He was tried and convicted thereof at the January term of the present year, and sentenced to be hanged, which judgment has been superseded for a defect in the verdict returned by the trial jury. The statute defining the crime of murder and providing for its punishment was last amended by the legislature of 1883. As amended the statute divides the crime of murder into two degrees, and requires the jury trying any person indicted for said crime, if they find him guilty thereof, "to designate by their verdict whether it be murder of the first or second degree." The amended statute further provides that "every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the penitentiary for a term not less than ten years." Laws 1883, p. 150. The jury in the present case failed to observe the statutory requirement, the verdict returned by it being as follows: "We, the jury, find the defendant guilty in manner and form as charged in the indictment. CHAS. S. CROSBY, Foreman." It is assigned for error that "the verdict of the jury does not specify the degree of homicide of which they find plaintiff in error guilty." We deem this error well assigned. If a verdict in this form could be sustained at all, it would have to be considered, in view of our former rulings, a verdict of murder in the second degree. *Garvey v. People*, 6 Colo. 559. But the statute is mandatory, and requires a jury trying a murder case to specify the degree of murder, in case of conviction, not by reference to the indictment, but by its appropriate numeral, first or second.

The following instruction is likewise assigned for error: "The court instructs the jury that 'if you believe from the evidence that defendant fired the shot that caused the death of the deceased, and that at the time of the controversy the defendant was in such a mental condition as to distinguish the difference between right and wrong, then he was responsible for his act, and you must convict.'" This instruction is incomplete. Standing alone it does not embody a correct and complete legal proposition. For the foregoing errors the judgment is reversed, and cause remanded for a new trial.

(11 Colo. 222)

GATES v. PEOPLE.

(*Supreme Court of Colorado*. April 27, 1888.)

EXCEPTIONS, BILL OF—FAILURE OF JUDGE TO SEAL.

A bill of exceptions to rulings of the court below, which is not sealed by the judge, will not be considered in the supreme court. STALLCUP, C., dissenting.

Commissioners' decision. Error to Conejos county court.

Defendant, John M. Gates, was prosecuted and convicted before a justice for violation of a town ordinance. He appealed to the county court, and his appeal was there dismissed for a defect in his appeal-bond. He excepted, and brings error.

*C. C. Holbrook*, for plaintiff in error. *Wells, Macon & McNeil*, for defendant in error.

**RISING, C.** The plaintiff in error was prosecuted, before a justice of the peace in the town of Alamosa, for the violation of an ordinance of said town "concerning drays and other vehicles," and upon trial was convicted and fined. Thereafter the defendant presented to said justice a bond for an appeal, which, in form and condition, was sufficient to effect an appeal to the county court from a judgment in a civil case. This bond was approved and filed by the justice within 10 days from the rendition of judgment in said case; and the same, with papers in the case, and a transcript of the judgment given by said justice, were by him duly filed in the office of the clerk of the county court of Conejos county. In the steps taken to perfect an appeal, the requirements of the statute, in relation to taking an appeal in criminal cases, were not complied with. The case was docketed in the county court, and thereafter the appeal was dismissed by order and judgment of said court. Plaintiff in error complains of the ruling of the court in dismissing his appeal, and assigns error thereon. What purports to be a bill of exceptions is not sealed by the judge, and cannot be considered. *De La Mar v. Hurd*, 4 Colo. 442; *Mining Co. v. Kirtley*, 8 Colo. 108, 5 Pac. Rep. 649. In the order of the court dismissing the appeal, it is recited that to such ruling the defendant "asks an exception, which is allowed by the court." This recital can only be regarded as evidence of the right of the defendant to seasonably demand a bill of exceptions. It is not the same thing as a bill of exceptions, and cannot be so considered. *Pomeroy's Lessee v. Bank*, 1 Wall. 592-598.

Upon an examination of the case incident to the ruling upon the foregoing points, we do not perceive any error in the ruling of the court below; but, for the reason that no exception to such ruling was saved, the questions attempted to be raised by the assignments of error are not before us for decision, and we do not pass upon them. The judgment should be affirmed.

**DE FRANCE, C.**, concurs. **STALLCUP, C.**, dissents.

**PER CURIAM.** For the reasons assigned in the foregoing opinion, the judgment of the county court is affirmed.

(9 Kan. 125)

## CLARKSON v. HIBLER.

(Supreme Court of Kansas. April 7, 1888.)

## APPEAL—REVIEW—EVIDENCE TO SUSTAIN VERDICT.

Where no exceptions were taken to the introduction of evidence or to the instructions, the judgment of the trial court will not be set aside if there was any evidence to sustain the verdict and judgment.

Error to district court, Cherokee county; GEORGE CHANDLER, Judge.

Action by J. D. Clarkson against Lee Hibler to recover personal property. Judgment for the defendant, and plaintiff brings writ of error.

W. R. Cowley, for plaintiff in error. C. O. Stockslager, H. G. Webb, and Ritter & Skidmore, for defendant in error.

PER CURIAM. J. D. Clarkson brought his action against Lee Hibler to recover the possession of one Aultman & Taylor traction engine, of the value of \$750, and one truck wagon of the value of \$50. He alleged special ownership therein by virtue of a chattel mortgage executed by the defendant on September 27, 1883. The mortgage contained the following clause: "If said mortgagee, his successors or assigns, or authorized agents, shall deem themselves insecure, then and from thenceforth it shall and may be lawful for the said mortgagee, his successors, assigns, or authorized agents, to enter, without liability for real or supposed damages, upon the premises of said mortgagors, or any place or places where said goods and chattels, or any part thereof, may be, or supposed to be, and take immediate possession thereof, and remove the same to any place or places they may deem best." The defendant filed his answer admitting the execution of the chattel mortgage, but denying the other allegations contained in the petition. Trial had before the court with a jury. The jury returned a verdict in favor of the defendant. Subsequently a motion for a new trial was filed and overruled. Thereafter judgment was entered upon the verdict. The plaintiff excepted, and brings the case here.

The court charged the jury, among others, as follows: "The law presumes that this plaintiff, when he said he deemed himself insecure, told the truth, and that his sayings are to control, unless the circumstances and his acts and doings overcome his sayings. It does not make any difference whether the ground of his insecurity was reasonable; but whether, as a matter of fact, he deemed himself insecure. On the part of the defendant, it is contended he did not deem himself insecure at all; that he took up this engine because he had agreed to do so with other parties,—if they would buy one, he would take this one; and that was the motive which actuated him. But I say to you the sayings of the plaintiff that he did deem himself insecure are to control, unless the circumstances of the case, his acts and doings, overcome his sayings. If he did, as a matter of fact, deem himself insecure, you are not to say whether in reason he had a right to do so or not. He is to be sole judge of that, whatever his motive of insecurity might be. If he acted in good faith in his own mind, he was to be protected therein, and I say to you the law presumes he did act in good faith until the contrary is made to appear from the evidence, under the rules of law herein given you." No exceptions were taken to the introduction of evidence, or to any of the instructions. At least, the briefs do not refer to the pages of the record where any exceptions to evidence or instructions can be found.

We affirm, to the fullest extent, *Werner v. Bergman*, 28 Kan. 60; but, after reading the entire record, we cannot say that there was no evidence before the jury to sustain the verdict and judgment. "A verdict, being based upon conflicting testimony, and coming with the indorsement of the trial court, cannot be set aside by the supreme court, although the testimony may seem to that court to preponderate against the verdict." *Higginbotham v. Fair*,

86 Kan. 742, 14 Pac. Rep. 267. "Where only a general finding is returned by a jury upon disputed testimony, it must be treated as a finding of everything necessary to sustain the general one; and, if such finding has received the sanction of the trial court, it cannot be disturbed here." *Elerick v. Braden*, 38 Kan. 83, 15 Pac. Rep. 887, and cases therein cited.

The judgment of the district court will be affirmed.

(39 Kan. 106)

BELL v. KEEPERS.

(*Supreme Court of Kansas. April 7, 1888.*)

1. FRAUD—ACTION TO RECOVER MONEY PAID—DUTY TO PLACE IN STATU QUO.

When one party seeks to recover money paid upon a contract because it was entered into fraudulently, before he is entitled to recover relief he must place the other party to such contract in the same condition, substantially, he was in when it was made.

2. SAME.

Where a contract of sale embraces several distinct pieces of property, and one is sold by the purchaser, he cannot rescind that part of the contract relating to the other property, and recover back what he has paid thereon, without restoring, or offering to restore, to the other party, the full amount of the proceeds of the pieces sold by him.<sup>1</sup>

3. SAME—DISAFFIRMANCE OF CONTRACT.

The right to disaffirm a contract for fraud must be exercised promptly after its discovery.

4. SAME.

If, after the discovery of fraud in a contract, the party imposed upon, without objection, pays several installments upon it, and sells one of the tracts of land embraced therein, he waives the fraud and affirms the contract.<sup>2</sup>

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Wyandotte county; J. P. HINDMAN, Judge.

*Nathan Cree*, for plaintiff in error. *J. O. Fife and Hale & Miller*, for defendant in error.

HOLT, C. John Keepers, the defendant in error, brought his action against S. B. Bell, and set forth in his petition five distinct causes of action. A general verdict was rendered in his favor, and special findings for amount of recovery upon the first, third, and fifth causes of action.

1. The first cause of action arose from the following facts: In April, 1884, Bell agreed to sell to Keepers three pieces of property,—two tracts of real estate and a barn,—which was treated by both parties as personal property. There was a contract entered into in writing, stipulating that Keepers should pay \$2,250 for the three pieces of property, in monthly payments of \$40 each until all were paid for. One of the tracts of real estate was purchased by Keepers for the purpose of erecting a canning factory thereon. It was situated in Wyandotte, on the "South-West Boulevard." Plaintiff, in his petition, averred that the defendant fraudulently described the land in pointing out the boundaries at the time of the sale. This tract, facing 100 feet upon the boulevard, ran back to a creek. If it was to be used as the location for a canning factory, it would be of great advantage to it to border upon the creek. At the time of the purchase, while this matter was being talked over, the defendant told plaintiff that the tract bordered upon the creek 88 or 90 feet, or that it was not more than 10 or 12 feet narrower in the rear than it was in front, upon the boulevard. By a survey afterwards made it appeared that the

<sup>1</sup> As to the necessity of restoring the consideration of a contract by a party seeking its rescission, see *Kelly v. Kershaw*, (Utah,) 14 Pac. Rep. 804, and note; *Insurance Co. v. Howard*, (Ind.) 13 N. E. Rep. 103.

<sup>2</sup> On the general subject of fraud and false representations, see *Grindrod v. Wolf*, (Kan.) 16 Pac. Rep. 691, and note; *Anderson v. Rainey*, (N. C.) 5 S. E. Rep. 182.

lot touched upon the creek for only 15 feet. This tract of land, which was called by the defendant, at the trial, a "gore," was a part of a body of land originally owned by Bell, but had been divided by the court in an action between Bell and his wife for divorce. It had not been surveyed, and probably the description which Bell gave to Keepers, and the boundaries designated, were given by him without knowing they were erroneous. He did not know where the division line ran, but talked to plaintiff as though he did. In November, 1884, the other piece of real estate was traded by Keepers to one Marks, and at Keepers' request Bell made Marks a deed. Marks gave a mortgage thereon for \$700 to Bell, and paid Keepers \$800. That payment was made in saddlers' stock, however, and there was some testimony showing that it was put in at more than its market value would have been at wholesale. Keepers paid several monthly installments of \$40, the last on the 1st day of January, 1885, and neglected to make any payment thereafter. On the 17th of March following, Bell sent him notice of leaving the premises. Bell abandoned the premises, and brought this action. He had in the mean time been making some improvements and renovations on the barn that he bought and occupied as a canning factory. He had paid altogether \$200 on the contract. There was a general verdict for the plaintiff, and the only special findings were in apportioning the different amounts upon the several causes of action. Upon the first cause of action it was found to be \$200 and interest. There were a number of errors alleged, only one of which we shall consider, as we believe the determination of that one will practically dispose of the case. The following instruction was asked and refused: "If the jury find that on the 27th day of November, 1885, Bell, at the request of Keepers, conveyed one of the parcels of land described in the contract of April 10, 1884, to one Marks, and that Keepers received a sum of money as the result of said sale, then the court instructs you that Keepers could not repudiate and rescind the said contract of sale, and retain the money so received, but was bound to return the same to Bell upon any rescission of the contract." This instruction, or one similar to it, ought to have been given. The proof shows that the three pieces of property were embraced in one sale, and it further appears that it has not been rescinded by mutual agreement. If plaintiff desired to rescind, he should have placed defendant on the same footing, so far as he was able, as he was at the time of the sale. He should not be permitted to retain that portion of the property, or the proceeds thereof, which had been profitable and advantageous to him, and turn back another portion of the property that he might not be satisfied with. The \$200 paid on the contract of April, 1884, was not paid upon the property called the "gore" alone, but was paid upon the entire property named in the contract; and before he would have the right to recover back the money so paid he must first offer to place Bell in the same condition he was when the trade was made. There were other errors of the court similar to the one pointed out here, but we do not care to specifically notice them. This error, committed by the court in this instruction, permeated the entire trial. The plaintiff ought to have done, or offered to do, what would have placed defendant substantially in the same condition he was in at the time the contract of sale was made, before attempting to recover the money paid upon the contract. *Harvey v. Morris*, 63 Mo. 475; *McIndoe v. Morman*, 26 Wis. 588; *Underwood v. West*, 52 Ill. 397; *Melton v. Smith*, 65 Mo. 315.

As this action will be remanded for a retrial, there is another phase of the case that requires a suggestion. The evidence of the plaintiff himself shows that he discovered, shortly after the contract was made, that the defendant had misled him in the description of the tract fronting upon the boulevard. After such knowledge he paid several installments upon the contract, and also effected the sale of the other tract embraced therein to Marks. When he found out that the defendant had deceived him in the description of a part of the land, he should have at once rescinded, or offered to rescind, the contract, and



reconveyed, or offered to reconvey, his interest in all the property he had acquired thereunder. He cannot be permitted to select his own time, and consult his own convenience, before exercising the right of rescission. That would give him the power to retain the property, and, after waiting, if markets should prove favorable, he could thus secure possible benefits, and on the other hand have time to reconvey if it should decrease in value, and thus escape all disadvantages. The law does not allow any one to play fast and loose in such a manner. *Estes v. Reynolds*, 75 Mo. 563; *Melton v. Smith*, 65 Mo. 315.

2. The third cause of action was founded upon a contract between plaintiff and defendant, whereby plaintiff was to do some grading upon the South-West boulevard in front of defendant's property. The contract was an oral one, and the parties differ materially in reference to its terms; and the jury were justified in rendering a verdict in favor of plaintiff if they believed that his statement of the contract was correct, and, although certain legal questions were raised in the brief in regard to this cause of action, it must be determined in favor of the defendant in error, upon the ground that there was sufficient evidence to sustain the verdict of the jury, and that the court rendered judgment thereon.

3. The fifth cause of action was concerning the rent of a certain tract of land leased by defendant to plaintiff for garden purposes. Defendant claims that the rent was to be \$200 for a certain tract, or \$10 an acre, and that the amount agreed upon in that tract was 20 acres. The plaintiff claims that the rent was to be at the rate of \$10 an acre per annum, but that the amount of the land was to be determined by survey, being all the ground that could be cultivated in said tract. It appears that plaintiff paid more rent than it would have amounted to at \$10 for an acre, and the action was to recover the amount above what the rent really was. In this cause of action there was also a conflict of testimony, and the jury found in favor of the plaintiff, and judgment was rendered thereon. Under the well-established practice in this state we shall hold that it was correct. We therefore recommend that this judgment be modified; that the judgment rendered on the first cause of action be reversed, and the cause remanded for retrial thereon, and the judgment upon the third and fifth causes of action be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 137)

#### SUMNER COUNTY v. WELLINGTON TP.

(*Supreme Court of Kansas. April 7, 1888.*)

#### VENUE IN CIVIL CASES—CHANGE OF VENUE—DISQUALIFICATION OF JUDGE.

Ordinarily, where the judge of the district court has been of counsel in a case, a party has the right to demand a change of venue to another district at any time up to the time of the trial, if the issues have already been made up, and up to the time of the rendering of the judgment where no issues have been made up; and, where no issues have been made up, he has the right to demand a change of venue for the purpose that they may be made up and a trial had.

(*Syllabus by the Court.*)

Error to district court, Sumner county; ISAAC G. REED, Judge *pro tem*.

This was an action brought in the district court of Sumner county, by the township of Wellington against the board of county commissioners of said county, to recover the sum of \$739.59, alleged to be due for rent of a certain lot and building alleged to have been leased by the plaintiff to the defendant by a written lease. Afterwards one of the attorneys for the plaintiff in the action became the judge of the court. Afterwards, and on March 8, 1886, a judge *pro tem*. was duly elected to try all cases in which the regular judge was interested, among which cases was the present. Afterwards, and on

March 24, 1886, a judgment was rendered in the case in favor of the plaintiff and against the defendant for the amount for which the plaintiff sued. Afterwards, and on March 27, 1887, the court, by the judge *pro tem.*, on a motion to vacate and set aside the judgment, made the following findings, to-wit: "On the 8th day of March, 1886, this case was set for hearing by the present sitting judge *pro tem.*, which said time for hearing was fixed for the 11th day of March, 1886. That on the 11th day of March the attorney for the defendant came into court, and said that he was not present at the time of the setting of the cause for hearing, and that they were not ready to hear it then, but consented that the case might be set for hearing on the evening of the 18th day of March, upon the matters in issue under the pleadings. That on the 18th day of March, by the consent of both parties, plaintiff and defendant, the hearing of the matters in this case was postponed until the evening of the 19th day of March. That on the evening of the 19th day of March, 1886, the defendants called the attention of the court to the fact that the motion for a change of venue had been filed in the case by them, and asked to have the hearing of the other matters in the case postponed until after the decision upon the motion for a change of venue. But afterwards, after the introduction of evidence by parties plaintiff and defendant upon the question of a change of venue, and after the court had indicated what its decision would be, the defendants withdrew their motion for change of venue, and gave notice that they would file a motion for leave to withdraw their demurrer and file an answer in the case. That afterwards, on the 24th day of March, the motion for leave to withdraw the demurrer and file an answer came on for hearing, and the motion was ruled on in the morning of said day. At that time, the court, over the objection of the plaintiffs, gave leave to the defendants to withdraw their demurrer, and gave them until 1:30 P. M. of that same day to make a showing why they should be allowed to file an answer. That afterwards, in the afternoon of the same day, the application for leave to file an answer again came on for hearing, and was overruled by the court. Thereupon the plaintiffs asked for judgment by default; and that before the court entered judgment in favor of the plaintiffs, and while the court was receiving the verdict of the jury which had just returned into court in another case, this motion for a change of venue was filed; and that afterwards, and after said motion for a change of venue had been filed, the court rendered judgment for the plaintiffs in said case, as prayed for in their petition. Counsel for the defendants objects and excepts to the finding of the court in reference to the time that the plaintiffs ask for judgment by default. After having examined said motion for a new trial and said motion to vacate said judgment, and having listened to the foregoing evidence, and arguments of counsel for plaintiff and defendant, said court (said judge *pro tem.* then presiding) overrules each and both of said motions; to which judgment overruling said motions said defendant objects and excepts." The answer which the defendant asked to file in the case was duly verified, and, omitting the title, the signature, and the verification, it reads as follows: "And now comes said defendant, the board of county commissioners of Sumner county, Kansas, and, for its answer to said plaintiff's petition herein filed, says: *First*, that it denies each and every material allegation in said plaintiff's petition contained; *second*, it is not nor was it ever indebted to said plaintiff in any sum of money whatever. And said defendant further says that said purported copy of a lease attached to said petition is not a copy of any legal lease that said defendant ever executed to said plaintiff; that said instrument, sued upon in said action, was never executed by said plaintiff to said defendant, because said defendant says that said plaintiff is a municipal township in said county, and never had any power to execute or deliver any lease of any real property whatsoever to said defendant; that said plaintiff has no power to take or receive any rents for said property; that said plaintiff never owned said property, nor had any

right to rent the same, but that said defendant has at all times owned said property, and that its then acting officers, who signed said instrument sued upon in said cause, never had any authority to sign or execute the same; that said instrument sued upon in said cause is spurious, and in law void and of no effect, and is, for reasons aforesaid, no contract between said plaintiff and defendant." The application for the change of venue, made and filed on March 24, 1886, omitting title and signature, reads as follows: "And now comes said defendant, the board of county commissioners of Sumner county, Kansas, and moves the court to change the place of trial of the above-entitled cause of action to some adjoining judicial district; and for grounds says that the Hon. JAMES T. HERRICK, the present judge of this, the 19th judicial district, wherein said cause is pending, was formerly of counsel in said cause, and, on behalf of said plaintiff, presented the claim herein sued upon to said defendant for payment, and argued said claim before said defendant, the board of county commissioners, all of which said facts will more fully appear from the records of said cause, and the records of this court, to which reference is hereby specifically made, and from oral evidence which the defendant is ready to produce to the court. Wherefore said defendant prays for the usual order changing the place of trial of said cause."

*Murray & Elliott*, for plaintiff in error. *George, King & Caldwell*, for defendant in error.

VALENTINE, J., (*after stating the facts as above.*) The only question necessary to be considered in this case is whether the court below erred or not in refusing to grant an application for a change of venue to another district. The regular judge of the court for that district had formerly been of counsel in the case for the defendant in error, (plaintiff below,) and the application for the change of venue was made solely upon that ground. A brief history of the case is as follows: The plaintiff below filed its petition. The defendant below demurred thereto. One of the plaintiff's attorneys became judge of the court. The defendant filed an application for a change of venue on that ground. A judge *pro tem.* was elected by the members of the bar of that court to try all cases which could not properly be tried before the regular judge of the district. The application for the change of venue was withdrawn. Afterwards the demurrer was also withdrawn; but the defendant, at the time of withdrawing the same, asked leave of the court to file an answer. Such answer, duly verified by affidavit, and stating a defense, was tendered to the court; but the court overruled the motion for leave to answer, and the plaintiff then asked for judgment, as upon a default, for the full amount claimed in its petition. Immediately thereafter, the defendant filed another application for a change of venue, upon the ground that the judge of the court had been of counsel in the case, and called the attention of the court to the same; but the court, without taking any action upon the application for the change of venue, and over the objection and exception of the defendant, rendered judgment in favor of the plaintiff, and against the defendant, as upon a default, for the full amount claimed by the plaintiff in its petition. All these proceedings were had before the judge *pro tem.*

We think the court below committed error in ignoring the defendant's application for the change of venue. The statute authorizing changes of venue to be taken in cases of this kind reads as follows: "Sec. 56. In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case, or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some county where such objection does not exist." Civil Code, § 56. The only question arising under the facts of this case is whether the defendant made the ap-

plication for the change of venue within proper time; for it is admitted that, if the application had been made within proper time, the defendant would have been entitled to the change of venue. It is claimed by the plaintiff below (defendant in error) that the defendant below should have made the application for the change of venue at the earliest opportunity, which it is claimed was not done. It is also claimed that the defendant carried on a system of dilatory proceedings from the beginning to the end,—proceedings merely for the purpose of delay. It is claimed that the defendant's counsel, the county attorney, participated in the election of the judge *pro tem.*, and thereby waived his right to a change of venue. It is also claimed that when the last application for the change of venue was filed, all questions in the case had been settled, and nothing was left to be done in the case except to render a judgment therein upon the plaintiff's petition as upon a default. It is claimed that there were no issues of fact to be tried, and no questions of law to be settled, and that a change of venue would have been useless, and could have accomplished no good purpose, nor any purpose, except costs and delay. We think that much that the plaintiff below (defendant in error) claims has force, and yet we think the statute is imperative, and will permit a party to demand a change of venue, in cases of this kind, at any time, and whether the demand is reasonable or unreasonable, and whatever the court or the adverse party may think of it. It is not left to the discretion or judgment of either the court or the adverse party to determine whether the change of venue shall be granted or not, but it is left wholly in the discretion of the applicant for the change of venue to determine whether he will take a change of venue, or proceed with the case under a *pro tem.* judge. We do not think that there was any waiver of right in the present case. The *pro tem.* judge was not elected merely to try this case, but was elected to try all cases that could not properly be tried before the regular judge, and although the defendant's attorney, who was such merely by reason of being the county attorney, participated in the election, yet he did so merely by virtue of his being a member of the bar of that court, and he may have had many other cases in which he was interested as well as in this, and could not well have refrained from participating in the election. In our opinion, in cases like the present, a party ordinarily has the right to demand a change of venue at any time up to the time of the trial, if issues have already been made up, and up to the time of the rendering of the judgment where no issues have been made up; and, where no issues have been made up, he has the right to demand a change of venue for the purpose that they may be made up and a trial had. There was no intention in this case, on the part of the defendant, to permit a judgment to be rendered as upon a default. The defendant claimed that no judgment could legally be rendered in the case; that the plaintiff's petition itself did not state facts sufficient to constitute a cause of action; but that, even if it did, still that the defendant had a good defense thereto upon the merits. The *pro tem.* judge passed upon the sufficiency of the petition when he rendered the judgment in the case, and this was after the application for the change of venue had been made. With reference to the granting of changes of venue, see the following cases: *Railway Co. v. Reynolds*, 8 Kan. 623; *Herbert v. Beathard*, 26 Kan. 746; *Hegwer v. Kiff*, 31 Kan. 636, 3 Pac. Rep. 303.

For the error of the court below in ignoring the defendant's application for the change of venue, the judgment of the court below must be reversed, and the cause remanded.

All the justices concurring.

(39 Kan. 204)

## LEAVENWORTH, T. &amp; S. W. RY. CO. v. JACOBS.

(Supreme Court of Kansas. April 7, 1888.)

## TRIAL—INSTRUCTIONS—SUBMISSION OF SPECIAL QUESTIONS.

Where a case is tried before a court and jury, and the court submits special questions of fact to the jury for their consideration and answers, but at the same time tells the jury when the evidence is not sufficient they may answer the questions by saying "Don't know," and the jury answer some of the questions by simply saying "Don't know," when in fact there is evidence introduced upon which some of the questions might have been directly and properly answered; and the questions were material; and the court refused to require the jury to make proper and direct answers to such questions, and overrules a motion to that effect, it is such an error that a new trial ought to have been granted upon the application of the defendant. The case of *Railroad Co. v. Cone*, 87 Kan. 587, 15 Pac. Rep. 499, cited and followed.

(Syllabus by Stimpson, C.)

Commissioners' decision. Error from superior court, Shawnee county; W. C. WEBB, Judge.

At the trial the jury returned their special findings as follows: "*Interrogatory* (1) Was not the deceased, James Jacobs, at the time of the accident resulting in his death, in the employ of and a servant of the Leavenworth, Topeka & Southwestern Railroad Company? *Answer*. Yes. (2) Had not the deceased, several times prior to his death, while on the flat cars of the construction train, passed the post and fence adjoining the cattle-guard at which he was killed? *A*. Yes. (3) Was not the post and fence of the cattle-guard at which the deceased was killed plainly visible to one sitting on the flat cars, and using his faculties? *A*. Do not know. (4) Whilst the deceased was working for the Leavenworth, Topeka & Southwestern Railroad Company, could he not, if he had used ordinary care, and exercised his faculties, discovered or seen the nearest of the posts and fences in the cattle-guards to the flat cars in the construction train? *A*. Jury cannot agree. (5) If you answer the last question in the negative, state what there was to prevent his so seeing them. *A*. ———. (6) Had not the deceased, while employed on the Leavenworth, Topeka & Southwestern Railroad, just prior to his death, rode upon the flat cars of the work train in going from the cut to the fill, between which points the posts and fences complained of were situated, from two to three times each day? *A*. Yes. (7) At several of the times he so rode upon the flat car, did he not ride sitting upon the flat car, with his feet and legs projecting over the side? *A*. Do not know. (8) If you answer the last question in the negative, then state how and in what position he did ride. *A*. ———. (9) Is it not a fact that the flat car upon which deceased was just prior to his death had but little dirt upon it, and there was plenty of room upon it for him to take a different position? And might he not have sat or stood wholly upon the flat car, and in a safer way or manner than he did? *A*. Do not know. (10) If you answer the last question in the negative, then state what were the facts, and why he could not have taken a safer position, and one in which he would not run the risk of being struck by posts or fences. *A*. ———. (11) Had not deceased been warned, just before he was struck, to lift his feet and look out for the fence or cattle-guard? *A*. Jury cannot agree. (12) Did not the workmen sometimes ride in the tool car or cabooso? *A*. When going to work, yes. (14) Would the deceased, James Jacobs, have met with his death had he not sat upon the flat car, and permitted his feet and legs to hang over the side thereof? *A*. Don't know. (15) Did not deceased voluntarily, and of his own will, sit upon the side of the flat car, and let his feet hang over the side thereof? *A*. Yes. (16) Was there any necessity for deceased sitting upon the flat car with his feet hanging over? If so, state what such necessity was. *A*. Yes. No better place provided. (17) Was deceased ordered or directed at any time by any of his superior officers while working for the L., T. & S. W. R. Co. to sit upon the side of the flat car in the manner in which he

did? A. Do not know. (18) Was there anything in the duties of deceased, which he was hired to perform, that required him to sit upon the flat car with his feet hanging over, when riding thereon? If so, state what. A. No. (19) What was the height of the post and fence at the cattle-guard where deceased was killed, with reference to the flat cars? A. About even. (20) What was the difference between the post at the bottom and the rail? A. About 28 inches. (21) Was not the posts of the fence at the cattle-guard, where deceased was knocked off the flat car, level with the top of the flat car? A. About. (22) How far was the top of such post from the flat car? A. Do not know. (23) Were there not four cattle-guard fences along the line of the Leavenworth, Topeka & Southwestern Railroad, where deceased had been working for two days, similar in construction and position to the one which knocked him from the car? A. Yes. (24) Had not deceased, in the course of his employment there, frequently seen, or had an opportunity to see, the manner of the construction and position of such fences? A. Do not know. (25) If you answer the last question in the negative, state what there was which prevented him from knowing or seeing the manner of their construction and position? A. ———. (26) Did not the accident happen to deceased in broad daylight? A. Yes. (27) Did not the deceased, at some time while working with the construction train there, and prior to the time he was struck by the post or fence, know of the post or fence being there near to the track, and passing flat cars while riding upon such flat cars? And did he not lift up his feet on several occasions to pass said fence or post, and avoid being struck by the same? A. Don't know. (28) If you answer the last question in the negative, then state how he did pass said post or fence on previous occasions, without being struck by the same. A. ———. (29) Is it not a fact that the construction train upon which deceased was, just prior to his death, and while deceased was upon it, and just before he was struck, running at the rate of about twelve miles an hour? A. Yes. (31) While deceased was at work for the defendant, did not the conductor in charge of the gang notify the gang to look out for the cattle-guard fences? A. Do not know. (32) Had not the deceased been, prior to the time of the accident, warned of the danger of the cattle-guard posts or fences? A. Jury cannot agree. (34) Was not the width of the track between the rails four feet eight and one-half inches? A. Yes. (35) Is not the distance outside of the wheel of the flat car to the outer edge of the car twenty-two inches? A. Yes. (36) Did not the post next to the cattle-guard slant about eight inches away from the track? A. Do not know. (37) Was not said post in height about on a level with the top of the flat car? A. Yes. (38) How much wider is a passenger car than a flat car? A. Twelve inches. (39) How far is it from the outside of the wheels of a passenger car to the outside of the car? A. Twenty-eight inches? (40) How far was it from the outside of a passenger car to the top of the post that struck deceased? A. Do not know."

*Geo. R. Peck, A. A. Hurd, and W. C. Campbell, for plaintiff in error.*  
*Gunn & Starbird, for defendant in error.*

SIMPSON, C., (*after stating the facts as above.*) This was an action commenced on the 13th day of August, 1885, in the superior court of Shawnee county, by Emily Jacobs, as administratrix of the estate of James Jacobs, deceased, against the Leavenworth, Topeka & Southwestern Railway Company, to recover damages for the death of the intestate, caused by the negligence and carelessness of the railroad company. It was tried to a jury at the January term, 1886, of said court, who returned a verdict in favor of the plaintiff below for \$575, and the costs of suit. The jury returned answers to special interrogatories submitted by the court on the request of the railway company. There was a motion made before the jury was discharged to require more specific and definite answers to be made to certain of the special

questions, that was overruled and excepted to. A motion for judgment on the special findings and a motion for a new trial were both overruled and excepted to by the railway company, and the case is brought here for review. The principal errors assigned are as to certain instructions requested and refused, some that were given, and the rulings in the various motions above recited. The facts are that the deceased, James Jacobs, a bright, active young man, about 17 years of age, some time in the month of May, 1884, engaged to work for the railroad company, and was employed in shoveling dirt on a construction train, at a point about seven miles south-west of the city of Leavenworth. He commenced to work some time during Tuesday, and on the following Thursday, about 4 o'clock in the afternoon, was killed. At the time of his death he was riding on a flat car, about one-third full of dirt, that was moving at the rate of about 12 miles an hour. He was sitting on the car, with his legs hanging over the side of the car, and, as the car was in the act of passing a post supporting the cattle-guard fence, he raised his legs to throw them over the post, but his heels struck the post, threw him around and off from the car, he falling under the wheels of the car, and being instantly killed. The construction train and the gang with which James Jacobs was employed were at work at a cut called the "Erhart Cut," and were repairing the road-bed. They were principally engaged in loading dirt on the flat cars of the construction train, and when the cars were sufficiently loaded, or when the construction train was obliged to pull out to give way to a passenger or other train, the men would get upon the flat cars, and ride to the place where the dirt would be dumped at a fill, or the flat cars would be run on a siding, and after the other train passed, would be returned to the cut. One of the fills was about a mile and three-quarters from and to the west of the cut. While the deceased was at work, they made two or three runs each way, thus passing from four to six times the post by which the injury was inflicted that resulted in the death of Jacobs. Between this cut and the fill there were three or four cattle-guards, the posts adjoining which were about as high as the top of the flat car, and were from eight to nine inches from the side of the flat car at the top, with a slight slant towards the track. To such posts were attached the boards, and these together constituted the cattle-guards. In riding upon the flat cars some of the men would ride with their legs hanging over the sides of the car, others would sit upon their shovels on the dirt in the middle of the cars, while others would stand erect. Those riding upon the sides of the cars as they approached these posts would lift their feet and legs over the posts. The deceased had passed this particular post before, and in doing so, had lifted his feet up over the same. There was evidence tending to show that the conductor, while Jacobs was working with the gang, and when he was present, and in hearing of the remarks, warned the men against riding on the flat cars with their legs projecting over the sides, and against the dangers of the cattle-guards. The posts were set far enough away from the track to permit the passage of passenger and other cars, that are wider than the flat cars, and the posts and fences were plainly visible to any one passing them. The court submitted a series of questions embodying, presumptively, inquiries as to the most material facts in issue and necessary to the defense of the action, at the request of the railroad company. We say that they were presumptively material for the sole reason that they were submitted by the court, and the jury were required to answer them; and it is not to be assumed that the trial court would direct the jury to return special findings on immaterial matters. The jury were told in the sixteenth instruction that if they could not agree respecting the proper answer to make to any of such questions, it would be sufficient to say in place of answer, "The jury do not agree;" and if they were not able to answer any particular question, for want of sufficient testimony or accurate information, it would be sufficient to say, "Don't know." The jurors seem to have availed themselves of this

very liberal permission, and returned such answers to very many of the special interrogatories. If there was not sufficient evidence to justify an answer, the questions ought not to have been submitted. When the jurors returned their special findings, and before they were discharged, the attorneys for the plaintiff in error filed their written motion to require the jury to make direct and responsive answers to questions numbered from 3 to 11, 14, 16, 17, 22, 24, 25, 27, 28, 31, 32, 36, and 40, and this motion was overruled. We find abundant evidence in the record from which the jury, as we think, could easily have answered directly some of these questions. Of course, the court committed error in instructing the jury that they might answer the special questions by simply saying "Don't know" or "Cannot answer." *Railroad Co. v. Cone*, 37 Kan. 567, 15 Pac. Rep. 499, and authorities cited. The practice was particularly objectionable in this case, as it is a very close question on the facts disclosed by this trial as to the liability of the railway company. It is recommended that the judgment be reversed and a new trial awarded.

PER CURIAM. It is so ordered; all the justices concurring.

(38 Kan. 754)

JOHNSON v. BRANT *et al.*

(Supreme Court of Kansas. April 7, 1883.)

1. GARNISHMENT—WHEN LIES—TO ENFORCE PRE-EXISTING LIEN.

Garnishment proceedings do not lie to enforce pre-existing equities or liens in favor of the plaintiff, and against the intended garnishee, or some third person who may file an interplea in the case, claiming the attached property, money, or credits.

2. SAME—PROPERTY LIABLE TO.

Garnishment proceedings bind such property, money, and credits, and only such, as belong to the defendant, and are not exempt from attachment and garnishment, and are in the hands of the garnishee, or owing by him to the defendant, at the time when the garnishee notice is served upon the garnishee.

3. SAME.

A plaintiff in a garnishment proceeding can never obtain a garnishment lien upon more in the hands of the garnishee than the defendant owns, and, where the property or fund is exempt from judicial process, he cannot obtain a lien upon even that much.

(Syllabus by the Court.)

Error to district court, Franklin county; A. W. BENSON, Judge.

*Mechem & Smart*, for plaintiff in error. *John W. Deford*, for defendants in error.

VALENTINE, J. This proceeding in error is brought to this court to reverse an order of the district court made upon an interplea filed by D. P. Johnson under section 1, c. 137, Laws 1877, (Comp. Laws 1885, par. 3839.) The action was one in which J. A. Brant and U. M. Beachy, doing business under the firm name of Brant & Beachy, were the plaintiffs, and W. A. Clark was the defendant. Brant & Beachy commenced their action against Clark for \$978.48 for services rendered by them as agents in the sale of lands for Clark and others, and in such action obtained an order of attachment against the property of Clark, upon the ground that Clark was a non-resident of the state of Kansas. They also filed an affidavit for garnishment, and gave notice to the officers of the Goodwin Bank of Ottawa for the purpose of garnishing the bank. The notice contained all that was necessary in such a notice, and a great deal more. By the terms of the notice it was not only attempted to garnish the bank and its officers with respect to all property and credits held by them at the time of the service of the notice and belonging to Clark, but it was also attempted to garnish the bank with respect to other property and credits belonging to other persons, and such property and credits also as might come into their hands, or debts that might be owing by them subsequently to the service of the notice of garnishment. C. W. Goodwin, presi-



dent of the bank, answered as garnishee for the bank and its officers; and the answer shows that the bank held a large amount of money and notes not belonging to Clark, but belonging to Richmond & Titus, and of course "covered by the notice of the garnishment." The court then found that a large amount of money and notes "was covered by notice of the garnishment," and the bank was ordered to retain \$1,100 thereof in its hands subject to the event of the suit and the further order of the court. Afterwards, and on September 7, 1885, D. P. Johnson filed his interplea. He claimed to own the aforesaid property and credits himself. Brant & Beachy answered to this interplea, and Johnson replied. Upon these pleadings a trial was had before the court without a jury, and the court made special findings of fact and conclusions of law, and stated them separately. The findings of fact are so voluminous that they cannot well be given in this opinion. We will attempt, however, to state the substance of them, so far as they are material and necessary for the consideration of the questions really involved in this case. Clark, as the agent of Underwood, Clark & Co., held the legal title to and owned a large amount of land upon which Johnson held a mortgage for \$20,000. Clark owed to Brant & Beachy the amount for which they sued him in this action, and he agreed to pay the same out of the proceeds of the sales of the land when paid. Brant & Beachy procured such sales; and afterwards, but before such proceeds were paid, informed Johnson that Clark owed them this amount, and Johnson agreed that he would see that it was paid, stating: "I will make the claim mine, and see it paid." The Goodwin Bank was Johnson's agent to receive the money for him on his mortgage, and to perform various other acts for him. Henry Jayne was an agent of Clark to receive the purchase money for the land when paid, and to pay the same to Johnson, or to his agents, on Johnson's mortgage. On May 29, 1885, certain of the purchasers paid to Jayne the amount of the purchase money which they owed; and, while he (Jayne) still had it in his possession, Brant & Beachy demanded of him payment of their claim against Clark, but he refused. Jayne then paid the money to the Goodwin Bank on Johnson's mortgage, and the money was placed to Johnson's credit; and releases, which had previously been executed by Johnson, and placed in the Goodwin Bank, releasing the property from Johnson's mortgage, were handed to the purchasers. Brant & Beachy, also, at the same time, and before and afterwards, demanded payment of their claim from the Goodwin Bank, but the bank also refused, and they then commenced this action, and garnished the bank in about one hour thereafter. There were many other facts found by the trial court which we deem immaterial to the consideration of the case by us. The trial court also made the following conclusions of law: "(1) That, by their agreements with Wilson and his grantees, the plaintiffs acquired a lien upon the funds arising on sales made by them for the payment of their said claims. (2) Conceding that, in the absence of notice, the lien of the interpleader under his mortgage was paramount to that of the plaintiffs, still he could waive such priority by parol, and did so waive the same, as appears from the 18th finding of fact. (3) Upon all the facts above stated, the plaintiffs have the superior equity to the fund in controversy, and the same must be held to satisfy any judgment that may be rendered in this action against the defendant W. A. Clark." The court then, upon its findings and conclusions, rendered the following judgment: "It is therefore considered by the court here that the claim of the said plaintiffs to the \$1,100 garnished and attached in the hands of the Goodwin Bank is prior, superior, and paramount to that of said intervenor, D. P. Johnson, to said fund, and that he take nothing by his said interplea, and that the plaintiffs recover their costs from Johnson." The "agreements" mentioned in the first conclusion of law were agreements made by the plaintiffs, Brant & Beachy, first with E. E. Wilson, and afterwards with Clark, and finally with Johnson, that their claim should be paid from the funds arising from

the sales of the land; but how the plaintiffs, by such agreements, could acquire a lien upon such funds, or how such a lien could be enforced, in a proceeding in attachment and garnishment, it is difficult to understand. A proceeding in garnishment can be maintained only upon the theory that the property attached by such proceeding belongs to the defendant in the action, (which in this case is Clark,) and not to any one else.

The second conclusion of law is also founded upon the theory that the plaintiffs had a lien upon the aforesaid funds, and that, while Johnson may have had a paramount lien thereon, still that Johnson, by his parol agreement with Brant & Beachy, waived his priority of lien, and conferred priority upon the plaintiffs' lien. As before stated, we think the plaintiffs did not have any lien upon these funds; and, besides, Johnson's waiver appears to have been wholly by parol, and without consideration whatever; and it was also an agreement to answer for the debt or default of another person. In this connection, however, we might also state that on September 25, 1884, Richmond & Titus, who were Johnson's agents, wrote the following letter to the Goodwin Bank, which was also an agent of Johnson, which letter reads as follows: "*L. C. Stine, Cashier Goodwin Bank, Ottawa, Kansas*—DEAR SIR: Yours of the 23d at hand. Underwood, Clark & Co. told us they should settle Beachy's claim. Presume that they will do so if they have to. We think it will be arranged, but perhaps they hope to reduce the demand some. We would prefer to have the whole amount, but if Beachy's claim must be settled let it be done. U., C. & Co. will make the amount good to us. Yours, truly, RICHMOND & TITUS. We notify U., C. & Co. to-day."

Of course, this letter from one agent of Johnson to another agent of Johnson cannot be construed into a contract between Johnson and Brant & Beachy, or as giving to Brant & Beachy a lien upon the funds still in the hands of the purchasers of the real estate, but presumably to be paid to the sellers, and by them to the mortgagee, Johnson, even if such a lien could be enforced in this kind of proceeding, which it cannot.

The third conclusion of law is that the plaintiffs have the superior equity to the fund in controversy. Now, proceedings in attachment and garnishment do not lie to enforce pre-existing equities or liens in favor of the plaintiffs, whether against the intended garnishee or some third person, as Johnson was, or some one else, but only to attach something subject to attachment or garnishment belonging to the defendant, and to subject the same to the payment of the plaintiffs' claim. Plaintiffs never attach their own property or their own equities or liens, but they merely attempt to attach something belonging to the defendant. If, however, it be supposed that the equity or lien supposed to exist in this case arose simply by virtue of the attachment and garnishment proceedings, then such equity or lien could arise only because the property or fund in the Goodwin Bank belonged to Clark when the notice of garnishment was served upon the officers of the bank. But, as we understand, there is no such claim made that such property or fund belonged to Clark at that time, but it is admitted that it belonged to Johnson, and it is claimed by Brant & Beachy that they had and still have a prior and paramount equity or lien to and upon about \$1,000 thereof, by reason of previous transactions. The fund at that time, which belonged to Johnson, and was deposited in the Goodwin Bank, consisted of something over \$8,000 in money, and about \$6,500 in mortgage notes, and the mortgage was for \$20,000. But, certainly, whatever may be claimed in this case, the aforesaid fund did not belong to Clark when the service of the notice of garnishment was made upon the bank. When the money was paid to Jayne, who was Clark's agent, who was the agent of Underwood, Clark & Co., it may be said, for the purposes of this case, that it belonged to Clark. But, when Jayne paid it into the Goodwin Bank on Johnson's mortgage, it then became the property of Johnson, and Clark had no more interest in it than the purchaser of the land who had

paid it to Jayne. After that money was paid into the bank, neither Jayne, nor Clark, nor Underwood, Clark & Co. could have maintained an action against Johnson or against the bank to recover it back, or to recover any part thereof, and the reason for this is simply that no part of such money belonged at that time to any one of them; and, as it did not belong to the defendant Clark, the plaintiffs procured no equity, nor lien, nor anything else valuable, by virtue of their attempted garnishment. Garnishment proceedings bind just such property, money, and credits, and only such, as belong to the defendant, and are not exempt from attachment and garnishment, and are in the hands of the garnishee, or owing by him to the defendant, at the time when the garnishee notice is served upon the garnishee. Civil Code, § 206. As to what and the time when the lien attaches, see *Phelps v. Railroad Co.*, 28 Kan. 165; *Muzzy v. Lantry*, 30 Kan. 49, 2 Pac. Rep. 102; *Railroad Co. v. Thompson*, 31 Kan. 180, 1 Pac. Rep. 622. A plaintiff in garnishment proceedings can never obtain a garnishment lien upon more in the hands of the garnishee than the defendant owns; and, where the property or fund is exempt from judicial process, he cannot obtain a lien upon even that much. We think that the able and careful district judge who tried this case was in some manner or for some reason misled; and, believing the judgment to be erroneous, it will be reversed, and the cause remanded for a new trial.

All the justices concurring.

(39 Kan. 172)

IVES v. ADDISON.

(Supreme Court of Kansas. April 7, 1888.)

JUDGMENT—ASSIGNMENT—GARNISHMENT BY CREDITOR OF ASSIGNOR.

F. brought an action against C. before a justice of the peace for the recovery of money. After judgment was given by the justice in favor of F., he duly assigned the same to A., which assignment was filed by the justice, and noted on the record. Subsequently, C. appealed from the judgment to the district court, and the certified transcript of the record taken up on appeal showed the assignment to A. The case was there continued in the name of F., and judgment was again given for plaintiff. Later, a creditor of F. caused C. to be garnished, and he answered that he was indebted to F. upon the aforementioned judgment. *Held*, that the assignment of the judgment to A. transferred all interest therein of F. to A., and the credit could not thereafter be garnished or appropriated by the creditor of F.

(Syllabus by the Court.)

Error to district court, Greenwood county; CHARLES B. GRAVES, Judge.

*R. C. Summers* and *C. W. Shinn*, for plaintiff in error. *R. P. Kelly* and *W. S. Martin*, for defendant in error.

JOHNSTON, J. This action was brought in the district court of Greenwood county by E. J. Addison against N. H. Ives and W. S. Robertson, clerk of the district court of Greenwood county, to recover \$56, alleged to have been paid to the clerk, Robertson, in satisfaction of a judgment owned by Addison, and which amount was paid by the clerk of the court to Ives. From the record it appears that on December 9, 1885, one William Freeman owned a herd of cattle, upon which H. P. Croff held a first mortgage, and E. J. Addison a second mortgage, to secure the payment of debts owing to them, respectively, by Freeman. On that day, Freeman sold the cattle to Croff, under an arrangement that Croff should purchase them at an agreed price, and that the balance of the purchase money remaining after the satisfaction of Croff's mortgage should be paid to Addison to apply upon his debt and second mortgage. Under this arrangement there remained a balance of about \$141, to apply upon the second mortgage. Croff failed to pay this balance. An action was begun by Freeman before a justice of the peace to collect the same, and on December 28, 1885, he recovered a judgment for \$212, and on the same day the judgment was duly assigned to Addison. Croff subsequently appealed from the judgment of the justice of the peace to the district court; and on

May 26, 1886, the cause was again tried, and judgment rendered against Croff for \$141.90, and immediately thereafter another written assignment was made by Freeman to Addison. On the same day, Ives was the holder of a judgment against Freeman; and, about the time that a result was reached in the trial of the case of *Freeman v. Croff*, Ives caused a notice of garnishment to be served upon Croff. On June 5, 1886, Croff answered the interrogatories in the garnishment proceeding, and stated that he was owing Freeman on the judgment in the case of *Freeman v. Croff*, and an order was made that he pay into the hands of the clerk of the district court a sum sufficient to satisfy the judgment in the case of *Ives v. Freeman*, which was about \$54. On July 9, 1886, Croff paid to the clerk of the district court the amount of the judgment and costs in the case of *Freeman v. Croff*, and the clerk receipted for the amount, and canceled the judgment. On the same day, and at about the same time, Ives demanded from the clerk an amount sufficient to satisfy his judgment against Freeman, and the clerk thereupon paid to him \$54 out of the amount paid in by Croff. Subsequently, Addison, finding that the judgment against Croff, which had been assigned to him, was fully paid and satisfied, demanded that the clerk pay to him the amount received, and the clerk thereupon paid him the amount, less the \$54 which he had previously paid to Ives. Addison then began this action to recover the balance, and at the September term, 1886, the cause was tried by the court without a jury. By consent, Robertson was dropped out of the case, and the finding and judgment of the court was in favor of Addison, of which judgment Ives now complains.

Some objections are made to rulings in the reception of testimony, but we do not think any of them are substantial or require discussion.

It is insisted that the finding and judgment are contrary to the evidence and the law. No special findings of fact were asked for or made, and therefore the view taken by the court of the evidence, and the exact grounds upon which its judgment was placed, cannot be stated; but, under the facts disclosed in the record, the judgment must be upheld. It is claimed, in behalf of Ives, that the money in controversy was rightfully paid to him by the clerk, for the reason that the notice of garnishment was served upon Croff, and the funds in his hands attached, before Addison acquired any right in the judgment. Independent of the fact that Addison had a lien on the cattle, and a right to the funds arising from their sale, we think the garnishment proceeding did not operate to transfer Croff's indebtedness, or any part of it, to Ives. The order of garnishment operated only as an assignment or transfer to Ives of any debt due from Croff to Freeman at the time the notice was served. If the debt or judgment was assigned to Addison before that time, it was placed beyond the reach of garnishment. Civil Code, § 206; *Johnson v. Brant*, 38 Kan. —, ante, 794. Now, it appears that an assignment was made by Freeman to Addison at the time the judgment was obtained against Croff before the justice of the peace. This transfer was based on a valid consideration, and no subsequent one was necessary; and therefore the second assignment, and whether it was made before or after the notice of garnishment was served, may be left out of consideration. It is true that an appeal was afterwards taken, and the case prosecuted further in the name of Freeman, the assignor of the judgment. But this did not nullify the assignment, nor affect the interest which Addison thereby acquired. Section 40 of the Code provides that, in case of any transfer of interest during the pendency of the action, it "may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." Addison chose, as is allowable, to continue the action in the name of Freeman as plaintiff, and it cannot be successfully said that no notice of this assignment was given. It appears that the transcript of the record from the justice's court showed an assignment of the judgment to E. J. Addison, dated December 28, 1885. A certified transcript showing this fact was transmitted, with

the undertaking on appeal and the other papers in the case, to the district court, and hence all parties had notice of the transfer of interest to Addison. Beyond that, there is much in the testimony that indicates that Croff had actual notice of the interest of Addison, and that he was actively endeavoring to assist Ives in securing a portion of the amount paid in by him upon the Freeman judgment. But his liability as garnishee is not to be adjudicated in this action. Addison was not a party to the garnishment proceeding, and had no notice of it, and hence it cannot be said that he has waived his right acquired under the assignment. The assignment, being effectual, transferred all right to the judgment and its fruits from Freeman to Addison, and only such property, money, or credits as belonged to Freeman at the time the notice was served, could be affected or bound by the garnishment. It is clear, therefore, that Addison was entitled to the full amount paid in upon the judgment, and therefore we think the district court reached the correct result. The judgment will be affirmed.

All the justices concurring.

(39 Kan. 148)

*SAWYER et al. v. SYMNS et al.*

(*Supreme Court of Kansas. April 7, 1883.*)

1. PAYMENT—WHAT CONSTITUTES—AUTHORITY TO RECEIVE.

When a firm, doing business as general merchants, order goods of one whom they know is not dealing in such goods, and they are shipped to them by a wholesale house in a city near their place of business, and an invoice, commencing, "Bought of A. B. S. & Co. \* \* \* Messrs. S. & C.," is sent to them at the time the goods are, it should lead the firm to inquire of whom they bought, and whom they should pay for the goods received

2. SAME.

Whenever one of two innocent parties must suffer by the acts of a third, the one who has enabled such third party to occasion the loss must sustain it.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Atchison county; D. MARTIN, Judge.

Action for goods sold, brought by A. B. Symns, John B. Murphy, Joseph W. Allen, and John J. O'Donnell, partners as A. B. Symns & Co., against Samuel D. Sawyer and John D. Crist, partners as Sawyer & Crist. Judgment for plaintiffs, and defendants bring error.

*Jackson & Royse*, for plaintiffs in error. *Tomlinson & Eaton*, for defendants in error.

HOLT, C. The defendants in error, as plaintiffs, brought this action to recover the amount of a bill of groceries claimed by plaintiffs to have been bought of them by defendants, through their agent, one Littonsky. The defense interposed was that Littonsky was not their agent, but was the principal from whom defendants purchased, and to whom they made full payment at the maturity of the debt. This action was tried by the court without a jury at the February term, 1886. The court made special findings of fact, and rendered judgment for the amount of plaintiffs' claim. In 1883 the defendants were keeping a small store at Comet, Brown county, a little village off the line of the railroads. Littonsky had often sold them dry goods and notions out of a cart in which he carried his goods. In December, 1883, John D. Crist, one of the defendants, met Littonsky in the cars as he was going to Atchison, and told him that he was going there to purchase goods. Littonsky asked and obtained permission to buy the goods for him, giving as a reason that he had an uncle in Leavenworth, of whom he could get money, and could furnish them to Sawyer & Crist cheaper than Crist could buy them himself, and still make his commission; whereupon Crist made out a list of groceries and handed it to him. Littonsky, obtaining a letter of introduction,

went to the store of plaintiffs, in Atchison, and ordered the groceries for Sawyer & Crist, and guaranteed their payment. The plaintiffs shipped them at once to Comet to the defendants, and at the same time sent them an invoice, which had for its heading: "Bought of A. B. Symms & Co., wholesale grocers. \* \* \* Messrs. Sawyer & Crist, Comet, Kansas." The goods were received by Sawyer & Crist, and placed in their general stock. Afterwards, Littonsky wrote them a letter for the amount they were owing him, \$38.50, for goods previously delivered from his cart; and, before 30 days had expired after he had ordered the goods, he called at the store of defendants, when they paid him, not only the amount they owed him, but also the amount of the bill of goods sent by A. B. Symms & Co. He had never before ordered any goods for them, nor did plaintiffs know him before this letter of introduction. He left the day after he received the money, and has never been seen or heard of since by the parties to this action. An effort was made to look him up, which proved futile. At the expiration of 30 days the plaintiffs notified the defendants their bill was due, and considerable correspondence passed between the parties. About a year afterwards the account was handed to Tomlinson & Eaton for collection. Mr. Tomlinson presented it to Sawyer, one of the defendants, when Sawyer executed a firm note, due six months after date, without interest, which the plaintiffs refused to accept, and an action was immediately brought upon the account. Sawyer, who was then on his way to Kansas City to visit his former partner, was served with summons, and again executed a firm note in favor of plaintiffs, due in 60 days, with interest, and gave it to Tomlinson subject to the approval of plaintiffs. From Kansas City the defendants inquired by telephone whether plaintiffs would accept such note, and were at once notified that they would not.

Defendants complain that the findings of fact are not sustained by the evidence; that they are not sufficiently definite and certain, and that from the testimony introduced the judgment should have been for the defendants, instead of the plaintiffs. We think none of the grounds taken by the defendants are tenable. By an examination of the circumstances attending the sale, the evidence shows that the plaintiffs sent an invoice when they shipped the goods, which was notice to the defendants that the groceries had been sold to them, not to Littonsky. In this transaction the plaintiffs were doing business in no unusual manner. On the contrary, the evidence shows that this mode of selling goods was frequently practiced. The heading of the invoice should have furnished the defendants with sufficient information that they were dealing with plaintiffs; and also from it, and other circumstances within their knowledge, that Littonsky bought the goods of plaintiffs for them, and that he was not the party from whom they were buying these goods direct. There is no evidence that could, even by inference, make Littonsky the agent of plaintiffs. On the other hand, if he were not employed by the defendants as their agent to buy the goods in question, though a part of Crist's testimony might be construed to make him one, it was at their suggestion that he purchased them. It is established that plaintiffs, in all this matter, pursued the methods customary and usual among merchants. It also appears that defendants paid Littonsky in good faith. He took advantage of their acquaintance with and confidence in him to obtain this money. It is a well-known and oft-approved rule that, whenever one of two innocent parties must suffer by the acts of a third, the one who enabled such third party to occasion such loss must sustain it. Applying this principle to the evidence in this action, it is plain that the defendants should pay the second time for the goods, rather than plaintiffs should lose them without fault on their part. The defendants cite *Lumley v. Corbett*, 18 Cal. 494, as authority in their favor decisive of this case. The facts in that case were that one Broadhurst was, and had been for some time, a wholesale merchant in San Francisco, having a stock in his storehouse, from whom Corbett had been in the habit of buying goods of the same kind as those

named in the action brought, and paying him therefor. He bought of Broadhurst five hogsheads of ale; and, as he did not have it in store, he obtained an order from Lumley, and gave it to Corbett. The ale delivered was Lumley's, but the defendant believed it to have been Broadhurst's, and paid him for it. That authority is not entirely applicable in this case. It differs in this, and we believe the difference a material one: Broadhurst was a merchant who usually carried a large stock of the same kind as those sold; Littonsky did not own a store, never had dealt in the kind of goods ordered, did not pretend to own them, but said he could buy them elsewhere. Broadhurst had repeatedly sold and received payment for goods of like character; Littonsky had never even pretended to traffic in similar goods before. Corbett himself procured the goods upon the order "to deliver" them; these plaintiffs sent the goods upon the order of Littonsky, given personally to them. The plaintiffs in this action sent an invoice to defendants, which showed that defendants had bought the goods of plaintiffs; these defendants paid Littonsky for goods he did not carry; Corbett paid Broadhurst, as he had often done before. We think this authority should not control the decision of the case.

The defendants asked that the findings be made more definite and certain; and that some of them, designating the ones, should be set aside, for the reason that they were not supported by the evidence. They were voluminous, and sufficiently comprehensive, definite, and certain to support the judgment. Probably one of the findings was more favorable to the plaintiffs than the evidence would justify; but, under the evidence brought here and the other findings, the error was immaterial. There is very little conflict in the evidence; and, from the almost undisputed facts in the case, the judgment was correctly given in favor of the plaintiffs. It is therefore recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 211)

WHITSON v. GRIFFIS, Sheriff.

(Supreme Court of Kansas. April 7, 1883.)

1. FRAUDULENT CONVEYANCES—CHATTEL MORTGAGES—BENEFIT TO MORTGAGOR.

Where a chattel mortgage is given, by the terms of which the mortgagor receives some benefit therefrom, *held*, the mortgage is not for that reason void, provided such provisions are made in good faith, although the property is thereby placed out of the reach of creditors.

2. SAME—CHATTEL MORTGAGE—BETWEEN STEP-DAUGHTER AND STEP-MOTHER.

Where the evidence shows that the mortgagor is a step-daughter of the mortgagee, and that they lived together as members of one family, it is proper for the court to instruct the jury that such facts may be taken into consideration by them in determining the good faith of the transaction.

3. SAME—CHATTEL MORTGAGE—POSSESSION OF MORTGAGOR.

Where a mortgage is given on a stock of goods, with a stipulation for possession thereof by the mortgagor, and by agreement outside the mortgage the mortgagor is permitted to continue disposing of the goods in the ordinary course of business, and to use a portion of the proceeds thereof in the support of his family, paying the remainder over in the discharge of the mortgage debt, the whole transaction is not thereby, as matter of law, rendered fraudulent and void as against creditors, but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not.

(Syllabus by Clogston, C.)

Commissioners' decision. Error to district court, Chase county; L. Houx, Judge.

This was an action brought by C. C. Whitson, the plaintiff in error, against J. W. Griffis, the defendant in error, as sheriff of Chase county, to recover the possession of a stock of goods which plaintiff alleged that he had a special ownership in. The record shows that at and before December 28, 1885, one M. E. Breese was the owner and in possession of a store at Cottonwood Falls, v.17p.no.8—51

in Chase county, upon which day she executed to the plaintiff a chattel mortgage on all the stock of goods and fixtures contained in said store to secure the payment of a promissory note executed to him for the sum of \$900, payable three months after date. Said chattel mortgage had a condition in it as follows: "That the said party of the first part, M. E. Breese, shall remain in possession of the property herein conveyed, and may sell and dispose of the same, or any part thereof, upon the following conditions, to-wit: That she shall keep an account of all sales made by her each day, in a book kept for that purpose, and that, prior to the close of banking hours in each day, shall deposit in the Cottonwood Falls or Chase County National Bank, to the order of the second party, the proceeds of all sales made up to the time of deposit, less such amounts of necessary change as may have to be kept on hand for the purpose of trade after the hours of deposit. The amounts so retained each day shall be shown by a cash-book. That the first party shall have a right to obtain, from the proceeds of such sales aforesaid, the necessary expenses attending the selling and care of said property, including store rent, fire, lights, fuel, clerk hire, and also reasonable living expenses of said party of the first part and her family, while she devotes her time to the business of selling and disposing of said property, for the purpose of paying said indebtedness; and, for the purpose last mentioned as aforesaid, said party of the first part shall have the right to draw upon the funds arising from such sales, subject to the approval of the second party, and such draft or order shall state the purpose for which it is drawn upon its face. That whenever it is necessary to purchase any articles or staple goods, from time to time, in order to sell the other goods, a check or order may be drawn, with the consent of the second party, to pay for such goods. When purchased, shall be kept separate from the other goods; and the proceeds from the sale of these goods to be deposited to the credit of said account, to the amount of the sum drawn to pay for the same." Under the provisions of this mortgage, said Breese continued to hold possession of the goods until February 24, 1886, when the defendant in error levied upon and took possession of said goods as the property of M. E. Breese, by virtue of an order of attachment issued out of the district court of Chase county upon a claim of \$600 against Mrs. Breese for goods purchased by her. Trial by jury, and verdict and judgment for the defendant; and the plaintiff now brings the case here.

*Madden Bros. and F. P. Cochran, for plaintiff in error. Smith & Solomon and Young & Kelly, for defendant in error.*

CLOGSTON, C., (*after stating the facts as above.*) This was an action in replevin to recover the possession of a stock of goods and fixtures claimed by the plaintiff by virtue of a chattel mortgage executed by his step-daughter, one M. E. Breese, to secure an indebtedness due from her of \$900. The defendant levied upon said goods, by virtue of an order of attachment, as the property of Mrs. Breese. The sole question in issue was the validity of this mortgage by which plaintiff claimed his right of possession. Plaintiff complains of the instructions of the court to the jury, and the refusal to instruct as requested by him. The court, among other things, instructed the jury as follows: "(7) But, on the other hand, I instruct you that if the mortgage in question was accompanied by an understanding or agreement that the same was wholly or in part for the benefit of said M. E. Breese, by placing her property out of reach of creditors, then such mortgage was void as against the plaintiff and attaching creditors, notwithstanding the fact that the plaintiff may have been an actual creditor of said M. E. Breese, and in such case plaintiff cannot recover." "(12) You are further instructed that if you find from the evidence that, at the time the mortgage in question was executed and delivered, C. C. Whitson was the step-father of the said M. E. Breese, and that they were residing together in the same house, and had so resided



together for a long time prior thereto, and were at said time members of the same family; then these facts may be taken into consideration in determining the question of good faith; for, where parties are so related, they are in law held to a stricter proof and accountability, as to good faith towards creditors, than mere creditors." These instructions were objected to, the objection overruled by the court, and excepted to by plaintiff. In addition to these instructions, the plaintiff asked the court to give the following instruction: "Where a chattel mortgage is given on a stock of goods, with a stipulation for possession thereof by the mortgagor, and, by agreement in or outside of the mortgage, the mortgagor is permitted to continue disposing of the goods in the ordinary course of business, and to use a portion of said stock, or the proceeds thereof, for his support, and that of his family, and pay, out of such stock or proceeds, rent, fuel, clerk hire, lights, paying the remainder over in discharge of the mortgage debt, the transaction will not be rendered fraudulent and void as to creditors, but will be upheld as valid, if entered into and carried out in good faith." Which instruction the court refused to give, and was excepted to by plaintiff.

We think that the court erred in giving the two instructions above quoted, and in refusing to give the instruction asked by the plaintiff. Instruction No. 7, given by the court, rendered it impossible for the jury to have returned a verdict for the plaintiff, no matter how honest or how much good faith there was in the transaction between plaintiff and Breese. The court by that instruction said that if it was understood or agreed between these parties that the transaction was for the benefit, in whole or in part, of Mrs. Breese, by placing her property out of the reach of her creditors, then that the mortgage was void. If this transaction was just as plaintiff claimed it to be, and the mortgage was given in good faith, and without any fraudulent intent, yet it would have the effect which the court said would render the mortgage void if it was partly for her benefit. The mortgage also gave her the right to use a part of the proceeds arising from the sale of the goods. It gave her the right to sell them, and to receive compensation for so doing. These would all be benefits resulting to Mrs. Breese; and, no matter how much good faith there was in the transaction, still under this instruction the jury was obliged to return a verdict for the defendant. *Howard v. Rohlfing*, 36 Kan. 357, 13 Pac. Rep. 566. To render a mortgage void by reason of some benefit resulting to the mortgagor from the giving of the mortgage, such benefit must have been given for the purpose of hindering, delaying, or defrauding creditors. *Frankhouser v. Ellett*, 22 Kan. 127.

Instruction No. 12, given by the court, we think was calculated to mislead the jury. The latter part of the instruction says: "They are in law held to a stricter proof and accountability, as to good faith towards creditors, than mere creditors." The jury might, and perhaps did, understand by this instruction that the bare fact that the relationship of step-father and daughter existed, and that they were living together as a part of one family, was a circumstance that would render this transaction fraudulent, unless the plaintiff by strict proof established the good faith in the transaction.

Where a chattel mortgage is given, containing a provision, as in the mortgage, that the mortgagor might retain possession and sell the property in the course of trade, and account for the proceeds, and receive out of such proceeds the expenses of operating the business, together with compensation and the means of subsistence of the family of the mortgagor during the time the business was being run, it has been upheld and sustained by this court. See *Frankhouser v. Ellett*, *supra*; *Howard v. Rohlfing*, *supra*; *Arn v. Hoersemann*, 26 Kan. 413; *Randall v. Shaw*, 28 Kan. 419; *Leser v. Glaser*, 32 Kan. 546, 4 Pac. Rep. 1026. This transaction was being questioned, and the defendant had a right to question the good faith of the parties in making this transaction; and, if it was found that this condition was put in the mortgage

for the purpose of hindering and delaying the collection of a debt, then, of course, the mortgage would be void; but the court ought to have submitted the question to the jury, and they ought to have been informed that where such conditions and stipulations are contained in a mortgage, and placed there in good faith, that it would not be, for that reason, void. Such an instruction, or one embodying the principle therein contained, ought to have been given to the jury. It is therefore recommended that the judgment of the court below be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 147)

**FAIRFIELD v. DAWSON.**

(*Supreme Court of Kansas. April 7, 1888.*)

**APPEAL—REVIEW—FAILURE TO OBJECT ON TRIAL.**

Errors occurring during the trial must be brought to the attention of the trial court by a motion for a new trial, before they can be considered in the supreme court. *Buettinger v. Hurley, et al.*, 34 Kan. 585, 9 Pac. Rep. 197.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Ottawa county; M. B. NICHOLSON, Judge.

Replevin by Charles Fairfield, as assignee, against Thomas W. Dawson. Judgment for defendant, and plaintiff brings error.

*W. O. Buchanan and Chipman & Painter*, for plaintiff in error. *R. F. Thompson*, for defendant in error.

HOLT, C. Plaintiff in error brought his action to recover a certain one-story building, alleged to be personal property, and averred that he was the owner thereof, and entitled to the possession of the same, and that the defendant wrongfully detained it, and had for the space of two months, to his damage, in the sum of \$300. At the trial a jury was impaneled, and the evidence of plaintiff was introduced. After he rested, the court, upon the motion of the defendant, directed the jury to render a verdict in favor of the defendant for costs. Plaintiff filed a motion for a new trial, but it does not appear in the record, nor is there any statement of the grounds named in such motion. In its absence, we are unable to determine whether there was any error of the court in overruling the motion. It is the settled law of this state that all errors during a trial must be brought to the attention of the trial court upon a motion for a new trial, before they will be considered here. *Buettinger v. Hurley*, 34 Kan. 585, 9 Pac. Rep. 197; *Hover v. Tenney*, 27 Kan. 133; *Decker v. House*, 30 Kan. 614, 1 Pac. Rep. 584. We recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered.

(39 Kan. 115)

**ATCHISON, T. & S. F. R. CO. v. TOWNSEND.**

(*Supreme Court of Kansas. April 7, 1888.*)

**1. WITNESS—IMPEACHMENT—COLLATERAL MATTER.**

Where evidence of a collateral fact, and one irrelevant to the issue, is drawn from a witness on cross-examination, the party adducing such testimony cannot introduce evidence contradicting his statement concerning such collateral matter solely for the purpose of discrediting him.

**2. RAILROAD COMPANIES—NEGLIGENCE—HIGHWAY CROSSING.**

It is negligence *per se* for the railroad to fail to sound the whistle 80 rods from a public crossing, but it does not excuse a traveler from using care and caution to avoid injury at such crossing.

## 3. SAME.

It is the duty of one about to cross a railroad crossing to look and listen for an approaching train; and, if the view of the track is limited and partially obstructed, greater care is required on the part of a traveler than would be if he had an open and extended view of the same.<sup>1</sup>

(Syllabus by Holt, C.)

Commissioners' decision. Error to district court, Jefferson county; R. CROZIER, Judge.

*Geo. R. Peck, A. A. Hurd, and Henry Keeler, for plaintiff in error. Thos. P. Fenlon and L. A. Myers, for defendant in error.*

HOLT, C. On the 21st of February, 1885, the defendant in error drove from Valley Falls to his home, about two miles north-east of that city. He was compelled to cross the track of the defendant's railroad twice, and at the crossing nearest his home the locomotive of a passing passenger train of the defendant struck the rear end of the wagon in which he was riding, and he was thrown out, and his foot injured. He brought this action against the company for the injury sustained. It was tried at the February term, 1886, of the Jefferson district court, and he recovered judgment for \$3,500. The company bring the case here. The only errors complained of that we care to notice are—*First*, the admission of irrelevant testimony; and, *second*, whether the plaintiff was guilty of contributory negligence. A witness for defendant, J. B. Kelly, in his direct examination, testified that he was the fireman on the train that ran into plaintiff's wagon at the crossing; that for the last 26 months his run had been between Topeka and Atchison, and that on the day the accident occurred the whistle was sounded three times at the whistling post, 80 rods west of the crossing. Upon cross-examination he testified: "During all the time I worked as fireman on that train, the whistle of the engine on which I worked was regularly sounded for the crossing, and the engineer never failed to sound his whistle for the crossing." Over the objection of the defendant, other witnesses were allowed, in rebuttal, to testify that, at other times than upon the day when the accident occurred, the whistle was not sounded for the crossing in question. Defendant contends that such evidence was irrelevant and immaterial; and as it tended only to contradict the witness on a fact which was collateral and irrelevant, and about a matter that was drawn out by the plaintiff himself upon cross-examination, it was error for the court to admit it. We are of the opinion that the contention of the defendant is correct. This testimony did not tend to establish any issue in the case. The witness had testified about the sounding of the whistle upon nearing this crossing that day. In the cross-examination by plaintiff he gave evidence concerning the blowing of the whistle at other times; that it was the invariable habit of the engineer to sound the whistle at all crossings. Such testimony would not be proper cross-examination ordinarily; in this instance, for the additional reason that this was the first trip the witness had made with the engineer then in charge of the engine, and the first time the engineer had run this passenger train. The well-settled rule is that a witness cannot be contradicted by evidence which is collateral and irrelevant to the issue, simply for the purpose of discrediting him. *Railroad Co. v. Linn*, 15 Neb. 234, 18 N. W. Rep. 35; Greenl. Ev. § 449. This testimony was important, because the only negligence of defendant complained of was the failure to sound the whistle at this crossing, and there was a conflict of evidence upon this question, not greatly preponderating in favor of either party. We believe that the court erred in permitting such testimony to go to the jury.

It is claimed by the defendant that Townsend was guilty of negligence in attempting to cross the track of defendant's road at the time of the acci-

<sup>1</sup>As to the duty of the traveler at railroad crossings, see *Durbin v. Navigation Co.*, (Or.) ante, 5, and note.

dent. The facts, as shown by the record, appear to be: The plaintiff had lived at his then home for eight years, and had crossed the track at this point very often during that time, and had become familiar with it. In approaching the crossing at the time of the collision, he was going nearly north, and the train nearly east. The wagon road, along which he was passing, before it reached the railroad track, was on higher ground, descending gradually until it crossed the rails. For some distance on the west side of the wagon road there were brush and small trees, but they did not obscure the view of the railroad except for a rod or two immediately before it entered the defendant's right of way. The right of way itself was clear of brush and trees. The wagon road first touched it about 60 feet from the rails. At that point the track could be seen, west of the crossing, a distance of 500 feet; and, when 30 feet from the crossing, it could be seen 750 feet. Plaintiff himself testifies, when he was 6 or 8 rods from the crossing, he looked for the approach of a train, and from the place from which he looked he could have seen a train of cars 25 rods west of the crossing. He did not look for the train after he reached defendant's right of way. The jury found that he ceased to look at the distance of 70 feet before he reached the rails. He was driving his team at a slow walk, and the train was approaching at the rate of 35 miles an hour. He wore a woolen overcoat and cloth cap, and around his neck a scarf about 2 yards long and 15 inches wide. He testified that he did not hear the whistle of the engine, nor the tread of the approaching train. The defendant contends that this testimony establishes the fact that plaintiff was guilty of negligence, and that such negligence contributed to his injury, and for that reason insists that he ought not to recover. The plaintiff argues that, as plaintiff did look up the track, that was some evidence of care, and as the question was submitted to the jury, and they found in favor of the plaintiff, it is conclusive on that point. He further argues that it was the province of the jury to determine whether plaintiff's acts, under the circumstances proven, were negligent, and that by the verdict in his favor they determined that he had exercised sufficient care. The findings of the jury, and the evidence of the plaintiff himself, show that he was not prudent in approaching the railroad track in the manner he did. He testified himself that he knew it was about train time, though further added that he supposed the train had passed. We think that it is no proof of care for a party 6 or 8 rods from a railroad crossing to look for an approaching train, when from that place he cannot see more than 25 rods from the crossing, especially if he is driving at an ordinary walk, and the train is approaching swiftly. The jury found, in this instance, it was going at the rate of 35 miles an hour, and the testimony shows that it usually passed the crossing at the rate of 25 or 30 miles an hour. The plaintiff, living near the crossing, must have known its ordinary speed. If it was approaching even at the rate of 25 miles an hour, and had been anywhere in sight within 25 rods, it would have passed the crossing before the plaintiff could have reached it; and, if the train was not in sight, it would have been the duty of the plaintiff to have looked again for the train, especially when he had an unobstructed view for 60 feet just before he crossed the rails. In this case the jury found that the plaintiff stopped looking when he was 70 feet from the track, and was then near the right of way of the defendant. The evidence of the plaintiff himself, corroborated by one of his neighbors, is that near the right of way, beside the wagon road, was a thick clump of trees extending for one or two rods, so dense that the train could not have been seen when looking from the road from that place. It was the only portion of the road where the brush and trees obstructed the view of the railroad track. We believe that no man should be excused in driving onto a dangerous crossing without looking or listening for an approaching train; and if he looked from a point where he could get only a partial view of the track, not extending more than 25 rods from the crossing, when he was any considerable distance

from it, he should have looked again when he was near it, and when he could have obtained an unobstructed view of the track. *Durbin v. Navigation Co.*, ante, 5; *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. Rep. 529; *Railroad Co. v. Beale*, 73 Pa. St. 504; *Pence v. Railroad Co.*, 63 Iowa, 746, 19 N. W. Rep. 785; *Tully v. Railroad Co.*, 134 Mass. 499; *Salter v. Railroad Co.*, 75 N. Y. 273; *Cordell v. Railroad Co.*, 70 N. Y. 119; *Seefeld v. Railroad Co.*, (Wis.) 35 N. W. Rep. 278; *Gunn v. Railroad Co.*, Id. 281; *Beach*, Cont. Neg. § 63; *Stepp v. Railway Co.*, 85 Mo. 229.

The plaintiff claims the negligence of the company consists in the fact that no whistle was blown at the whistling post, a quarter of a mile from the crossing. That was negligence on the part of the railroad company, without question; but it is also to be determined whether the failure to blow the whistle caused the injury sustained by plaintiff. *Railroad Co. v. Morgan*, 31 Kan. 77, 1 Pac. Rep. 298. When he approached the track, he did not hear the approaching train, even when it was almost upon him, owing either to his preoccupation of mind, or because his ears were muffled in his clothing. If his hearing was obstructed, it was his duty to have been more careful in looking for approaching trains. He was familiar with the crossing; knew the speed at which trains passed that place ordinarily. He knew it was about train time; and, if he attempted to drive across the track without any further effort to ascertain whether the train was coming than shown by the evidence in this case, it seems to us that he cannot be held to have used ordinary care. We do not mean that a man should be required to make nice mathematical calculations when approaching railroad crossings; yet we are of the opinion that, in crossing a track he was familiar with, knowing the usual way of running trains, the curves of the road, and difficulty in looking down the track, he should not be excused from failing to look or listen for an approaching train from a point where he could either have seen or heard it. It was not simply his own safety to be considered in this matter, but the danger of derailing the train, and causing an accident that might have been more serious. Both railroad companies and the traveling public have the right to a crossing; and it is the duty of the traveler, as well as of the engineer in charge of the locomotive, to see that a crossing is free from danger when approached. While it may not be necessary for the traveler to stop and listen, yet it is his duty to use some care and caution in ascertaining whether a train is coming. If he had looked for an approaching train where he could have seen the track for any considerable distance, that would have been some proof of ordinary care. We have no wish to limit the rule established in this state, that, where the facts and circumstances are such that different men might arrive at different conclusions as to the degree of care exercised, it is then a question for the jury to determine. *Railroad Co. v. Pointer*, 14 Kan. 37; *Railway Co. v. Fitzsimmons*, 22 Kan. 686; *Osage City v. Brown*, 27 Kan. 74. But where the facts are established, and the reasonable deduction to be drawn from them is strongly against the verdict of the jury, the court should hesitate to render a judgment thereon.

It is recommended that the judgment of the court below be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 93)

WEST v. WESTERN UNION TEL. CO.

(Supreme Court of Kansas. April 7, 1888.)

1. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—ACTION FOR DAMAGES.

Where a son, for the benefit of his father, left a written message at the office of a telegraph company, properly addressed to his father, with direction to the agent to forward it immediately, and paid the amount of money demanded by the agent for the transmission and delivery of the same, and subsequently, with a full knowledge of all the facts, the father returns to his son the money paid by him to the tel-

telegraph company, and fully ratifies his acts in the transaction, and the message is never delivered. *Held*, that the father may maintain an action for a breach of the contract in his own name, against the telegraph company. *Dresser v. Wood*, 15, Kan. 844; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. Rep. 398.<sup>1</sup>

2. SAME.

Where a written message, which is accepted by a telegraph company for transmission and delivery, although paid for, is never delivered on account of the gross negligence of the agents of the company. *Held*, that the person who may maintain an action on the contract is entitled to recover against the telegraph company his actual damages caused by a breach thereof, including, also, the money paid for the transmission and delivery of the message. *Telegraph Co. v. Howell*, *ante*, 813; *Telegraph Co. v. Crail*, *ante*, 309.

3. SAME.

Where a telegraph company accepts a written message, and receives pay for its immediate transmission and delivery, and the agents of the company fail to transmit or deliver the same, on account of such gross negligence as amounts to wantonness or a malicious purpose, *held*, that the company will be liable, in addition to the actual damages sustained, also to exemplary damages.

4. SAME.

Where an action is brought against a telegraph company to recover damages for a breach of contract in failing to deliver a message announcing a death, *held*, that damages cannot be recovered by the plaintiff solely for the mental anguish or suffering occasioned by the non-delivery of the message.

(*Syllabus by the Court.*)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

On November 12, 1885, George West brought this action against the Western Union Telegraph Company, in the district court of Shawnee county, and alleged—

"That the defendant, the Western Union Telegraph Company, was, at the time of the grievances hereinafter stated, and is now, a corporation duly organized and incorporated under the laws of the state of New York, and as such was and is doing business in the state of Kansas, and was and is owning and operating a telegraph line in the state of Kansas, between the city of Topeka, in and through Shawnee county, and the city of Delphos, Otawa county, in the said state of Kansas, and was then and is now engaged, as common carrier for hire, in sending messages for the public, by means of such telegraph, between said points. Plaintiff further states that on or about the 14th day of September, 1885, he was temporarily at the city of Delphos, in said state of Kansas, and that, on or about said dates, the plaintiff, by his agent, John G. West, made and entered into a contract with said defendant, its agents and employees, at the city of Topeka, who, in consideration of the sum of forty cents to it paid by said plaintiff, undertook, promised, and agreed to transmit and deliver, without unnecessary delay, a certain telegraphic message to said plaintiff at said city of Delphos, state of Kansas, where said plaintiff was temporarily residing, as aforesaid, which said message was in words and figures following, to-wit:

"NORTH TOPEKA, KANSAS, September 14, 1885.

"To George West, Delphos, Kansas, care of Post-Office: Uncle Sam died last night. Funeral Wednesday. JOHN G. WEST."

"That said plaintiff, by his agent, as aforesaid, then and there paid said defendant, to-wit, forty cents, the regular consideration and price by it charged for the transmitting and delivering said message from said city of Topeka to the said city of Delphos, in said state of Kansas, which said consideration was then and there accepted by defendant, and for which it agreed, without unnecessary delay, as aforesaid, to transmit said message to said plaintiff at the city of Delphos, as aforesaid, and deliver the same to plaintiff in person, or

<sup>1</sup> Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him. *Baker v. Eglin*, (Or.) 8 Pac. Rep. 280, and note; *Shamp v. Meyer*, (Neb.) 29 N. W. Rep. 379. See, also, *Hostetter v. Hollinger*, (Pa.) 12 Atl. Rep. 741, and note.

in care of the post-office, at said city of Delphos. That although said defendant well knew the whereabouts of said plaintiff, and the post-office, in care of which said message was sent, at said city of Delphos, state of Kansas, and could and should have delivered the same to said plaintiff, as aforesaid, on the same day it was sent, yet said defendant, its agents and employes, maliciously, and in gross neglect of duty, failed and refused to deliver the same to said plaintiff, or to the said post-office, as aforesaid, within a reasonable time; but grossly and maliciously neglected and failed to deliver said message to said plaintiff when called for by him in person, and never delivered the same to said plaintiff, or in care of the said post-office, as by its contract it had obligated itself to and was bound to do. Plaintiff further avers that, at the time of the said grievances, he was seventy-three years of age, and had an only brother, Samuel C. West, who was seventy-six years of age, and who resided in Philadelphia, Pa., and that said telegram was to notify plaintiff of the death of his said brother Samuel, which was then and there to the defendant, its agents and employes, well known; and at whose funeral and obsequies the plaintiff desired to and would have attended, but for the gross negligence of said defendant, its agents and employes, to deliver said message to said plaintiff, as by the said contract it obligated and bound itself to do. That the funeral of the said Samuel C. West, deceased, was deferred, so that plaintiff could attend the same, and which the plaintiff intended to and would have done if said telegram had been delivered within a reasonable time. In accordance with said contract, but in consequence of the failure and gross and malicious negligence of the defendant, its agents and employes, to deliver said dispatch, as by its said contract it had obligated itself and was bound to do, the plaintiff was deprived of the satisfaction and pleasure of seeing his said brother, and being present at the funeral and obsequies of said brother, and because of which plaintiff suffered great and irreparable injury, distress, and mental pain and anguish, and which was great and overpowering, and was due and caused by the failure and gross malicious neglect of the said defendant, its agents and employes, to comply with, and in breach of, its said contract. And thereby, also because of the failure of said defendant to transmit and deliver said telegram to said plaintiff, as it was bound to do, the plaintiff was forced to and did then and there lay out and expend large sums of money, and performed labor, to-wit, ten dollars, in and about making search for and attempting to find said telegram, caused by the failure and gross and malicious neglect of the said defendant, its agents and employes, to comply with and in breach of its said contract, and by its negligence. Wherefore, the said damages sustained, as aforesaid, by reason of the breach of contract and gross negligence of the defendant, through its agents and employes, was and is in the sum of ten thousand dollars, for which plaintiff demands judgment, costs, and other relief.

"GEORGE WEST, Plaintiff,

"By JETMORE & SON, his Attorneys."

On December 8, 1885, the telegraph company filed its answer, containing a general denial. On September 30, 1886, trial was had before the court, with a jury. After George West had testified, and also had produced the evidence of John West, George W. Strickler, Delia A. Knowles, James Clark, Lizzie Strickler, Levi Reynolds, and Joseph McDonough, the telegraph company demurred to all of the testimony, upon the ground that it did not prove, or tend to prove, a cause of action in favor of the plaintiff against the defendant. After argument, the demurrer was sustained by the court, and the case taken from the jury. Thereupon judgment was rendered by the court against the plaintiff, and in favor of defendant, for all the costs. The plaintiff subsequently filed his motion for a new trial, containing all the statutory grounds, which was overruled. He excepted, and brings his case here.

*Jetmore & Son*, for plaintiff in error. *J. D. McFarland* and *J. B. Johnson*, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) This was an action brought by George West against the Western Union Telegraph Company, to recover \$10,000 damages, occasioned, as claimed in the petition, by the gross and malicious negligence of the company to transmit and deliver the following telegraphic message:

"NORTH TOPEKA, KANSAS, September 14, 1885.

"*To George West, Delphos, Kansas, Care Post-Office:* Uncle Sam died last night. Funeral Wednesday."

JOHN G. WEST."

Upon the trial, after the plaintiff had closed his evidence, the telegraph company interposed, and filed a demurrer thereto, upon the ground that no cause of action was proved. The court sustained the demurrer. The plaintiff excepted, and brings the case here for review. The testimony introduced tended to show that the foregoing written message was handed by John West, the son of George West, to the agent of the telegraph company, at its office at North Topeka, on the afternoon of its date, with directions "to forward it immediately;" that the message was ordered to be sent by John West for the benefit of his father; that he paid the agent 40 cents for sending the message; that subsequently his father repaid to him the money; that Delphos is about 100 miles west of North Topeka; that, at the date of the message and subsequently, it was operating a telegraph line for hire between the towns of North Topeka and Delphos, with an office in each town; that George West has resided in Kinmundia, Ill., since 1859; that in September, 1885, he was visiting in Kansas, and at the date of the message, and for several days thereafter, was with friends in the neighborhood of Delphos; that Samuel C. West was his oldest brother, and after his death that he had no other brother living; that Samuel lived at Philadelphia, Pa., and at the time of his death was 78 years of age; that George West was 73 years of age; that he was expecting to hear of the death of his brother, on account of his ill health, and anxious to attend his funeral if notified in time; that while in Kansas he had so fixed his matters as to start at a moment's warning to attend the funeral; that on September 14, 1885, he inquired at the post-office at Delphos for his mail, but did not receive the telegram; that he inquired frequently afterwards, and sent others to inquire for his mail, but never received the telegram; that subsequently he learned, by a letter from his son, John, of the death of his brother, Samuel, but the information came too late for him to attend the funeral; that, if he had received the telegram within a reasonable time after it had been sent, he could have attended the same; that his son John informed the agent, at the office of the telegraph company at North Topeka, that the message had never been delivered; that George West also inquired at the office of the telegraph company at Delphos on the morning of the 18th of September for the telegram; that the agent said that none had been received for him; that he then told the agent "he would investigate the matter," and he replied "he had received none, and that none could have been received without his knowing it;" that both George West and John West were informed by the agent at North Topeka that the message had been sent over the wire, at its date, to Delphos; that the telegram was never delivered to the post-office at Delphos, or to George West, by the agent of the telegraph company, or any one else.

Upon what grounds the trial court sustained the demurrer to the evidence is not clearly disclosed. In our opinion, the demurrer should have been overruled, as there was ample evidence introduced for the case to go to the jury. The message was written and delivered at the office in North Topeka, and paid for by John West, the son of the plaintiff, for the benefit of the latter. Subsequently George West returned to his son the money paid by him to the telegraph company, and ratified and approved his son's acts in the transaction in all respects as if the message originally had been written and sent under his direction. In *Burton v. Larkin*, 36 Kan. 246, 13 Pac. Rep. 398, it was held that "a person for whose benefit a promise to another, upon a sufficient



consideration, is made, may maintain an action on the contract in his own name against the promisor." In *Dresser v. Wood*, 15 Kan. 344, it was held "that where an action is commenced by an attorney at law, without the knowledge or consent of the plaintiff, the plaintiff may afterwards ratify the same, and thereafter be entitled to its benefits." The contract, therefore, made by the son with the telegraph company for the benefit of his father, which was afterwards approved and ratified by the father, was sufficient as the basis of this action. The plaintiff, upon the evidence introduced, was entitled to recover judgment against the defendant for his actual damages, including the 40 cents paid for the transmission of the message. *Telegraph Co. v. Howell*, ante, 313; *Telegraph Co. v. Crall*, ante, 309; *Logan v. Telegraph Co.*, 84 Ill. 468.

Further than this, if upon another trial it shall be established that there was such gross negligence on the part of the agents of the telegraph company as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message, then the plaintiff would be entitled to exemplary damages. Such damages are given more to punish the wrong-doer than to recompense the party injured. *Scott & J. Tel.* §§ 417, 418; *Railroad Co. v. Rice*, 38 Kan. —, 16 Pac. Rep. 817, and cases cited therein. In *Schippel v. Norton*, 38 Kan. —, 16 Pac. Rep. 804, we recently held, where no actual damage is suffered, no exemplary damages can be recovered; but, as actual damages are shown in this case, that decision is not applicable.

It seems, however, to be claimed upon the part of the plaintiff that he is entitled to recover for his mental anguish or suffering occasioned by the delay in the announcement of the death of his brother. Where mental suffering is an element of physical pain, or is a necessary consequence of physical pain, or is the natural and proximate result of the physical injury, then damages for mental suffering may be recovered, where the injury has been caused by the negligence of the defendant; but, in an action of this kind, we do not think that damages for mental anguish or suffering can be allowed. "Such damages can only enter into and become a part of the recovery, where the mental suffering is the natural, legitimate, and proximate consequence of the physical injury." *City of Salina v. Trosper*, 27 Kan. 544. The general rule is "that no damages can be recovered for shock and injury to the feelings and sensibilities, or for mental distress and anguish, caused by a breach of the contract, except a marriage contract." *Russell v. Telegraph Co.*, 3 Dak. 315, 19 N. W. Rep. 408. In *So Relle v. Telegraph Co.*, 55 Tex. 308, it was decided that an action for mental suffering alone could be maintained. The opinion in that case, however, was prepared by a member of the commission of appeals of Texas, and subsequently, in the case of *Railway Co. v. Levy*, 59 Tex. 563, the supreme court of Texas overruled that decision. See also *Wood's Mayne, Dam.* (1st Amer. Ed.) 74.

We also add that the trial court should have permitted the plaintiff to have shown the arrangements made with his son John to forward to him, at Delphos, all telegrams and mail matter that came addressed to him at Topeka.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the justices concurring.

(39 Kan. 181)

ATCHISON, T. & S. F. R. Co. v. DOUGAN *et al.*

(Supreme Court of Kansas. April 7, 1886.)

1. ERROR, WRIT OF—TIME OF FILING.

A petition in error must be filed in this court within one year from the date of the order or judgment complained of; and the issuing of an execution upon such judgment cannot be enjoined, after the lapse of one year, because a case for this court

has not been settled and signed within that time, owing to the fault or neglect of the defendant in error, even though the plaintiff in error might have been misled thereby.

2. **SAME.**

The suggestion of the attorney of a party that he may suggest amendments to the case served upon him at a time later than the date fixed by the court for settling and signing the same, is not sufficient in law to mislead the other party when no effort is made to obtain an order of the court or judge extending the time of settling and signing the case.

(Syllabus by Holt, C.)

Commissioners' decision. Error to district court, McPherson county; S. O. HINDS, Judge.

*Geo. R. Peck* and *A. A. Hurd*, for plaintiff in error. *D. K. Cunningham*, for defendants in error.

HOLT, C. This action was brought in the district court of McPherson county to restrain the issuance and levy of execution in the case of *Lee Dougan v. Atchison, T. & S. F. R. Co.*, in which case judgment was rendered in favor of Dougan, and against the railroad company, May 12, 1885, for \$700 and costs. On defendant's application, it was given 90 days from said date to make and serve a case for the supreme court upon plaintiff. He was given five days thereafter to suggest amendments, and the case was to be settled and signed during the August term, 1885. On the 6th day of July the case was delivered by the company to the clerk of the court, and a day or two after he handed it to Messrs. Barker & Pancoast, attorneys for Dougan. No amendments were ever suggested by Dougan's attorneys, nor did they return the case made to the clerk of the court, or any attorneys for the railroad company, until the last of May, 1886. After a good deal of correspondence and suggestions, the matter was delayed, and no case was presented to the court or the judge; and, after the expiration of the year, the attorneys for Mr. Dougan issued an execution. On the 18th day of June, 1886, the petition in this case was filed, and a temporary injunction allowed by the probate judge of McPherson county, and at the August term following the temporary injunction was discharged by the court. The plaintiff brings the order here for review.

There was judgment in the case of *Dougan v. Atchison, T. & S. F. R. Co.* on the 12th day of May, 1885. The petition in this action was filed June 18, 1886, more than a year after said judgment had been rendered, and no petition in error had been filed in the supreme court; and under section 2, c. 126, Sess. Laws 1881, (Dass. Comp. Laws 1885, § 556, c. 80,) the time had elapsed in which to bring action here. The plaintiff claims that the statute named should not apply to them, because of the fraud of Pancoast, one of the attorneys for Dougan. The court finds that Pancoast was not guilty of any fraud, deception, or unprofessional conduct practiced upon the said Santa Fe Railroad Company, or its attorneys, and we believe that such finding is amply supported by the evidence in the record before us. There were delays, suggestions, and propositions made both by the attorneys for Dougan and for the railroad company, but none of them were in fact carried into effect, and the matter of presenting the case was allowed to drift along, probably without any intention of allowing it to go beyond the time permitted in which to bring the case here for review, until the year had fully elapsed. Some suggestions had been made by the attorney, Pancoast, that the attorneys for the railroad company seemed to rely upon. It was about the time when the case should be presented to the judge, and settled and signed; but there was no effort made to extend the time of settling and signing the case, and a part of the conversation, letters, and suggestions were after the time had elapsed at which the court had fixed the date of settling and signing it. It was simply a matter of neglect, for which the attorney for the defense is not any more responsible than the attorneys for the railroad company. The acts of the defendant

Pancoast may have been negligent; yet they were no excuse or justification for the delay of the plaintiff in presenting its case for settling and signing before the judge. The time allowed them by the statute had elapsed through their own fault, and they must abide the result. *Insurance Co. v. Koons*, 26 Kan. 215. This view of the case precludes us from examining the alleged errors in the action of *Dougan v. Atchison, T. & S. F. R. Co.* We therefore recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 230)

BETHELL v. BETHELL *et al.*

(Supreme Court of Kansas. April 7, 1888.)

1. MECHANICS' LIENS — ON PROPERTY OF WIFE — CONTRACT BETWEEN HUSBAND AND WIFE.

Where the husband of the owner contracts for material to erect improvements upon the property of his wife, and a mechanic's lien is filed against said property by the contractor furnishing the material, *held*, that no contract between the husband and wife can defeat the lien; where such contract is not disclosed to said contractor.

2. SAME — NECESSARY STATEMENT — AFFIDAVIT.

Where an itemized statement, and the allegations necessary to constitute a mechanic's lien, are all included and made in the form of an affidavit, instead of a statement with an affidavit attached, *held*, that the lien is not void because of such form.

3. REFERENCE — REPORT — FAILURE OF COURT TO ACT UPON.

Where a reference of a question of fact has been made, and the referee has made his report to the court, and no action has been taken thereon, and at the trial all the questions are submitted to the court as though no reference had been had, *held*, such reference and report is not binding upon the court, and may be disregarded.

(Syllabus by Clogston, C.)

Commissioners' decision. Error to district court, Cloud county; E. HUTCHINSON, Judge.

This was an action brought in the district court of Cloud county by M. T. Green and others, constituting the Chicago Lumber Company, against Annie and John Bethell. The defendants below were husband and wife. The action was brought to foreclose a mechanic's lien against said defendants for lumber and material purchased for the erection of a dwelling-house, and for repairing and transforming a carpenter shop into a dwelling-house, on certain lots in Concordia, Kansas, alleged to have been owned by Annie Bethell in her own right. The plaintiffs claimed that the lumber in controversy was sold under a contract with John Bethell, the husband of Annie Bethell, the owner, for the erection of these buildings, and that said lumber was furnished and used for that purpose, and part payment was made therefor by Annie Bethell. Defendants claimed that said lumber was purchased by John Bethell, as contractor, and that, as such contractor, he had a contract with Annie Bethell, his wife, for the erection and repairs of said buildings, by the terms of which he was to furnish all the material therefor at a stipulated price; that said sum had been paid to the contractor without knowledge of any claim of the plaintiffs. Trial by the court, who found the following facts and conclusions of law, and afterwards rendered judgment for the plaintiffs, and for the foreclosure of the mechanic's lien, as prayed for:

"CONCLUSIONS OF FACT.

"(1) On the 11th day of September, 1883, the defendants were and still are husband and wife, and on that day the defendant Annie Bethell was the owner of lots 30, 31, 32, 33, 34, and 35, in block 156, in Concordia, Kansas. All of said lots are adjoining tracts, and are not separated by any intervening land; but they were not all purchased by said Annie Bethell at one time, nor all from the same grantor. At that date there was a dwelling-house on lot

34, which extended across the line on lot 35. There was also a carpenter shop on lot 33, and the remainder of the premises were vacant and unoccupied. The carpenter shop and the dwelling-house were independent of each other; were not used in connection with each other,—there being a space of about four feet between the two buildings, and no passage-way communicating from one to the other. (2) On September 3, 1883, the defendants, who were then husband and wife, and the defendant Annie Bethell being the owner of said premises, made a written contract between themselves, by the terms of which, for a stated sum, the defendant John Bethell was to repair and improve said carpenter shop, and convert it into a dwelling-house; he furnishing the material and doing the work. And on the 3d day of October, 1883, the defendants made another written contract, by the terms of which, for a stipulated sum, said John Bethell was to furnish the material and do the work necessary to erect and complete a new dwelling-house on lots 30 and 31. Said contracts were afterwards performed by both parties, except that the new building was erected on lots 31 and 32, with a space of about eight or nine feet intervening between it and the carpenter shop. All of said houses have since been occupied by numerous tenants at the same time, and were never all leased to one person. (3) On September 11, 1883, said John Bethell made a contract with the plaintiffs for the purchase, at an agreed price per thousand feet, of as much lumber as he would need in altering the carpenter shop into a dwelling-house, and erecting a new dwelling-house on said lots. This contract was made with W. H. Fullerton, the manager of plaintiff's business. Said Fullerton was not informed of the existence of any contract between the defendants, but was informed by the defendant John Bethell that he and his wife had talked the matter over, and concluded to alter the old carpenter shop into a dwelling-house, and build a new house. He also informed said Fullerton that, any time he wanted the money, he could go to the defendant Annie Bethell, and she would pay him. Upon this contract, plaintiff furnished the lumber used in the alteration of the said carpenter shop, and the erection of the said new dwelling-house, for the price of which this action was brought. Said Fullerton twice called on the defendant Annie Bethell for money on account of said lumber, and on each occasion an amount of money was paid by her to him on said account, and at each of said times she requested said Fullerton to give her a receipt for the amount paid, which he declined to do, but gave receipt for the same to John Bethell. (4) All the entries made in the books of account of the plaintiffs relating to the transaction were made in the name of John Bethell, and the name of Annie Bethell nowhere appears in said books. Neither is there in said books any description of or reference to said lots. (5) The last item of materials furnished by plaintiff under said contract, and used in the alteration and erection of said dwellings, was furnished on the 14th day of January, 1884. The plaintiff's statement for a mechanic's lien was filed in the office of the clerk of the district court of Cloud county, March 17, 1884. This action was commenced December 24, 1884. In entering said mechanic's lien statement in the record of mechanics' liens, the clerk entered therein the name of John Bethell as owner; but the statement which was filed gives the name of Annie Bethell as owner, and states that the contract under which the lumber was furnished was made with her husband, John Bethell. Said statement was subscribed by W. H. Fullerton, as plaintiff's manager, and was by him sworn to before J. W. Sheafor, notary public, who is now, and was at the commencement of this action, the attorney of record of the plaintiff. No copy of mechanic's lien statement was ever served on any person, nor furnished nor delivered to either of the defendants.

“CONCLUSIONS OF LAW.

“(1) The plaintiff is entitled to a personal judgment against the defendant Annie Bethell only, for the amount found to be due the plaintiff, and for costs. (2) The plaintiff has a valid mechanic's lien for \$236.80 on lots 30, 31, 32,

and 33, in block 156, in Concordia, Kansas, and is entitled to have the same foreclosed."

Defendants bring the case here for review.

*L. J. Crans*, for plaintiff in error. *J. W. Sheafor*, for defendants in error.

CLOGSTON, C., (*after stating the facts as above.*) Plaintiff in error now insists that, on the pleadings and findings of fact, no judgment ought to have been rendered in favor of the plaintiffs, defendants in error. The petition alleged a contract for material with the husband of the owner, Annie Bethell, and asked for the foreclosure of the mechanic's lien against said property under the contract. The plaintiff insists that as the findings show that John Bethell was a contractor, and had a written contract with his wife, Annie Bethell, to erect the improvements and furnish the material, and to receive certain compensation therefor, that defendants, if they had any claim whatever, and were entitled to have any lien against said property, it must be as subcontractors, instead of a direct lien as contractors. Section 630 is as follows: "Sec. 630. Any mechanic or other person who shall, under contract with the owner of any tract or piece of land, his agent or trustee, or under contract with the husband or wife of such owner, perform labor or furnish material for erecting, altering, or repairing any building, or the appurtenances of any building, or any erection or improvement, or shall furnish or perform labor in putting up any fixtures or machinery in or attachment to any such building or improvement, or plant and grow any trees, vines, and plants, or hedge or hedge fence, or shall build a stone fence, or shall perform labor or furnish material for erecting, altering, or repairing any fence on any tract or piece of land, shall have a lien upon the whole piece or tract of land, the buildings and appurtenances, in the manner herein provided, for the amount due to him for such labor or material, fixtures or machinery. Such liens shall be preferred to all other liens and incumbrances which may attach to or upon such lands, buildings, or improvements, or either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, or planting and growing of such trees, vines, or plants, or hedge or hedge fence or stone fence, or the making of any such repairs or improvements; and if any promissory note, bearing not exceeding twelve per cent. interest per annum, shall have been taken for any such labor or material, it shall be sufficient to file a copy of such note, with a sworn statement that said note, or any part thereof, was given for such labor or material used in the construction of any such building or improvement, in the office of the district clerk; and it shall be necessary to file a list of items used; and the lien shall be for the principal and interest aforesaid, as specified in said note." Dass. Comp. Laws 1885, p. 685.

The language used in this statute is broad enough to include all contracts made by the husband or wife of the owner of the property for the purchase of material, or the erection of improvements thereon; and when a contract is made, and the material furnished or improvements made, the party making or furnishing such improvements is entitled to a direct lien against the property. It is true that the husband might contract for the material as a contractor, in such manner that the person furnishing material thereunder would be entitled only to a subcontractor's lien; but, when material is furnished under such circumstances, there ought to be some knowledge conveyed to the party furnishing the material of the existence of such a contract. Where the husband of the owner of the property purchases material, which the statute provides he may do, the person furnishing the material under such a contract may presume, and he has the right to do so, that it is furnished to the husband of the wife, to be charged to her and upon her property, and has a right to file a lien to secure its payment. The findings show that the plaintiffs, defendant in error, had no knowledge of any contract by and between Annie Bethell and

her husband in relation to the erection of these improvements. The want of this knowledge continued until after the time had expired in which a subcontractor's lien could have been filed against the property. It is true that a person dealing with an agent must at his peril know the rights of the agent in the premises; and, if this contract had been made with any person other than the husband, this lien could not be upheld; but as the husband, under the law, has the right to contract, this rule cannot be applied in this case. The parties can rely upon the presumption that they were not dealing with the husband as agent, but as owner, under the statute. If the claim of the defendants can be upheld, then the way is left open for great wrongs and frauds to be perpetrated. A contract is entered into between husband and wife. No disclosure is made of the extent of that contract. Material is furnished. Afterwards, when the time for filing a subcontractor's lien has expired, a contract is produced under which the building was erected; the wife receiving the benefit of the transaction, and the husband and wife thereby defeating the lien law.

Plaintiff in error also insists that what purported to be a mechanic's lien was not sufficient as a statement, under the mechanics' lien law, to establish a lien. In this we think the plaintiff is mistaken. It contained an itemized statement of accounts. This account shows that the material was charged to John Bethell; but it was shown that it was contracted for by John Bethell for his wife, and for the erection of these buildings on her property. The bare fact that, after this contract was made, the lumber was charged to John Bethell for convenience, was not material, and could not change its effect. The statement constituting the contract and the lien were all included in the affidavit; and plaintiff in error contends that because of this fact that there was no lien. It does not to us seem material whether or not the facts alleged and set out, which, if true, entitled the claimant to a lien, are set out in a statement by themselves, and an affidavit attached thereto, or whether all these facts are embraced in the affidavit itself.

Plaintiff also insists that as certain matters in said action had been referred to a referee, and his report filed, that no action could be had or findings made by the court until said findings and report of the referee had been set aside in some manner. In this we think the plaintiff is in error. Some questions of fact were referred to the referee. He made findings on these questions, and reported the same to the court; but it seems there was no action taken by either plaintiff or defendants looking towards a confirmation or setting aside of said report. It was abandoned for all the purposes of this trial, and no attention was paid thereto: It was tried upon every question of fact, and submitted to the court as though no reference had ever been made. Under such circumstances, we think it is not material whether the report had been set aside or not. At best, the report of the referee was only to furnish information to the court. The court might regard it or disregard it, at its pleasure. We are therefore of the opinion that no error was committed which is shown by the record. It is recommended that the judgment of the court below be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(39 Kan. 76)

**STATE ex rel. ATTORNEY GENERAL v. MILLS, Sheriff.**

(*Supreme Court of Kansas. April 7, 1888.*)

**COUNTIES—COUNTY SEAT—ELECTION TO REMOVE.**

Upon the evidence introduced in this case, it is found and held that, at the election held in Hamilton county on November 2, 1886, the town of Syracuse did not receive

a majority of all the legal votes cast in that county for the county-seat, and *therefore held*, that the town of Syracuse was not chosen as the permanent county-seat of the county, and that the town of Kendall still remains the temporary county-seat. (*Syllabus by the Court.*)

Original proceeding in *mandamus*.

*Webb & Spencer* and *C. N. Sterry*, for plaintiff. *Milton Brown, J. J. Milliken, J. M. Johnson*, and *Rossington, Smith & Dallas*, for defendant.

VALENTINE, J. This is an action of *mandamus*, brought originally in this court on November 27, 1886, in the name of the state of Kansas, upon the relation of the attorney general, against C. C. Mills, as sheriff of Hamilton county, Kansas, to compel the defendant to hold his office at the town of Syracuse, which is alleged to be the county-seat of said county. It appears that the county of Hamilton was organized on January 29, 1886, and the first election therein was held on April 1, 1886. At this election no place received a majority of the votes cast for county-seat, and therefore no place was chosen as the permanent county-seat of the county. For a full report of this election, see the case of *State v. Commissioners of Hamilton Co.*, 35 Kan. 640, 11 Pac. Rep. 902. At the general election held on November 2, 1886, the question as to where the permanent county-seat of Hamilton county should be located was again voted upon by the electors of that county. This election was also for all state, county, and township officers, and for some other things. Returns of this election were duly made, and a canvass thereof was duly had, except as hereafter stated. The result of the canvass, as stated by the county commissioners and the county clerk, in tabular form, is as follows:

"*State of Kansas, Hamilton County—ss.*: The following is an abstract of the votes polled at the several voting precincts of Hamilton county, Kansas, at an election held on November 2, 1886, for the permanent location of the county-seat, by virtue of the organization of said county, and in pursuance with the proclamation of the board of county commissioners of said county, under statutes in such cases made and provided, for the the permanent location of the county-seat. Said abstract was made from the official canvass of said votes, at the court-room in the town of Kendall, the temporary county-seat of said county, on Friday, November 5, 1886.

VOTING PRECINCTS.	Coolidge.	Kendall.	Johnson City.	Syracuse.	Gognac.	Kearney.	Hartland.	Grand total.
Coolidge township.....	195	1	.....	24	.....	.....	.....	.....
Grant township, Surprise precinct.....	.....	.....	.....	66	1	.....	.....	.....
Ulysses precinct.....	5	.....	.....	92	.....	.....	.....	.....
Shockeyville precinct.....	8	119	4	19	.....	.....	.....	.....
Golden precinct.....	1	87	1	24	.....	.....	.....	.....
Hartland township, Hartland precinct.....	5	26	.....	79	.....	.....	1	.....
Hoover precinct.....	15	10	.....	36	.....	1	1	.....
Kendall township, Kendall precinct.....	.....	144	.....	2	.....	.....	.....	.....
Coomes precinct.....	.....	.....	.....	.....	.....	.....	.....	.....
Stanton township.....	.....	43	88	108	.....	.....	.....	.....
Syracuse township.....	.....	11	.....	835	.....	.....	.....	.....
Totals.....	224	390	93	785	1	1	2	1,496

"We, the commissioners of Hamilton county, Kansas, hereby certify that the above is a true and correct abstract of the votes cast at said election for the permanent location of the county-seat, as shown by the canvass of the votes as aforesaid, as returned by the election boards of the several precincts  
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in said county; and we hereby further certify that Syracuse having received a majority of all the votes cast in said county at said election for the permanent location of the county-seat, wherefore we hereby declare said Syracuse to be the permanent location of the county-seat of Hamilton county.

"Attested:

L. C. SWINK,  
"W. D. H. SHOCKEY,  
"T. J. BARTON,  
"Commissioners.

"Attested: THOS. H. FORD, County Clerk."

It is admitted that this statement of the canvass shows the correct vote in all the townships and precincts in the county, except the vote in Coomes precinct and the vote in Syracuse township. From this statement it appears that the returns from Coomes precinct, which the defendant claims gave Kendall 85 votes and Syracuse 6, and which the plaintiff admits gave Kendall 65 votes and Syracuse 6, were not canvassed at all; and it is further claimed by the defendant that at least 21 illegal and fraudulent votes were returned from Syracuse township. We shall consider these matters in their order.

It is admitted by both parties that a legal and valid election was held in Coomes precinct, and that returns thereof were duly and legally made out, signed, sealed, etc., but what then became of such returns is a disputed question. They cannot now be found. A package of papers, however, purporting to be the election returns from Coomes precinct, was duly delivered by William C. Spaulding, one of the judges of the election, to Thomas H. Ford, the county clerk of Hamilton county, but whether it was the true election returns from that precinct or not is disputed. Afterwards a package of papers, which also purports to be the election returns from that precinct, but which returns are admitted to be forgeries, was found in the possession of the county clerk, which package he claims is the same package that was originally delivered to him by the judge of the election as the election returns from Coomes precinct, but which package the defendant and the aforesaid judge of the election at Coomes precinct claims is not. These forged returns are made out upon printed blanks precisely like the blanks used for the other election returns of that election, and are in form precisely the same as all the genuine returns of that election are. As to when or where these forged returns were forged and substituted for the genuine returns, whether before or after the time when the county clerk received the supposed genuine returns from one of the judges of the election, and by whom the forgery was committed, are disputed questions, and we think, under the evidence in the case, are wholly immaterial; and we shall not attempt to decide them. These forged returns show that at Coomes precinct 91 votes were cast for the county-seat, of which Kendall received 85 votes, and Syracuse received 6 votes; and from the evidence in this case, and aside from these returns, and without reference to whether they show the correct vote with reference to the state, county, or township offices or not, we are inclined to think they show the correct vote with reference to the county-seat. There was much evidence introduced on the trial tending to show that before the election was had, and even before Coomes precinct was created, it was the intention of the persons directing the affairs of Hamilton county to put obstacles in the way to prevent the people living in the territory which is now known as Coomes precinct from having a full, fair, and free election. That precinct was created out of territory belonging to Kendall township, and it is still a part of Kendall township. It was known, before the precinct was created, that the people living in that territory were favorable to Kendall as the county-seat, while the county commissioners and the county clerk were hostile to Kendall, and strong partisans of Syracuse. There was evidence introduced tending to show that Coomes precinct was secretly created, just before the election, and without any petition from the voters thereof, or any notice to them; and the place for holding the election



was located at the residence of T. V. Coomes, a strong partisan of Syracuse, nearest to Syracuse, remote from the center of the precinct, and also remote from the center of the population thereof, and at a very inconvenient place for the attendance of the voters; and three persons, hostile to Kendall and friendly to Syracuse, of whom T. V. Coomes was one, were secretly, illegally, and without authority of law, appointed to register the voters of that precinct. We think, however, that the people of the precinct, by their own vigilance and good sense, held a legal and valid election; and we are inclined to think that 91 votes were cast in that precinct for the county-seat, of which the town of Kendall received 85 votes, and the town of Syracuse received 6 votes. All the judges of the election in that precinct and one of the clerks so testified, and they testified that the true, genuine, and original election returns from that precinct so showed. Coomes, however, who was the other clerk of that election, and two other persons, testified that only 71 votes were cast for the county-seat in that precinct, of which Kendall received 65 votes and Syracuse 6, and that the genuine returns so showed. The testimony of all these persons, and on both sides, corresponded precisely with their preferences for the county-seat. There was some corroborating testimony on both sides. On the side that there were only 71 votes cast at that election was the current rumor to that effect immediately after the election, both at Syracuse and at Kendall. On the side that there were more than 71 votes cast at that election, is the following: The testimony of various witnesses was introduced, clearly showing that more than 71 electors of that precinct, and their names are given by the witnesses, were actually present at the polls at that election and voted. Indeed, we think it was fairly shown by such evidence that 82 electors of that precinct, and their names are given, were present at the polls at that election and voted. There were 112 registered voters in that precinct. Taking this evidence, and the evidence of the judges and one of the clerks of the election, tending to support the defendant's side of the case, and all the evidence on the plaintiff's side, we think the weight of the evidence preponderates in favor of the theory that 91 electors were present at the polls at that election and voted, and that Kendall received 85 of their votes and Syracuse 6. We might say here, however, that we have not given all the evidence on either side of this question. It is too voluminous to give in this opinion.

It is also claimed that 21 illegal and fraudulent votes were polled in Syracuse township. This is very nearly, if not entirely, true; and yet this election in Syracuse township is fair and honest when compared with the election in that same township held on April 1, 1886. The returns of the election held on April 1, 1886, showed that 1,178 votes were cast in Syracuse township, and all for the town of Syracuse for the county-seat except two, (35 Kan. 642, 11 Pac. Rep. 902;) while at this election the returns show that only 346 votes were cast in Syracuse township, and that 11 thereof were cast for Kendall, and 335 thereof for Syracuse. The territorial boundaries of Syracuse township were precisely the same at the second election as they were at the first. Of these 335 votes which were cast for Syracuse in Syracuse township, it is claimed by the defendant that at least 21 are illegal and fraudulent, and we think the claim is substantially correct. The election in Syracuse township was held at the town of Syracuse, and during all the forepart of the day T. G. Cutlip, who was friendly to Kendall, stood at the polls of Syracuse to detect and prevent fraud, and during that time the election was conducted with reasonable fairness and honesty; but between 3 and 4 o'clock in the afternoon he left Syracuse, and went to Kendall, and immediately thereafter the alleged fraudulent voting commenced at Syracuse. In some cases two fraudulent votes of well-known persons, absent from Syracuse, were polled at the same time. A vote was polled in the name of C. A. Cordes, a man who had been a prominent merchant in Syracuse, but had recently failed, and was then at Kansas City, Mo. The next vote polled was a vote in the name of C. H.

Dye, a prominent citizen and business man of that place, who was then at Bowling Green, Ky., for the purpose of getting married. A vote was also polled in the name of William E. Moore, a son of one of the present acting county commissioners. William E. Moore was taken sick, and was not at the polls at any time during that day. A vote was also polled in the name of John Carmody, who was absent in Iowa on that day, and voted in that state. Votes were also polled in the names of John Sawyer and C. W. Wiley, who were residents of Morton county, and voted in Morton county, and did not vote in Hamilton county. A vote was also polled in the name of J. V. Ratliff, who was in Elk county at the time, and was not a resident of Syracuse township. A vote was also polled in the name of Thomas Winn, who was a resident and voter of Hartland precinct, and voted in Hartland precinct, and not at Syracuse. A vote was also polled in the name of C. I. Moon, who was then at Los Angeles, Cal. A vote was also polled in the name of Jackson Wood, a resident of Iowa, who probably did not vote at all, but who was then in Syracuse, and was the father of one of the clerks of the election. A vote was also polled in the name of H. R. McPherson, who was not in Syracuse that day, and had not been for a long time, but was somewhere in the East. A vote was also polled in the name of D. E. Halleck, who was then, and had been for a long time, at Long Island, N. Y. A vote had previously been polled in the name of J. A. Wiley, a resident of Morton county, but finally his name was scratched out, and the name of D. E. Halleck was written over it. A vote was also polled in the name of Paris Mills, who did not vote at that election, but was at the time in Chase county, Kan. Votes were also polled in the names of E. R. Good, J. S. Jones, H. E. Barnes, E. C. Downs, Dan Reinhardt, Ira Evans, and J. F. Evarts, which votes were shown to be illegal. Indeed, the votes of at least 21 persons which are claimed to be illegal and fraudulent were polled at that election. It is possible that the vote of one of these 21 persons, Dan Orr, was legal. It is suggested, however, by the plaintiff, that, as 11 of the votes which were polled at Syracuse were counted for Kendall, these 11 votes counted for Kendall may have been 11 of the illegal and fraudulent votes that were polled in Syracuse. This can scarcely be possible; and yet, if it were entirely true, it would make no difference so far as this case is concerned. All the judges and the clerks of the election at Syracuse were friendly to Syracuse and hostile to Kendall, and nearly all the people at that place were also in that same condition and on the same side, and they certainly would not have permitted illegal or fraudulent votes to have been cast for Kendall. It is not possible to suppose that the judges and clerks and the by-standers at that election would have permitted such fraudulent votes to have been polled for Kendall as were polled in the names of such well-known persons as C. A. Cordes, C. H. Dye, and several other persons who at that time were absent from Syracuse and from Hamilton county. Would they have permitted a fraudulent vote to have been polled for Kendall in the name of the father of one of the clerks of the election? Would they have permitted a fraudulent vote to have been polled for Kendall in the name of a son of one of the present, acting county commissioners? Undoubtedly, every fraudulent vote polled at that election was polled and counted for Syracuse. If the judges and the clerks were alone the authors of these fraudulent votes, then, of course, they knew that such votes were polled and counted for Syracuse; but if some person or persons pretended to represent the absent persons, and actually voted these fraudulent votes, still both the judges and the clerks, and also the by-standers, must have known it, and must have known that the votes were cast for Syracuse. It would require too great a stretch of credulity to believe otherwise. The persons in whose names nearly all these fraudulent votes were polled cannot testify with reference to what place these votes were intended to be counted for the county-seat, for such persons were not present at the election, and did not cast such

votes. And, further, it can hardly be supposed that the judges and the clerks of the election at Syracuse could be so innocently mistaken with regard to these illegal and fraudulent votes as to think that they were in fact legal and valid votes. They could not have supposed that C. A. Cordes, who had formerly been a prominent merchant of that place, and C. H. Dye, a prominent citizen and business man of that place, and William E. Moore, a son of one of the present, acting county commissioners, and several other persons whom we might mention, who were not at or near the polls at any time during the day of the election, had actually come in person to the polls and had actually voted. And it can hardly be supposed that Jackson Wood was not known by his son, who was one of the clerks of the election. However, we think it is immaterial, for the purposes of this case, whether the judges and the clerks of the election knowingly participated in these frauds or not; for in any case it is clear that the town of Syracuse did not receive a majority of the legal votes cast at that election. The canvass of the board of county commissioners shows that Syracuse received 785 votes, and that the other places received 711 votes. Now, if we add to the 785 votes which the canvass shows were received by Syracuse, the 6 votes cast for Syracuse in Coomes precinct, and deduct 20 votes for the illegal and fraudulent votes cast for Syracuse in Syracuse township, it will leave 771 votes as cast for Syracuse. And if we add to the 711 votes which the canvass shows were received by the other places the 85 votes cast for Kendall in Coomes precinct, it makes the votes received by the other places 796, or 25 votes more than were received by Syracuse; and this is probably about the correct result of the election. This count may not be absolutely correct, and yet we think it is proximately so. The majority may be more or less against Syracuse, and for the other places; but, in whatever way we may reasonably view this case under the evidence, Syracuse did not receive a majority of the legal votes cast at that election in Hamilton county. Nor did any other place. Therefore, under the evidence and the statutes, no place was chosen to be the permanent county-seat of Hamilton county, and therefore Kendall still remains the temporary county-seat of the county; and hence the defendant, C. C. Mills, is not illegally holding his office of sheriff at Kendall.

The judgment of this court will be in favor of the defendant, Mills, and against the plaintiff.

All the justices concurring.

(39 Kan. 170)

BEST v. STONEBACK *et al.*

(*Supreme Court of Kansas. April 7, 1888.*)

**VENDOR AND VENDEE—CONTRACT TO REMOVE BUILDINGS—NOTICE TO VENDEE.**

Two parties occupied the same tract of land, being a portion of the Osage Indian diminished reserve. By agreement one was allowed to purchase the land, and the other to remove his house and *corral*. The one who had the right to purchase did so, and made two payments upon it, and then, while the other party still occupied his house and *corral*, conveyed the land by warranty deed, subject to the payment to the government of the balance due upon it. The grantee was not informed of the contract between the parties concerning the removal of the house and *corral*. The owner afterwards does remove them without unnecessarily injuring the freehold, but in doing so is compelled to take down a wire fence, which he immediately replaces. In an action by the grantee against the owner of the house, *held*, that by the fact of occupying the house the grantee had notice of the owner's rights, and *further held*, that such owner was not a trespasser in removing his house and *corral*.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Chautauqua county; E. S. TORRANCE, Judge.

Action by Wesley Best against E. H. Stoneback and William Burr for injury to property. Judgment for defendants, and plaintiff brings error.

*Peckham, Henderson & Shartel*, for plaintiff in error. *McBrin & Pile*, for defendants in error.

HOLT, C. Plaintiff in error, as plaintiff, brought his action in the Chautauqua district court against defendants for tearing down and taking away a house and *corral*, and cutting and breaking down a barb-wire fence. Trial by the court, without the intervention of a jury, at the November term, 1885, and a general finding for the defendants. Plaintiff brings the case here for review. The facts, as shown by the evidence, are that David Gallentine and William Burr, one of the defendants, settled upon the west half of the S. W. quarter, section 23, township 32 S., of range 10 E., in Chautauqua county, being a part of the Osage Indian trust and diminished reserve lands, both parties claiming interest in said land, and a right to purchase. By an agreement between Gallentine and Burr, Gallentine was to make settlement, and purchase the land at the local land-office, and Burr was to be allowed to remove the improvements he had made upon the land, which consisted of a box-house and *corral*. Burr at the time was living at the house with his family, and kept stock in the *corral*. He built the house he was then occupying some time in the summer of 1884, and was using this land as a pasture. After this contract between Gallentine and Burr, and upon the 29th day of September, 1884, Gallentine gave a warranty deed of the 80 acres to Best, the plaintiff, subject to the payments to be made upon the land, as provided in the act of May 20, 1880, in reference to the Indian lands of the Osage reserve. In this deed Gallentine made no reservations in writing, and Best testifies that nothing was said about the property of Burr then upon the land. Best lived about a mile from the land, and in plain view of it. In the early morning before daylight of October 10, 1884, the defendants and two others went with teams, and loaded the house and *corral* on wagons, and removed them to the adjoining land of Stoneback. In doing so they took down the fence inclosing the entire 80 acres, but replaced it again after driving through with their load.

The question discussed in the briefs of the parties is whether Best had any title to the 80 acres in question, under the deed given him by Gallentine. Gallentine had been an actual settler, with the qualifications of a pre-empter, and had made his entry and purchased the land at the local office; had made two payments, and two remained unpaid. The defendants contend that because Best did not show himself to be an actual settler, possessing the qualifications of pre-empter upon public lands of the United States, he could not obtain title to the land by the deed from Gallentine, it still being public land, and to be had only by actual settlement thereon; that such instrument was void, being against public policy, and could not convey any title to the grantee. We think it is unnecessary to decide the question raised, for it does not appear that a trespass was committed by the defendants, even though Best was the owner of the land. He said he had no knowledge of the trade between Gallentine and Burr. Burr, however, was in possession of the house and *corral*, and had been so during the summer preceding the sale. He had lived in the immediate neighborhood, and had known of the conflicting claims of Gallentine and Burr. It would seem strange that he did not have any actual knowledge of the rights of Burr and his claim to the land, but he certainly had constructive knowledge from the fact that Burr was still in possession of the property, using it as his own. He had a right, under his contract with Gallentine, to remove the property from the premises. This he did. It is found that he took down the fence, but replaced it again. We believe he was authorized and justified in taking and removing his property, and in so doing he had the right to go upon the land, using care not to injure the freehold. He selected an unusual hour to remove the property, but he may have had good reasons for doing so that are not apparent from the evidence

brought here. It may have been done for the purpose of avoiding trouble. In any event we suppose a man has a right to exercise proper authority over his own property by night as well as by day. We believe there was no trespass committed by the defendants in this action, and therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 185)

SHAHAN v. TALLMAN *et al.*

(*Supreme Court of Kansas. April 7, 1888.*)

GARNISHMENT—INSUFFICIENT ANSWER—GENERAL VERDICT.

In a civil action against a garnishee, because his answer is not true and satisfactory as to the possession of money alleged to belong to the judgment debtors, in which action a personal judgment for money only is rendered against the garnishee, it is error to refuse to allow a jury to render a general verdict in the case.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Reno county; L. HOUK, Judge.

*Vandever & Martin*, for plaintiff in error. *Whiteside & Gleason*, for defendant in error.

SIMPSON, C. The petition alleges that Tallman & Sanborn are judgment creditors of Freese & Stealy, who pretend to be insolvent, but who in truth and fact are able to pay all their creditors; that they entered into a conspiracy with John N. Shahan, the plaintiff in error, and it was agreed between them that Freese & Stealy were to buy all the goods that they could on credit, and in the shortest time possible, and then make a pretended sale to Shahan, place the goods in his possession, fail to pay for them, and then share with Shahan the proceeds of their sale; that on the 21st day of January, 1884, the stock of groceries of Freese & Stealy had been increased, by recent purchases, to the value of more than \$5,000, in accordance with said arrangement, when the usual amount of stock carried by them had been about \$2,000; that Freese & Stealy were not being pressed by creditors at this time, and were able to pay all their indebtedness, but on that day, falsely and fraudulently intending to carry out their conspiracy to cheat their creditors, they made a pretended sale and transfer of all their goods to Shahan, the plaintiff in error; that sale and transfer was without consideration, and made with the intent, as Shahan then well knew, of delaying, hindering, and defrauding their creditors; that Shahan took possession of said goods, sold them, and now holds the proceeds of the sale fraudulently; that the claim of Tallman & Sanborn is for the purchase money for a part of said goods; that a notice of garnishment was issued out of the district court of Reno county, and served on Shahan, together with a lot of interrogatories in the action, in which the defendants in error recovered a judgment against the firm of Freese & Stealy; that Shahan in his answer, did not make a complete disclosure of all the facts as he knew them to be, and denied having any property, money, or effects of Freese & Stealy in his possession or under his control, when he in fact had more than the sum of \$5,000 belonging to them. He denied that he knew the amount of the proceeds of said sale, when in fact he had made the sale. He answered that he paid Freese & Stealy the proceeds of said sale, when in fact he had not done so. He claimed that the proceeds of the sale belonged to him, when in fact they did not. Tallman & Sanborn claimed to own, by assignments, judgments against Freese & Stealy, in favor of nine other creditors, the assignments on their face being absolute transfers of said judgments to Tallman & Sanborn; that they caused executions to be issued on each of said judgments, that were returned indorsed, "No property found." The prayer of the pe-

tion is that the pretended sale of goods to Shahan be declared null and void, and the proceeds of their sale, now in the hands of Shahan, be applied to the payment of the plaintiffs' claim, amounting to \$1,363.67, with interest, and for other relief. The answer was a general denial, and an allegation that the plaintiffs were not the real parties in interest; that the alleged assignments of judgments to plaintiffs are only for the purpose of this suit, and not *bona fide*; that the plaintiffs paid no consideration therefor, and ought not to recover. Trial was had at the January term, 1885, of the district court of Reno county, resulting in a judgment for the defendants in error, for \$1,363.67, with interest at 7 per cent., and costs. Motion for a new trial overruled, and exceptions saved. Assignments of error insisted on here are, denial of the right of trial by jury, overruling demurrer to the petition, and very many questions as to the admissibility of testimony.

After judgment, a pleading is to be construed in favor of the pleader, and in support of the judgment. In this case there was a judgment for money only against the plaintiff in error. This determines the nature of the action, brought by the defendants in error against the plaintiff in error, to be the statutory action against the garnishee because his answers were not true and satisfactory. All other things stated in the petition were unnecessary, or are to be considered as an inducement to the statement of the main cause of action. Under the allegations of the petition, the stock of goods having been sold and converted into money, the only possible relief for the plaintiff below would be a money judgment. This money was alleged to be in the possession of the plaintiff in error. A process of garnishment was served on him, with a list of interrogatories. He answered, denying that he was in the possession or control of the money. He had the opportunity to return the money into court, and be discharged, with his costs. He chose another course, and denied the possession of the proceeds of the sale. This action was instituted, in pursuance to section 219, Civil Code, to recover from him the amount of money in his possession as proceeds of the sale, sufficient to pay the judgments, with interest and costs. It is an action for the recovery of money within the meaning of section 266, Civil Code. *McCardell v. McNay*, 17 Kan. 433. The plaintiff in error was entitled to the general verdict of a jury on the issues in the case, and it was prejudicial error for the court below to refuse to submit the issues to the jury when it was demanded. For this error the case must be reversed; and, as this disposes of the case in this court, only such errors will be noticed as might cause a return of the case here. Viewing the pleading as we do now, Freese & Stealy are not necessary parties, and there is a misjoinder as to them.

As to the other judgments alleged to be assigned to the defendants in error, if garnishment proceedings were had against the plaintiff in error on each one of them, the right to recover in this action on each one of them, as against the plaintiff in error, does not depend upon previous knowledge of fraud or conspiracy on the part of the plaintiff in error with Freese & Stealy, but upon the naked fact whether or not the plaintiff in error has money in his possession belonging to the judgment debtors. It matters not how he came into the possession of it. If it belongs to the judgment debtors, and he refused to pay it over in obedience to the order of garnishment, he is liable in this action for it, to the extent of the judgments, with interest.

It is recommended that the judgment be reversed, with instructions to grant a new trial.

**PER CURIAM.** It is so ordered; all the justices concurring.

(39 Kan. 173)

FLERSHEIM *et al.* v. CARY.

(Supreme Court of Kansas. April 7, 1888.)

## CHATTEL MORTGAGES—VALIDITY—INTOXICATING LIQUORS.

Where a chattel mortgage is given to F. & Co. on certain personal property, including intoxicating liquors, and afterwards the mortgagor sells all of said mortgaged property, except the intoxicating liquors, to C., and C., as a part consideration therefor, agrees to pay the mortgage debt to F. & Co., *held*, that such mortgage is void, and C. is not estopped from denying its validity by reason of his agreement to pay the mortgage debt.

(Syllabus by Clogston, C.)

Commissioners' decision. Error to district court, Linn county; C. O. FRENCH, Judge.

This was an action in replevin, brought by B. S. Flersheim, H. Openheimer, and Sol Black, partners as B. S. Flersheim & Co., the plaintiffs in error, against A. R. Cary, the defendant in error, in the district court of Linn county. Trial by jury, and verdict and judgment for the defendant for costs. The opinion states the facts. Plaintiffs bring the case here.

W. R. Biddle, for plaintiffs in error. J. D. Snoddy, for defendant in error.

CLOGSTON, C. Plaintiffs brought this action to recover certain billiard and pool tables and fixtures, claiming the right of possession by virtue of a chattel mortgage executed by one I. Croxton to the plaintiffs. Plaintiffs allege that defendant purchased said property from Croxton with a full knowledge of said mortgage, and subject thereto; and, as a part payment thereof, agreed to pay plaintiffs the amount then due on the mortgage debt, being \$450, and interest. A copy of the chattel mortgage was attached to the plaintiff's petition, which showed that said mortgage also included other property not sold by Croxton to the defendant, and among which was three barrels partly filled with whisky. The defendant admitted the purchase of the property alleged in plaintiffs' petition and mortgage, except the three barrels of whisky, and chandeliers, but denied that he purchased the same subject to the mortgage, or that he agreed to pay the mortgage debt to the plaintiffs. The plaintiffs, in support of their petition, offered the chattel mortgage in evidence, and also offered to show that the defendant purchased the property in controversy subject to the mortgage, and agreed to pay the mortgage debt to the plaintiffs; all of which was objected to by the defendant, for the reason that it was incompetent and immaterial and void, which objection was sustained by the court; whereupon the court instructed the jury to return a verdict for the defendant for costs; and this ruling and order is alleged as error. This presents the question, is the mortgage void because of the fact that it included, among other property, intoxicating liquors? This question is no longer an open one in this state. This court, in *Korman v. Henry*, 32 Kan. 49, 3 Pac. Rep. 764, and *Gerlach v. Skinner*, 34 Kan. 86, 8 Pac. Rep. 257, held that where a chattel mortgage was given on property, and included intoxicating liquors, it was void; and that it was not only void as to the liquor, but as to all the property contained in said mortgage. But plaintiffs insist that, if the mortgage for that reason is void, the defendant, by reason of his agreement to pay the mortgage debt as a part consideration in its purchase, is estopped from denying its validity. If this was an action on the promise of the defendant to pay the mortgage debt to the plaintiffs, and judgment was sought against him for the amount due, and which the defendant agreed to pay, the action would be maintainable; but where the provisions of the mortgage are sought to be enforced, and the mortgaged property recovered, the validity of the mortgage is then brought in question. The action is then one upon the mortgage, and not upon the promise of the purchaser of the mortgaged property to pay the mortgage debt. The mort-

gage being void, no action can be maintained to enforce it. The contract between Croxton and defendant was lawful and valid, but that being so would not give the mortgage life and validity. True, if the contract by which defendant purchased the property in controversy had been such as of itself, independent of the mortgage, was sufficient to constitute a parol equitable mortgage, then such equitable mortgage might have been enforced; but the allegations in plaintiff's petition were not sufficient to warrant such conclusions. It is therefore held that the mortgage, by which plaintiffs claimed the right of possession of the property, is, by reason of its containing property which by law could not be sold or mortgaged in that manner, void; that the court correctly excluded the same; and that the contract between Croxton and defendant in this form of action was not material. It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 100)

STARK v. BARE.

(Supreme Court of Kansas. April 7, 1888.)

EXEMPTIONS—ASSIGNMENT OF CLAIM TO EVADE—ACTION FOR DAMAGES.

B. and S. were citizens of Kansas. B. was employed by a railroad company which owned and operated a line of railroad extending through Kansas and into Missouri. He was the head of a family, and his personal earnings were necessary to their support. He was indebted to S., and S., for the purpose of evading the exemption laws of Kansas, and to prevent B. from availing himself of the benefit of such laws, made a pretended assignment of his claim, without consideration, to L., a citizen of Missouri, and caused an action to be begun thereon in Missouri, whereby the wages earned by B. within three months next preceding that time were taken and appropriated by process of garnishment, and whereby B. was prevented from availing himself of the benefit of the exemption laws. *Held*, that a cause of action arises in favor of B. against S., for wrongfully appropriating the personal earnings of B., which were exempt, and that B. is entitled to recover such damages as he actually sustained.

(Syllabus by the Court.)

Error from superior court, Shawnee county; W. C. WEBB, Judge.

*Frank Herald*, for plaintiff in error. *C. C. Clemens*, for defendant in error.

JOHNSTON, J. J. V. Bare brought an action in the superior court of Shawnee county against N. D. Stark to recover damages for the wrongful action of Stark in defeating him from obtaining the benefit of the exemption laws of Kansas, and in injuring the credit and standing of Bare with his employers. The allegations of the petition are, in substance, that the plaintiff and defendant are permanent residents of the city of Topeka, and that Bare is a married man, having a family depending upon him for support, and is engaged in the service of the Atchison, Topeka & Santa Fe Railroad Company, which operates a railroad through the state of Kansas, and into Kansas City, Mo., in which latter place the railroad company has an agent, and is subject to the process of garnishment and other processes issued from the justices of the peace and courts of Kansas City, Mo.; that, under and by virtue of the laws of Missouri, when an action is commenced before a justice of the peace in the city of Kansas City, holding his office under the laws of Missouri, against an inhabitant and resident of Kansas, and in such action garnishment is issued to and served upon the railroad company, the earnings of the employee of the company, being such Kansas defendant, are garnished and held, and such earnings are not exempt from appropriation in the action, and neither the exemption laws of Kansas or Missouri have any application in such action; that on or about July 20, 1886, Stark claimed that Bare was owing him a small sum of money, but Bare claims a set-off of an amount greater than Stark



claimed; and that immediately Stark made a pretended sale and transfer of his claim, without consideration, to one John W. Leatherbury, a resident of Missouri, for the purpose of having Leatherbury bring an action against Bare before a justice of the peace of Kansas City and have garnishment process issued and served upon the railroad company, and thereby garnish and appropriate the personal earnings of Bare, and apply them to the payment of Stark's alleged claim; that Bare is engaged at work for the railroad company in the city of Topeka, 70 miles distant from Kansas City, on monthly wages, and that his earnings are necessary for the maintenance of his family; and that the defendant, knowing these facts, and that he was unable to leave his employment to go to Kansas City to make a defense to the action on the pretended claim, colluded and conspired with Leatherbury to make the pretended transfer, so as to defeat Bare from all benefit of the exemption laws exempting to him his personal earnings; that an action was brought before a justice of the peace of Kansas City, in the name of Leatherbury as plaintiff, against Bare; that garnishment process was issued and served upon the railroad company, compelling it to answer concerning its indebtedness to Bare, and a judgment was rendered in favor of Leatherbury for the sum of \$50.70, including \$16 for costs, which amount the railroad company paid over as garnishee, and was received by Leatherbury, who was acting collusively with Stark; that the personal earnings so appropriated were necessary for the maintenance of Bare's family, and were his personal earnings for his services rendered within four weeks next before the pretended transfer, and within three months prior to the rendition of the judgment; that all of these acts and things were done by Stark from malice towards the plaintiff, and with the deliberate purpose of defeating him of his defense and of his exemption, to injure his credit, and by means of the annoyance of garnishment proceedings to induce his discharge by the railroad company from its employment, and by reason of the action he has been deprived of the benefit of his earnings and exemption, is in danger of losing his employment, his credit in the community is injured, and his family are put in want by being deprived of the earnings which they sorely need. It is also averred that Stark well knew that he was indebted to Bare more than \$100 over and above his alleged demand. Bare prayed judgment for damages to the extent of \$2,000. A demurrer to the petition was filed by Stark, the grounds of which were that there were two causes of action improperly joined, and that the petition does not state sufficient facts to constitute a cause of action. The demurrer was overruled by the court, and this ruling is complained of here.

The point that there is a misjoinder of causes of action because of the allegation that Stark owed the plaintiff more than \$100 at the time of the alleged wrong-doing is not good. The pleader manifestly intended to state but one cause of action. The matter of the indebtedness is only one of the many facts set out in the petition to show the relations existing between the parties at the time Stark attempted to defeat Bare from availing himself of the benefits of the exemption laws. No recovery is sought upon that indebtedness in this action. The policy of our state is exceedingly liberal in providing protection for the families of indigent debtors. Among other exemptions, it is enacted that the personal earnings of a debtor for three months next preceding the issue of any process against him for the collection of a debt, and which earnings are necessary for the support of the debtor's family, are exempt from such process. This provision has been frequently sustained and enforced. We have gone further, and held that where a citizen of this state attempts, by a proceeding in attachment or garnishment in another state, to subject to the payment of his debt personal earnings of the debtor which under our laws are exempt, and thus prevent such debtor from availing himself of the benefit of the exemption laws of the state, an action by injunction restraining the wrongful action may be maintained by the debtor against such wrong-doer. *Zim-*

*merman v. Franke*, 34 Kan. 650, 9 Pac. Rep. 747. In the present case both parties are citizens of the state, and subject to its laws. According to the allegations of the petition, Stark brought his action in Missouri, at a place far distant from the residence of Bare, for the express purpose of evading the Kansas laws, and wrongfully appropriating the earnings of Bare to which he was not entitled. We think it is a wrong which may not only be restrained by injunction, but that the citizen who proceeds and inflicts the wrong is liable to the debtor to the extent of the injury sustained. In Nebraska, where a somewhat similar statute exists, exempting the personal earnings of the debtor who is the head of a family, a creditor instituted a proceeding in which he appropriated by garnishment the earnings of the debtor which were exempt from execution or garnishment process. The debtor subsequently brought suit to recover the amount so wrongfully appropriated, and the supreme court of that state sustained the action, holding that the creditor had procured property, to be applied to the payment of his judgment, to which he was not entitled, and that he must refund. In disposing of the case the court remarked: "It is well settled that if exempt property is seized, and applied to the payment of a judgment, the owner may have his action against the wrong-doer, unless such exemption is waived by some act or omission of the debtor." *Albrecht v. Treitschke*, 17 Neb. 205, 22 N. W. Rep. 418. See, also, *Phillips v. Hunter*, 2 H. Bl. 403; *Vail v. Knapp*, 49 Barb. 299; *Snook v. Snetzer*, 25 Ohio St. 516; *Haswell v. Parsons*, 15 Cal. 266; *Phelps v. Goddard*, 1 Tyler, 60. Within the principles of these cases, it must be held that the petition states a cause of action, and therefore the judgment of the superior court will be affirmed.

All the justices concurring.

(39 Kan. 128)

PFEFFERLE v. STATE.

(Supreme Court of Kansas. April 7, 1888.)

1. INTOXICATING LIQUORS—ACTION TO ENFORCE FINE AND COSTS—ACT KAN. 1881, CH. 128, § 18.

In a civil action to enforce the fine and costs, as a lien upon real estate of the owner, for the sale of intoxicating liquors in violation of the prohibitory act, under the provisions of section 18, c. 128, Sess. Laws 1881, which were assessed against a person using the same, the fine and costs embraced in the judgment in the criminal action are *prima facie* the amount of the lien; and the original judgment for the costs cannot be changed or corrected by merely showing that a motion to set aside the costs in the criminal action was made and overruled, where no evidence was presented in either action showing the specific costs, if any, which were erroneously taxed.

2. SAME—ACTION TO ENFORCE FINE AND COSTS—PARTIES.

Where an action is brought to enforce a lien upon real estate for a fine and costs under said section 18 of the prohibitory act, and the title of the real estate is in the name of the wife, the husband is a proper party defendant, and therefore a joint party with his wife, and hence a competent witness in the action.

3. SAME—ACTION TO ENFORCE FINE AND COSTS—POWER OF COUNTY ATTORNEY.

Where a civil action is brought by a county attorney in the name of the state, under section 18 of the prohibitory act, to enforce a lien for a fine and costs upon real estate against the owner of premises who has knowingly suffered a person to sell liquor thereon in violation of law, and the attorney general does not appear in the case, or have any connection therewith, the county attorney is, for the prosecution and trial of the cause, the sole and only representative of the state; and, upon proof that the deeds of the real estate are not in his possession or under his control, certified copies thereof may be read in evidence with like effect, and on the same conditions, as the original deeds. Section 27, c. 22, Comp. Laws 1885.

(Syllabus by the Court.)

Error to district court, Lyon county; CHARLES B. GRAVES, Judge.

*Kellogg & Sedgwick*, for plaintiff in error. *J. W. Feighan* and *J. Jay Buck*, for defendant in error.

HORTON, C. J. On October 1, A. D. 1883, Louis Macke was convicted upon one count of an information charging him with the sale of intoxicating

liquors in violation of the prohibitory law, in the district court of Lyon county, and acquitted upon two counts of the information; and upon conviction he was fined in the sum of \$250, and adjudged to pay the same, and the entire costs, and to stand committed until all were paid. He was never committed to jail. On February 28, 1886, the state filed a petition in the district court of Lyon county against Louisa Pfefferle and her husband, O. Pfefferle, alleging the conviction of Louis Macke, and that the fine and costs had never been paid; and further alleging that the unlawful sale of intoxicating liquors was in a certain building owned by Louisa Pfefferle and her husband, and that they had rented the building and had knowingly suffered the same to be used for the unlawful sale of intoxicating liquors; and sought to have Macke's fine and costs charged upon the building as a lien. Louisa Pfefferle interposed a plea of the statute of limitations in the case, which was sustained by the court below. The state brought the case here, where the judgment of the lower court was reversed, and the case remanded for trial upon its merits. *State v. Pfefferle*, 33 Kan. 718, 7 Pac. Rep. 597. This case was tried in the court below at the January term for 1886, and upon the trial it was shown that the lower portion of the building was used for business purposes, the front as a grocery store, and the rear as a saloon; that a lease for the renting of the building had been entered into between O. Pfefferle and Perrier & Weiss, which lease was signed by O. Pfefferle in his own name; that afterwards this lease was assigned by Perrier & Weiss to one O'Dowd, who ostensibly conducted the grocery business, and that Louis Macke conducted the liquor business, but whether for himself, or as clerk for O'Dowd or some one else, the record does not disclose; that Louis Macke was the brother of Mrs. Pfefferle and the brother-in-law of O. Pfefferle, her husband; that the building was a "store," and that Pfefferle and his family lived for a time on the second floor, and that Louis Macke boarded and roomed with them; that the place where the liquor was sold was open, and the smell of liquors was strong about the building; that Mrs. Pfefferle was frequently seen going up and down the stairs, and was about the building; that the family got their groceries in the building; that O. Pfefferle, her husband, was generally in the building, in the grocery and about the saloon, and sometimes behind the bar, and was the bondsman of Macke in liquor prosecutions in the police court; and that numerous parties were passing in and out of the saloon both through the front and back doors. Judgment was rendered that the state had a lien on the building belonging to Mrs. Pfefferle, for the sum of \$250,—the fine,—and also for the costs, amounting to \$146.95. Mrs. Pfefferle complains of the judgment.

1. It is said that the original judgment against Lewis Macke was erroneous in that he was adjudged to pay all the costs of the prosecution upon the two counts upon which he was acquitted, as well as the costs upon the count upon which he was convicted. The only evidence that any costs were improperly taxed against Macke was his motion to retax the costs in the case, but nothing was shown in the *Macke Case*, nor in this case, as to the amount of costs erroneously taxed; and therefore, in this collateral way, the judgment against Macke cannot be changed, corrected, or reversed.

2. It is further said that it was error in the trial court to permit the agency of the husband to be proved against the wife by his evidence, and it is also said that the court erred in permitting the husband to testify generally in the case. We have recently decided that an agent may testify as to his authority to act for his principal; and that this rule is not changed by the fact that the agent is the husband of the principal. Section 323, Civil Code; *Railway Co. v. Kuhn*, 38 Kan. —, 16 Pac. Rep. 75; *French v. Wade*, 35 Kan. 391, 11 Pac. Rep. 138. The title of the real estate upon which the fine and costs were adjudged a lien was in Mrs. Louisa Pfefferle, but O. Pfefferle was her husband; and, as it was sought by the action to have the lien foreclosed, and the

premises sold, the husband was a proper party defendant, and therefore was a joint party with his wife, and hence a competent witness. Section 323 of the Code reads as follows: "The following persons shall be incompetent to testify: \* \* \* *Third*. Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties, and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards." *Busenbark v. Busenbark*, 33 Kan. 577, 7 Pac. Rep. 245.

3. The next alleged error is that the building in which the liquor was sold was a homestead, and that the lien for fine and costs could not fasten itself or be foreclosed upon a homestead. We do not think the question is properly in the record. *State v. Snyder*, 34 Kan. 425, 8 Pac. Rep. 860. The answer of Louisa Pfefferle and O. Pfefferle contained a general denial only. No claim of homestead was alleged. No evidence was offered upon the part of the defense tending to show that the premises described in the petition were occupied as a homestead by Louisa Pfefferle and family. It was brought out in the examination of some of the witnesses that the Pfefferles resided over the store in which Macke did business, and that Macke lived in the family; but O. Pfefferle, the husband, testified that he was living over the store "a part of the time, not for all the time." It also appears, from the testimony of one witness, that the Pfefferles moved away from Emporia into the country some time in 1883 or 1884. No instruction was asked by either party as to whether the store was occupied by the Pfefferles as a homestead, and no such issue was fairly passed upon by the jury or the court.

4. The next error alleged is the manner in which the title of the real estate was proved to be in the name of Mrs. Pfefferle. It was shown by the county attorney that he did not have the deeds of the real estate in his possession, or under his control. It is suggested that the attorney general of the state is the superior officer of the county attorney, and therefore that it should have been shown that the deeds were not in his possession, or under his control, before the certified copies were properly admissible in evidence. We think otherwise. As this action was brought by the county attorney of Lyon county, as the attorney general was not required by the governor, or either branch of the legislature, to appear therein, and as he did not make any appearance in the case, the county attorney was the sole and only representative of the state. The state had the right, under section 27, c. 22, Comp. Laws 1885, to prove the title by the records. Section 136, art. 10, c. 25, Comp. Laws 1885, reads: "It shall be the duty of the county attorneys to appear in the several courts of their respective counties, and prosecute or defend, on behalf of the people, all suits, applications, or motions, civil or criminal, arising under the laws of this state, in which the state or the county is a party or interested." See, also, section 71, c. 102, Comp. Laws 1885.

5. Finally, it is contended that an action will not lie under section 18 of the prohibitory act until Macke has been committed to the jail. This point is disposed of in *Hardten v. State*, 32 Kan. 637, 5 Pac. Rep. 212, and *State v. Pfefferle*, 33 Kan. 718, 7 Pac. Rep. 597. The judgment of the district court will be affirmed.

All the justices concurring.

(39 Kan. 241)

RITCHIE *et al.* v. MULVANE *et al.*

(*Supreme Court of Kansas*. April 7, 1888.)

SCHOOLS AND SCHOOL-DISTRICTS — DIVISION AND ANNEXATION OF DISTRICTS — TAXATION.

From September 4, 1877, up to October 7, 1884, certain territory constituted *de facto*, though not *de jure*, a part of the city of Topeka and of the school-district of

Topeka, and this under an ordinance regularly passed by the mayor and council of the city of Topeka on the first-mentioned date, in pursuance of an act of the legislature regularly passed and approved, which act, though general in form, was special in fact, and therefore void under section 1, art. 12, Const., for the reason that it attempted to confer corporate power upon certain cities; and taxes were levied upon the annexed territory in the same manner as though such annexed territory was a part of the city of Topeka and of the school-district of Topeka, in law as well as in fact; and certain real estate in such annexed territory was sold at a tax sale for such taxes to an individual purchaser, and a tax deed was afterwards executed on such sale; and in an action in the nature of ejectment brought by the tax-deed holder against the original owner of the land for the recovery thereof, the district court held that the tax deed and the city taxes were void, and that the state, county, and school-district taxes were valid to the extent that they might be recovered in such action, under section 142 of the tax laws. *Held*, that the district court did not err with reference to said state, county, and school-district taxes.

(*Syllabus by the Court.*)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

This was an action in the nature of ejectment brought by John R. Mulvane and Joab Mulvane against John Ritchie, Hale Ritchie, John Ritchie, Jr., and others, to recover certain real estate described in the plaintiffs' petition. The defendants answered. Afterwards a trial was had before the court without a jury, and the court made special findings of fact and conclusions of law, among which are the following:

FINDINGS OF FACT.

"(1) The real estate in controversy is part of the north-east quarter of section six, in township twelve of range sixteen, in Shawnee county, Kansas, and is adjacent to the city of Topeka, and is included in what is commonly called 'Ritchie's Addition,' which is described as follows: Commencing at a point where the north line of section five, town twelve of range sixteen, intersects the center of Shunganunga creek; thence southerly with the center of said creek as it winds and turns to its intersection with the prolongation east of the south line of Twelfth (12th) street of the city of Topeka; thence westerly along said prolongation of 12th street to its intersection with the prolongation south of the east line of Jefferson street of said city; thence southerly along said prolongation of Jefferson street to its intersection with the south line of the north-east quarter of section six, town twelve, (12,) range sixteen, (16;) thence west along south line to its intersection with the west line of said quarter section; thence north to the north-west corner of said quarter section; thence east to the place of beginning. (2) Said defendant has sold parcels of land in said territory known as 'Ritchie's Addition,' describing the same by metes and bounds as corresponding to lots on certain streets of said city extended across said territory, and fronting on what would correspond to said streets if they were so extended, and corresponding in shape and size with lots in said city. And for more than fifteen years roads in front of said tracts have been in common use as streets, with cross-streets, corresponding with the streets and cross-streets of said city extended across said territory. (3) That on the 15th day of April, 1875, the mayor and city council of the city of Topeka, then a city of the second class, passed an ordinance whereby they attempted to take into the corporate limits of the city of Topeka the territory described in finding No. 1. That the said John Ritchie was then, and for more than five years prior thereto had been, the owner of a majority of the acres attempted to be taken into the city of Topeka by virtue of said ordinance. That said John Ritchie did not consent, in writing or otherwise, to the said annexation, and he never made, acknowledged, and recorded a plat of said tract. That after the passage of said ordinance the said city of Topeka exercised jurisdiction over said tract, which was unopposed by a majority of the citizens residing thereon until October 7, 1884; but the said Ritchie during all said time was the owner of a majority of the acres in said tract, and he opposed the exercise of the jurisdiction of said city over

said tract. That during said time no townships adjoining said tract attempted to exercise jurisdiction over said tract, and never attempted to assess the property in said tract for taxation. That during all said time the inhabitants of said tract generally voted at the city election held in the city of Topeka, and a person residing on said tract one time held the office of city councilman for the city of Topeka. During said time the fire service of the city of Topeka was extended over said tract, and a fire-alarm box was placed in said territory. Taxes were levied and collected upon a majority of the inhabitants of said territory, but during said time the defendant John Ritchie never voted in the city of Topeka, or paid taxes therein on said land, although the same were levied thereon for every year since 1875 up to the year 1884, and the trustee of Topeka township made no attempt to assess any of the above tracts for taxes. During said period a school-house was built upon said tract, and schools maintained therein by the board of education of the city of Topeka, and the children of proper age residing upon said territory were enrolled as school children of the city of Topeka. That sidewalks were ordered to be built by the said city of Topeka, and were built and paid for by the abutting land-owners of said territory, except the defendant John Ritchie; and said sidewalks were kept in repair by the owners of the land abutting the same, except the defendant John Ritchie. And a culvert was built by said city on said tract, and three water hydrants were placed upon said territory in the year 1881, upon which the said city agreed to pay rent. The said territory was never taken into the city of Topeka, or annexed for school purposes, except by said ordinance of April 15, 1875, and all the taxes described in the findings in this action as school taxes were levied by said board of education of the city of Topeka. And the court further finds that from the 15th day of April, 1875, up to October 7, 1884, the defendant John Ritchie was and is now the owner of all the tracts of land described in the plaintiffs' petition, unless the tax deeds hereinafter described are valid, and divested him of the title thereto. (4) That the real estate in controversy was subject to taxation for the year 1876, and thence hitherto. (5) The valuation of said real estate in controversy by the city assessor of said city for the years 1876-79, 1881-83, were not excessive. (6) The real estate in controversy was sold on the 4th day of September, 1877, for the taxes of 1876, to the plaintiffs, who paid the taxes for the subsequent years. (7) The defendants never paid or offered to pay the taxes on said real estate in controversy, or any part thereof, for any of said years. (8) That on November 8, 1880, J. Lee Knight, county clerk of said Shawnee county, executed to plaintiffs a tax deed for each of the tracts of real estate in controversy, which deeds are in the form, and were executed and acknowledged in the manner, provided by statute. (9) The several tracts of real estate in controversy, so sold for delinquent taxes, were sold to the plaintiffs at the dates and for the amounts, and subsequent taxes paid thereon by them at the dates and in amounts, respectively, as follows: That on the 4th day of September, 1877, the following tract of land, viz.: A tract in the north-east quarter of section six, (6,) town twelve, (12,) range sixteen (16,) east 6th P. M., as follows, viz.: Beginning on a line with the east side of Quincy street, and 1,820 feet southerly from south-east corner of 10th avenue east and Quincy street, city of Topeka, southerly on the said line 25 feet; thence easterly, at right angles to said line, 150 feet; thence northerly, parallel to said line, 25 feet; thence westerly 150 feet to place of beginning,—same as lot 454 Quincy street, city of Topeka, Shawnee county, state of Kansas,—was sold to said plaintiffs for the taxes of the year 1876. That said plaintiffs paid, at the dates below given, the amounts of taxes below given, levied on said above-described tract of land for county, state, and city purposes, respectively, for the years below given, and have paid the expenses of advertising the sale of said tract, the certificate fee, the county clerk's fee for issuing tax deeds, and the recorder's fee for recording tax deed, as follows,

viz.:" [Here follows a tabular statement of all the taxes paid for the years 1877 up to 1882, inclusive, and the penalties, costs, and interest thereon. The findings numbered 10, 11, 12, 13, 14, 15, and 16, are with reference to the sales of other tracts of land, and the payment of taxes, penalties, interest, and costs thereon, and they are the same in form as finding numbered 9.] "(17) And the court further finds that said John Ritchie never filed in the office of register of deeds of Shawnee county any plat of the land described in the first finding of fact herein, and never made and acknowledged any plat of said premises subdividing the same into blocks and lots with streets and alleys, and never consented that said premises should be made or become a part of the city of Topeka. And said John Ritchie never subdivided said property into the pieces and tracts as above described and assessed for taxation, nor did the said John Ritchie ever divide said tract of land described and bounded in the first finding of fact herein into lots, blocks, streets, and alleys, or authorize the same to be done. (18) That said premises were assessed for taxation by the city assessor for the city of Topeka for the years 1876-82, and not by the trustee of Topeka township. (19) That the city taxes for the city of Topeka for the years 1876-82 were levied by resolution of the city council, and not by ordinance. (20) That on the 8th day of December, 1883, the said John Ritchie, with others, commenced their action in this court for the purpose of enjoining the collection of the taxes levied on said tract for state, county, city, and board of education purposes, in which action a temporary injunction was granted; and in the trial of said action in this court said injunction was made perpetual, and said judgment was affirmed by the supreme court on the 7th day of October, 1884. And the court finds that during all the time from the said 15th day of April, 1875, to the 7th day of October, 1884, the said city of Topeka had notice that the defendant John Ritchie opposed the annexing of the said territory to the city of Topeka, and resisted the city's exercise of jurisdiction over the same."

*W. P. Douthitt and C. M. Foster*, for plaintiffs in error. *Patrick Bros.*, for defendants in error.

*VALENTINE, J., (after stating the facts as above.)* This was an action in the nature of ejectment, brought by John R. Mulvane and Joab Mulvane against John Ritchie, Hale Ritchie, John Ritchie, Jr., and others, to recover certain real estate described in the plaintiffs' petition. The defendants answered. Afterwards a trial was had before the court without a jury, and the court made special findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of the defendants, and against the plaintiffs, with regard to the recovery of the real estate; but rendered judgment in favor of the plaintiffs, and against the defendants, under section 142 of the tax laws, for the recovery of the amount of the taxes paid by the plaintiffs on such real estate, together with the interest and costs thereon, except the taxes levied on the land for the benefit of the city of Topeka, with the interest and costs thereon. And to reverse this judgment the defendant John Ritchie, as plaintiff in error, brought the case to this court, making the plaintiffs below the defendants in error. Afterwards John Ritchie died, and the case was revived in the name of Hannah Ritchie, John Ritchie, and Hale Ritchie, his successors in interest. The defendants below were in the possession of the lands in controversy, and claimed to own the same by virtue of a regular chain of title from the government down, while the plaintiffs below claimed title only under certain tax deeds. The plaintiffs below, however, who are now the defendants in error, claim in this court only to be entitled to recover the amount of certain taxes which they paid on the lands as follows: The plaintiffs below purchased the lands in controversy at a regular tax sale held on September 4, 1877, for the taxes of the year 1876, and afterwards paid the taxes on such lands for the subsequent years 1877-82. They also in proper time procured

regular tax deeds for the lands so purchased. These are the tax deeds under which the plaintiffs below claimed title when they commenced this action. The taxes paid by them were city taxes, county taxes, state taxes, and school-district taxes. The tax deeds and the city taxes were held to be void by the court below, and the judgment of the court was rendered accordingly. No complaint is made concerning this judgment. But the court below also held that the county taxes, state taxes, and school-district taxes were valid to the extent that they might be recovered by the plaintiffs below under section 142 of the tax laws, and rendered judgment accordingly; and of this judgment the plaintiffs in error representing John Ritchie, who was one of the defendants below, complain. That section reads as follows: "Sec. 142. If the holder of a tax deed, or any one claiming under him by virtue of such tax deed, be defeated in an action by or against him for the recovery of the land sold, the successful claimant shall be adjudged to pay to the holder of the tax deed, or the party claiming under him by virtue of such deed, before such claimant shall be let into possession, the full amount of all taxes paid on such lands, with all interests and costs, as allowed by law, up to the date of said tax deed, including the costs of such deed, and the recording of the same, with interest on such amount at the rate of twenty per cent. per annum, and the further amount of taxes paid after the date of such deed, and interest thereon at the rate of twenty per cent. per annum."

It has been held by this court that this section applies to all actions in the nature of ejectment,—as well as to those where the tax-deed holder is the plaintiff in the action, and not in the possession of the property, (which is this case,) as to those where the tax-deed holder is the defendant in the action, and in the possession of the property. *Fairbanks v. Williams*, 24 Kan. 16, 19; *Russell v. Hudson*, 28 Kan. 99, 101; *Counratt v. Myers*, 31 Kan. 30, 2 Pac. Rep. 858; *Belz v. Bird*, 31 Kan. 139, 145, 1 Pac. Rep. 246; *Krutz v. Chandler*, 32 Kan. 659, 5 Pac. Rep. 170. In construing the foregoing statute, when it was numbered section 117 of the tax law, this court in the case of *Smith v. Smith*, 15 Kan. 290, 295, used the following language: "This statute was enacted in the interest of equity and justice, and its provisions should be so construed as to promote justice. It is wholly unlike that class of statutes which attempts to give the land of one person to another for an inconsiderable sum. The former is liberally construed. The latter is strictly construed. The former was enacted for just such cases as the one at bar. It was enacted for void tax deeds, and not for valid tax deeds. A person holding under a valid tax deed has no need of such a statute. Only persons holding under void tax deeds need such a statute. The laws under whose provisions tax titles are created are usually construed strictly, and therefore we hold that the tax deed in this case is void. But laws enacted for the purpose of enforcing, in a fair and reasonable manner, the delinquent members of society to discharge that moral obligation resting upon them, as well as upon others, to bear their proportionate share of the public burdens, are always construed liberally so as to promote their object." In the case of *Belz v. Bird*, 31 Kan. 139, 144, 145, 1 Pac. Rep. 246, this court used the following language: "It would seem that in all cases of void tax deeds, whatever may be the grounds upon which the deeds are held to be void, the holder of the tax deed, when defeated in an action of ejectment, whether he is the plaintiff or defendant, may recover the taxes which he has paid." See, also, *Stetson v. Freeman*, 36 Kan. 608, 14 Pac. Rep. 256.

The plaintiffs in error claim—*First*, that all the aforesaid taxes,—state, county, and school-district,—are void for the reason that the property taxed was not assessed by the proper assessor; and they claim, *second*, that the school-district taxes are void for the additional reason that the property taxed did not constitute any part of the territorial subdivision for which the taxes were levied, to-wit, the city of Topeka, but was in law a part of another ter-



ritorial subdivision, to-wit, Topeka township. These are the only questions to be decided in this case.

It appears that on April 15, 1875, and prior thereto, the land upon which the taxes were levied was a part of Topeka township, and not a part of the city of Topeka; but on that day the city of Topeka attempted, by an ordinance regularly passed by the mayor and council, in pursuance of an act of the legislature regularly passed and approved on March 3, 1875, (Laws 1875, c. 73,) to take this land, along with other land, into the corporate limits of the city of Topeka, and to make it a part of the city. And from that time on up to about October 7, 1884, this land was in fact, though not in law, within the corporate limits of the city of Topeka, and a part of such city; when at that time it was decided by the supreme court of the state that such land was not within the corporate limits of the city, and that it formed no part of such city. *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. Rep. 800. The ground upon which this decision was made, and the only ground, was that the aforesaid act of the legislature, though in form general, was in fact special, and was therefore void because it attempted to confer corporate power by a special act, in contravention of section 1, art. 12, of the constitution of the state. During that time, that is, from April 15, 1875, up to October 7, 1884, the city of Topeka and the school-district of Topeka had the absolute and exclusive control over the annexed territory for municipal and school purposes, and the same control, precisely, as they had over any territory belonging to the city of Topeka, except that John Ritchie, and a few others, who represented the largest number of acres of land within the annexed territory, refused to recognize the validity of the aforesaid ordinance of annexation, and at all times claimed that the annexed territory did not constitute any part of the city of Topeka. The majority of the inhabitants, however, of that territory, as well as the people and the officers of Topeka township, and the people and the officers of the city of Topeka and of the school-district of Topeka, and the public generally, recognized the validity of the aforesaid ordinance, or at least regarded the annexed territory as constituting a part of the city of Topeka, until it was decided otherwise by the courts, in 1884. City taxes were levied by the city of Topeka upon this territory, and such taxes were generally paid by the inhabitants of the territory. School-district taxes were also levied by the board of education of the city of Topeka upon this territory, and they were generally paid by the inhabitants of the territory. Sidewalks were built and maintained by order of the city of Topeka upon the supposed streets of the annexed territory, and assessments to pay for such sidewalks were levied by the city of Topeka, and were generally paid by the abutting property owners. Both the water service and the fire service of the city of Topeka were extended by the city over this annexed territory. The children residing in the annexed territory attended the public schools of the city of Topeka. A school-house was also built in this territory, and a school maintained therein, by the board of education of the city of Topeka. The electors of that territory voted at the city elections, and at one time one of the electors of that territory was elected a member of the city council, and served as such. And, while the city of Topeka and the school-district of Topeka were exercising jurisdiction over this annexed territory, no other city, or township, or school-district attempted to exercise the slightest jurisdiction or control over the same. During that time no township tax was levied upon this territory, and no school-district tax, except such taxes as were levied by the board of education of the city of Topeka; and no taxes of any kind were attempted to be collected from that territory except such as were computed upon the assessments made by the city assessors, and such are now claimed to be illegal. Indeed, no assessment was made of any property in that territory except the aforesaid assessments made by the city assessors, which are now claimed to be illegal. John Ritchie, however, never paid any of his taxes levied against him or upon his prop-

erty in this territory, and never did any other act that would indicate that he considered the annexed territory as a part of the city of Topeka, but always resisted the claim that his property, or any other property in that territory, constituted any part of the city of Topeka, or of the school-district of the city of Topeka.

We think from the facts found in the present case that the annexed territory was *de facto* a part of the city of Topeka, and a part of the school-district of the city of Topeka, from April 15, 1875, up to October 7, 1884. This did not so clearly appear under the facts as found in the case of *City of Topeka v. Gillett*, heretofore cited, as it now does under the facts found in this case. It did not appear in that case that the annexed territory was so universally recognized as a part of the city of Topeka as it now does; and yet, if it had so appeared, still the decision in that case would have been, and should have been, precisely as it was. We think that by virtue of the foregoing facts the city assessor of the city of Topeka became and was the assessor *de facto* for that territory, if such a thing could be possible, and we think it could. In this state, in the assessment of property for taxation the main object is always to have a fair and reasonable assessment made, and it is not so material as to what particular officer makes it. In townships the assessment is generally made by the township trustee, who is *ex officio* the township assessor. In cities the assessment is usually made by a city assessor. And both the township trustee and the city assessor may have deputy assessors who may assess the property. Railroad property, both in cities and in townships, is assessed by a board of railroad assessors. Tax Law, § 26. And where property is omitted from the assessment roll, whether the property is in a city or in a township, the county clerk may assess the same. Tax Law, §§ 18, 52, 53, 54, 70. And the county board, as a board of equalization, may increase or diminish the assessment of any particular piece of property. Tax Law, § 74. Indeed, the substantial thing in all the assessments of property in this state is that the assessments shall be made by some officer, and that the assessments shall be fair and reasonable; and all the assessments made in the present case were made by an officer exercising exclusive jurisdiction over that territory, and were found to be fair and reasonable by the trial docket. We think this is sufficient to render the taxes valid for the purposes of the present case, and under section 142 of the tax law.

But this is not all. Section 85 of the present tax law, and section 74 of the prior tax law, provides as follows: "Sec. 85. All taxes shall be due on the 1st day of November of each year. A lien for all taxes shall attach to the real property subject to the same on the 1st day of November in the year in which such tax is levied, and such lien shall continue until such taxes and penalty, charges and interest which may have accrued thereon, shall be paid by the owner of the property, or other person liable to pay the same." Observe the foregoing language: "A lien for all taxes shall attach to the real property subject to the same." No reference is here made to any assessment. This means that whenever a tax is levied, and the 1st day of the next November has arrived, a lien shall attach to all property subject to the tax, whether any assessment has yet been made or not. If no assessment has yet been made, the county clerk may make it afterwards. Tax Law, §§ 18, 52, 53, 54, 70. Of course the amount of the lien cannot be ascertained until some assessment or valuation of the property is made, but the county clerk can make it at any time. It will be seen that the law is careful to prevent the escape from taxation of any person. All must bear their fair share of the public burdens, and no one is permitted to escape taxation merely because of some irregularity in the assessment or elsewhere. All must pay their taxes. For the purposes of this case it may be admitted that any taxes like the taxes in the present case would be held to be invalid in an action brought, under section 253 of the Civil Code, for the purpose of restraining the collection of such taxes

by any one or more of the persons taxed, against the corporation or the officers attempting to collect the taxes; and it may also be admitted that any tax title founded upon any such taxes, or upon any taxes based upon any such assessment as the ones that were made in the present case, would also be held to be void. A person who commences early, under section 253 of the Civil Code, to enjoin the collection of a supposed illegal tax is entitled to be favorably heard. Also a person whose land is claimed for an inconsiderable sum of money paid for it, as a tax paid at a tax sale usually is when compared with the value of the land, is entitled to defeat the tax deed or tax title for comparatively a very small irregularity. But when a person stands by for years, knowing that his land is taxable, that it is taxed, and that only a reasonable tax is imposed upon it, refusing to pay his just taxes,—the just demands of the public in the form of taxes,—because of some irregularity that does not render the taxes any the less just than they would be if no irregularity had intervened, and until some innocent third person has invested his money by paying such taxes, he is not entitled to any sympathy or encouragement from the courts or elsewhere. Section 142 of the tax law was enacted for just such persons, and for just such cases. We think the arguments and authorities of the plaintiffs in error have but little force in proceedings like this under section 142 of the tax law, for nearly all their arguments and authorities have reference to tax deeds or tax titles, or to questions concerning the validity of the tax, where such questions are raised directly between the wrong-doer, that is, the corporation or officer attempting to enforce the questionable tax, and the person wronged or to be wronged, that is, the person whose property is supposed to be wrongfully taxed, and not between the innocent third persons who have expended their money upon the faith of a state of things permitted to exist, not only by the corporation or person attempting to enforce the tax, but also by the person taxed. And here we might say that John Ritchie, with those who felt the same as he did, had his remedy, from the beginning, to enjoin the officers of the city of Topeka from exercising jurisdiction over his property, and to enjoin the city of Topeka and its officers, and the board of education or other officers, from attempting to enforce the collection of any unwarranted tax upon his property; and this he could have done before any tax sale was had, and before any innocent third person expended any money in the purchase of the lands at the public tax sale. His lands were taxable and subject to state, county, and school-district taxes, and he knew it; and he as well as others was morally bound to pay his just and fair proportion of these public charges. His lands were in the county, and the county had the right to tax them, and to receive the taxes, and he had no right to deprive the county of them. They were also in the state, and the state also had the right to tax them, and to receive the taxes, and he had no right to deprive the state of its taxes. And the only irregularity with regard to the state and the county taxes was the aforesaid irregular assessment. These lands were assessed by the city assessor, when it is claimed they should have been assessed by the township trustee of Topeka township. With reference to the school-district taxes it is urged that the annexed territory did not belong to the city of Topeka or to the school-district of Topeka, but belonged to some other school-district, and therefore that only such last-mentioned school-district could lawfully tax the same for school purposes. But this territory was in fact, though not in law, a part of the school-district of Topeka, and the board of education of the city of Topeka had in fact the absolute and exclusive control and jurisdiction over that territory as a school-district, and this with the consent of such board, and the consent of a majority of the inhabitants of the territory, and, indeed, with the consent of all other persons except John Ritchie and a few others. Is not this enough? A school-district of a city is never a part of the city municipal corporation. It is merely a school-district, and a distinct corporation from the city. *Knowles v. Board,*

*etc.*, 33 Kan. 692, 701, 7 Pac. Rep. 561. And territory may be attached to a city school-district for school purposes, although the territory may not belong to the city as a municipal corporation, nor be within its limits. Topeka was a city of the second class up to the year 1881, and the statute governing in such cases reads as follows: "Territory outside the city limits, but adjacent thereto, may be attached to such city for school purposes, upon application to the board of education of such city, by a majority of the electors of such adjacent territory; and, upon such application being made to the board of education, they shall, if they deem it proper, and to the best interests of the schools of said city and the territory seeking to be attached, issue an order attaching such territory to such city for school purposes, and to enter the same upon their journal; and such territory shall, from the date of such order, be and compose a part of such city for school purposes only; and the taxable property of such adjacent territory shall be subject to taxation, and shall bear its full proportion of all expenses incurred in the erection of school buildings, and in maintaining the schools of such city." Laws 1872, c. 100, art. 5, § 99; Laws 1876, c. 122, art. 11, § 3; Comp. Laws 1885, c. 92, art. 11, § 3. This provision of the statute was complied with, in this case, in substance though not in form. The territory in dispute was originally incorporated into the city of Topeka, and therefore into the school-district of the city of Topeka, by an ordinance void so far as the city of Topeka as a municipal corporation was concerned; but was it void so far as the school-district of Topeka is concerned? *Knowles v. Board, etc.*, 33 Kan. 692, 7 Pac. Rep. 561.

Special acts relating to school-districts may be valid, and the only ground upon which the aforesaid ordinance was held void was that it was based upon a special act. But, conceding the ordinance to be void with reference to the school-district as well as to the municipal corporation, still the board of education and the majority of the people of the annexed territory afterwards ratified and confirmed the annexation attempted to be effected by it, by their voluntary acts, though not in the statutory form. In other words, the board of education and the people of the annexed territory made such annexed territory as much a part of the school-district of the city of Topeka in fact, though not in law, as it would or could have been if it had been annexed under a valid ordinance, or attached in the most formal manner under the foregoing statute. These acts of the board of education and the people of that territory made such territory a part *de facto* of the school-district of the city of Topeka; and hence as to the public in general, and as to third persons in particular, the annexation or attachment of this territory to the school-district of the city of Topeka must be considered as legal and valid when attacked collaterally, as in this case. In the case of *School-District v. State*, 29 Kan. 57, it was held that bonds issued by a school-district, which was not a school-district *de jure*, but only such *de facto*, and where the bonds had gone into the hands of innocent purchasers, were legal and valid. In the case of *Beck v. Carpenter*, 29 Kan. 349, it was held that where assessments were made and taxes levied upon property in the city of Council Grove, and where other things were done by the city officers as though such city was a city of the second class, when in fact it was only a city of the second class *de facto*, and not such *de jure*, all such acts were legal and valid as to third persons. See, also, *Voss v. School-District*, 18 Kan. 467; *Pape v. Bank*, 20 Kan. 440; *Watkins v. Inge*, 24 Kan. 612; *Morton v. Lee*, 28 Kan. 286; *State v. Carroll*, 38 Conn. 449; *Petersilea v. Stone*, 119 Mass. 465. In the case of *State v. Carroll*, 38 Conn. 449, it was held as follows: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit or

to invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition,—as to take an oath, give a bond, or the like; (3) under color of a known election or appointment void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." The rules of law with respect to the validity of acts of corporations *de facto* are substantially the same as the rules of law are with reference to the acts of officers *de facto*.

We think that the court below did not err in holding that the state, county, and school-district taxes paid by the plaintiff below may be recovered in this action, and therefore its judgment will be affirmed.

JOHNSTON, J., concurring. HORTON, C. J., not sitting, and not taking any part in the decision.

(39 Kan. 257)

LITCHIE *et al.* v. MULVANE *et al.*, (three cases.)

(*Supreme Court of Kansas*. April 7, 1888.)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge. *Wm. P. Douthett* and *C. M. Foster*, for plaintiffs in error. *Frank Patrick*, for defendants in error.

PER CURIAM. The judgment of the court below will be affirmed in the foregoing cases upon the authority of the case of this same title, (*ante*, 830.) just decided.

HORTON, C. J., not sitting, and not taking any part in the foregoing cases.

(39 Kan. 216)

MCCREARY *et al.* v. HART *et al.*

(*Supreme Court of Kansas*. April 7, 1888.)

NEW TRIAL—CONFLICT OF EVIDENCE—DISCRETION TO GRANT NEW TRIAL.

Where a verdict of the jury is founded upon the testimony of a witness, directly contradicted by another witness, and the trial court sets the verdict aside, the supreme court will not reverse the decision or order of the trial court granting a new trial.

(*Syllabus by the Court*.)

Error to district court, Montgomery county; GEORGE CHANDLER, Judge.

*J. B. Zeigler* and *J. D. McCue*, for plaintiffs in error. *William Dunkin*, for defendants in error.

HORTON, C. J. Messrs. Tootle, Hanna & Co., and other mercantile firms, obtained writs of attachment against Logan Bros. & Pitzer and A. G. Logan, which were levied upon a stock of general merchandise found in the possession of T. F. Hart & Co., who claimed to be the owners thereof. Hart & Co. brought their action against the sheriff and his deputy for the possession of the goods. The following are the leading facts disclosed by the evidence: On February 6, 1885, Logan Bros. & Pitzer were the owners and in the possession of the stock of merchandise at Cherryvale, in this state. A. G. Logan, the father of the Logan brothers, upon that date purchased the same, and assumed the indebtedness, which consisted of a chattel mortgage to C. Dobson & Co. of \$2,100, and various accounts due to firms for goods, amounting to about \$2,000. At the time, the Logan brothers were also indebted to their father in the sum of \$1,800, and it was the agreement that this sum should be received as part of the purchase money on the stock. On March 6, 1885, A. G. Logan sold and transferred the goods to T. F. Hart & Co. The bill of

sale of the goods was signed by Logan Bros. & Pitzer and A. G. Logan. Hart & Co. assumed the payment of the chattel mortgage, then amounting to \$1,900, paid A. G. Logan \$900 in cash, conveyed to him 160 acres of land in Missouri, and also turned over to him two notes aggregating \$300. The unsecured liabilities of the Logan Bros. & Pitzer and A. G. Logan were \$2,000 or over; the value of the goods, \$4,500 to \$5,000. At the time of the purchase by Hart & Co., no invoice of the goods was taken. The firm of Hart & Co. consisted of T. F. Hart and S. M. Pearson. Hart was lately from Illinois, but Pearson was a resident of Cherryvale. He had formerly been engaged in farming, and also for some years in the mercantile business. At the time of the purchase, he was a real-estate agent. Hart turned over to Pearson \$1,500 in money as his part of the capital of the firm. Prior to the purchase, Pearson knew that A. G. Logan was being pressed by his creditors, and did not have any ready money to pay his debts. He also knew that an attorney of some of the creditors had been at Cherryvale seeking the payment of claims against the Logans. After the sale was completed, A. G. Logan had the following assets with which to pay the claims of the unsecured creditors: Cash realized upon the sale, \$900; book-accounts, from \$600 to \$800; notes, \$250; judgment, \$380; and 160 acres of land in Missouri, estimated at \$1,500. The jury returned a verdict in favor of the defendants, finding that they were rightfully in possession of the stock of goods; and also found that the value of the defendants' interest in the property, under the writs of attachment, was \$2,026.40; being the amount of the attachments, with costs, of the creditors of Logan Bros. *et al.* T. F. Hart & Co. filed their motion to set aside the verdict of the jury, upon the grounds, among others, that the verdict was contrary to the evidence, and that it was not sustained by sufficient evidence; also, that it was contrary to law. The district court set the verdict aside, and granted a new trial. Of this complaint is made.

This court will only interfere, where a new trial is granted, when the trial court misapplies or mistakes some settled principle of law, or manifestly abuses its discretion. Again, new trials are favored, instead of being disfavored, where any question can arise as to the correctness of the verdict. *Field v. Kinnear*, 5 Kan. 238; *Owen v. Owen*, 9 Kan. 96; *Atyeo v. Kelsey*, 13 Kan. 216; *City of Sedan v. Church*, 29 Kan. 192; *Brown v. Railroad Co.*, Id. 189; *Railway Co. v. Diehl*, 33 Kan. 426, 6 Pac. Rep. 566. We think it is plainly manifest that if the real estate conveyed to A. G. Logan, and situated in Missouri, was not worth about \$1,500 at the date of the purchase, as testified to by S. M. Pearson, then the necessary consequences of the sale and transfer of the stock of goods by A. G. Logan to Hart & Co. was to hinder and defraud his creditors. If such was the case, the law presumes that it was done with fraudulent intent. Hart cannot claim ignorance of Pearson's knowledge, as it appears that Pearson was Hart's agent, and knew that A. G. Logan was being pressed by his creditors and was unable to pay. The trial court, however, seems to have relied upon the evidence of Pearson as to the value of the Missouri property, instead of the evidence of Logan. Pearson testified that the real estate was taken by A. G. Logan at the estimated value of \$2,000, but that its actual value was \$1,500. Logan testified that Pearson represented "that the real estate was worth \$2,000;" but after the sale he ascertained that it was worth only \$200 or \$300. He testified: "I would not give three hundred dollars for it; it would not sell for that." If the real estate was fully worth \$1,500, as testified to by Pearson, then, not only no fraud was intended, but no fraud would result from the sale of the goods, as Logan was possessed of ample ability to pay all his creditors. The real estate could be readily subjected to his debts, and is situated in the state where his creditors reside and transact business. If the real estate in Missouri was only worth two or three hundred dollars, then Pearson not only committed a fraud upon his partner, Hart, but also defrauded Logan, and attempted to defraud his creditors. For

this action, the firm of Hart & Co. must be held responsible, as he was not only the partner of Hart, but his agent in all his transactions with A. G. Logan and the Logan brothers. If the real estate and other assets in the hands of A. G. Logan, after the sale of the stock of goods, were not plainly in sight, and clearly accessible to his creditors, and sufficient to pay their claims, and if the circumstances of the transaction between Hart & Co. and Logan, or Pearson and Logan, were sufficient to put them, or either, on the inquiry, they ought to have seen to it, and known that the \$900 paid to Logan was applied in payment of his debts, and they could not rely upon his declaration of an intention to so apply the \$900. Assuming, however, that the trial court did not believe, from the testimony, that the sale was made with any fraudulent intent, but did believe that the real estate in Missouri conveyed to Logan was worth \$1,500, and therefore that Logan possessed more ability to pay his creditors after the sale than before, we cannot interfere with the ruling of the trial court in setting aside the verdict. Upon another trial, doubtless more evidence will be presented concerning the actual value of the real estate conveyed. This seems to be the pivotal point in the case. If the real estate was only worth two or three hundred dollars, Logan, after retaining from his creditors the nine hundred dollars paid in cash, did not have the means with which to pay his debts; and, in any event, there was not sufficient property in sight, if the real estate was only worth two or three hundred dollars, clearly accessible for the payment of his creditors. The decision and order of the district court will be affirmed.

All the justices concurring.

(39 Kan. 132)

#### SOMERS v. SOMERS.

(*Supreme Court of Kansas. April 7, 1888.*)

#### 1. DIVORCE—ALIMONY—RIGHT OF HUSBAND TO.

An action for alimony cannot be maintained by the husband against the wife.

#### 2. APPEAL—REVIEW—FINDINGS OF TRIAL COURT.

The trial court having made a special finding that certain real property conveyed by the husband, through a trustee, to the wife, vested in her an absolute title, and that she did not hold it in trust for the husband, and there being some evidence to sustain such finding, it will not be disturbed here.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Sedgwick county; D. M. DALE, Judge.

The plaintiff, Isaac Somers, commences his action against the defendant, Catherine Somers, by filing in said court on May 12, 1885, his petition, which is in the words and figures as follows, to-wit:

"The plaintiff complains, and for his first cause of action against defendant alleges, that on or about the 29th day of April, A. D. 1880, at Donaldson, in Marshall county, Ind., the plaintiff intermarried with the defendant; that, ever since their said marriage, he has been ready and willing to discharge all his marital vows and duties towards the defendant, but that defendant has, without fault or neglect on his part, been guilty of extreme cruelty towards this plaintiff for more than four years last past. And plaintiff says that on or about the 1st day of October, 1883, the defendant violently assaulted this plaintiff, and beat and bruised him with various weapons and missiles, and thereby caused a great pain and distress of body and mind; and that the defendant at said time called this plaintiff vulgar, obscene, and opprobrious names, and applied to him violent and indecent epithets, commanding him to leave their house and home, title to which was in her name; and that defendant continued from time to time, and almost daily thereafter, to violently, cruelly, and inhumanly beat and abuse this plaintiff up until the 1st day of October, A. D. 1884, on or about which time she violently assaulted, beat, and abused this plaintiff,

and required him to finally quit and abandon their said home. That all of the property belonging to the said parties at the time of their marriage is now in the name and possession, and under the exclusive control, of the defendant, and that this plaintiff has, since the 1st day of October, 1884, been compelled to rely upon the charity of friends for his livelihood. That, at the time of their marriage, he was the owner of one hundred and sixty acres (160) of land in Sedgwick county, Kansas, which is now of the value of five thousand dollars, (\$5,000,) and of personal property of the value of five hundred dollars, (\$500,) and of four hundred dollars (\$400) in cash. That the title and possession of all of said property is now in the defendant, and she violently and forcibly keeps this plaintiff out of the possession, use, and enjoyment of the same, either jointly and together with her, or separately and by himself. That the description of the lands owned by him at the time of said marriage is as follows, to-wit: The south-west quarter ( $\frac{1}{4}$ ) of section number three, (3,) township number twenty-eight, (28,) range number two (2) east, in Sedgwick county, Kansas. That defendant is the owner of real and personal property, apart from that therein described as received from plaintiff, of the value of about two thousand five hundred dollars, (\$2,500,) and is sound in body, and fully able to comfortably support herself, without any portion of plaintiff's above-described property. That plaintiff is seventy years old, (70,) feeble in body and mind, and is totally destitute of property and all means of support. He therefore asks a decree and judgment of the court that he be awarded said lands, and the sum of nine hundred dollars (\$900) as alimony, and his own separate estate for his exclusive benefit, use, and enjoyment.

*"Second cause of action.* The plaintiff says that he makes all of the allegations of his first cause of action a part of this, his second cause of action, and he further says that he is seventy-five years of age, (75,) and weak and feeble in his mind and body, and that the defendant is 20 years his junior, and is strong and vigorous in mind and body, that the defendant, wickedly and designedly intending to cheat, wrong, and defraud this plaintiff out of valuable property of which he was the owner, entered into the marriage relations with him at the time and place set forth in his first cause of action. That, at the time of said marriage, plaintiff was the owner of the land described in his first cause of action, and of personal property of the value of five hundred dollars, (\$500,) and of four hundred dollars (\$400) in cash. That, shortly after said marriage, the defendant, in pursuance of her fraudulent design of possessing herself of all of plaintiff's property, and then abandoning him, proposed to him that they come to Kansas, and occupy plaintiff's said land as a residence, to which proposition, plaintiff, reposing full confidence in the good faith and virtuous motives of his said wife, assented. That, prior to starting upon their trip to Kansas, defendant represented to plaintiff that he was liable to be robbed while on his journey, and proposed to him to deliver his said four hundred dollars (\$400) to her, to be by her carried to Kansas for his use and benefit; that plaintiff, reposing full confidence in defendant, did deliver said four hundred dollars (\$400) to her, to be carried to Kansas for his use and benefit. That after their arrival in Kansas, and while they were occupying plaintiff's residence, defendant, by repeated entreaty, and by representing to him that his children were liable to rob him of his property, or take his life to secure the same, persuaded and induced the plaintiff to deed said land to her. That, at the time he so deeded the same, defendant represented and agreed with plaintiff that they should use and enjoy all their property in common, and that plaintiff should always be provided with a comfortable and happy home with her. That plaintiff relied upon her statements with the utmost confidence and faith, and was by her led to believe, and did believe, from and on account of her representations so made to him, that it would be better for him to place the title to his said lands in the name of the defendant, and that the defendant, at the time of



deeding the same, promised and agreed with plaintiff that, if he would deed the same to her, she would hold in trust for him, and for his use and benefit, and that, at any time he desired her to do so, she would reconvey said lands to the plaintiff. That said conveyance was not intended as a gift to defendant, which she well knew, and was not made in fraud of the rights of any person; and that the plaintiff never received any consideration whatever for said conveyance, and that the same was made solely with a view of better securing the same to the use and enjoyment of this plaintiff during his life-time, and with the full expectation and belief on his part that defendant was acting in good faith, and would continue to provide him with a comfortable home, and that she would at any time reconvey the same to him at his request. That, shortly after the said land was deeded to defendant, they returned to her homestead in Indiana. That, immediately after their return to Indiana, defendant deposited and loaned out the four hundred dollars (\$400) in money, which she had received from plaintiff, taking obligations therefor in her own name, and at once began to treat this plaintiff in the most violent, cruel, and inhuman manner. That she frequently assaulted, beat, and maltreated him, using in her assaults all manner of weapons and missiles, and indecent, obscene, and profane language. That she habitually provoked and annoyed him in all possible manners by beating, taunting, blackguarding, and cursing him, by reviling the memory of his dead wife and his children, destroying their pictures, pilfering memorials and keepsakes that plaintiff cherishes, and by telling his neighbors and friends that she did not care for him, but only wanted his property, etc. That finally, on or about the 1st of October, A. D. 1884, defendant required plaintiff to leave their home in Marshall county, Indiana, refused to return to him his property, or any part thereof, since which time plaintiff has been compelled to depend entirely upon his children, who are also poor, for the necessities of life. The plaintiff's children reside in Kansas; and that he has resided in this state with them since his deprivation of a home with defendant; and that, since his removal to this state, defendant prosecuted a suit for divorce against him in Indiana; and, as he is informed and believes, procured a divorce against him upon her own false, perjured testimony. That plaintiff had no money to carry him to Indiana to be in attendance at said trial, but that no proceedings were taken in said action touching his property rights or claims. That, since said plaintiff was ejected from the home of defendant, she has had residing with her one Joseph Straup, a former divorced husband, who is now residing with said person. That defendant still keeps and holds plaintiff's said land, receiving the rents and profits of the same, and is now threatening to incumber and dispose of the same. Therefore plaintiff prays judgment against said defendant for a decree setting said land, to-wit, the southeast quarter ( $\frac{1}{4}$ ) of section twenty-three, (23,) township twenty-eight, (28,) range two (2) east, in Sedgwick county, Kansas, apart to him as his permanent alimony, and that the defendant holds the title thereof in trust for him; and that she be ordered to reconvey the same by good and sufficient deed of general warranty; and, in case the title thereof cannot be so conveyed, then for a judgment for five thousand dollars, (\$5,000,) the value of said premises, and also, in addition to the above decree, a judgment for nine hundred dollars, (\$900,) and costs of this action."

The petition was verified.

"ANSWER.

"The defendant, for answer to the plaintiff's petition, admits the marriage of plaintiff and defendant, as set out in said petition; that she is the owner in fee-simple of the real estate mentioned in said petition, to-wit, the southeast quarter ( $\frac{1}{4}$ ) of section number three, (3,) in township number twenty-eight, (28,) range number two (2) east, in Sedgwick county, Kansas; and that defendant obtained a divorce from plaintiff in the state of Indiana. Defend-

ant denies each and every other allegation contained in said petition. Defendant, further answering, states that on the 23d day of September, 1884, the said defendant filed in the office of the clerk of the Marshall circuit court of Marshall county, Indiana, her complaint and petition against the said plaintiff for divorce, and thereby sued the said plaintiff in said court, asking judgment that she be divorced from the said plaintiff. And on said 23d day of September, 1884, this defendant caused a summons to be issued out of said court in due form, notifying the said Isaac Somers that he had been sued in said action, and to appear and answer the said action for divorce of the said Catharine Somers on the 6th day of October, 1884; that said summons was duly served on said Isaac Somers on the 24th day of September, 1884; that said plaintiff, Isaac Somers, duly appeared in said action, and filed his answer in said complaint, denying each and every allegation therein contained; that afterwards, on the 3d day of April, 1885, said cause was duly called for trial, both plaintiff and defendant appearing therein, and was tried by the court; and the court, having heard the evidence adduced in said cause, took the same under advisement until the 4th day of April, 1885, at which time a judgment was rendered by said court divorcing the said Catharine Somers from the said Isaac Somers, declaring the bonds of matrimony existing between them to be forever null and void; that the said court rendering judgment had jurisdiction of the parties to, and the subject-matter of, said action. Wherefore defendant demands that the judgment prayed for by plaintiff may be refused, and that she may have judgment for her costs herein, and such other and further relief as equity may require."

"REPLY.

"Comes now the plaintiff, and replies to the answer of defendant filed herein, and denies each and every material allegation, matter, and thing therein contained that in any way or manner tends to prevent the plaintiff of the recovery in his petition prayed. For a further reply, plaintiff says that if any decree of divorce was ever granted, as alleged in defendant's answer, that said decree and divorce is absolutely null and void, for the following reasons, viz.: *First*, that no service was ever had upon this plaintiff as required by law; *second*, that plaintiff never entered his appearance, or authorized any one to enter his appearance for him, or in any way ever ratified the acts of any one who may have entered such appearance for him, or never authorized any one to employ an attorney, or in any manner ever waived service of summons in said action; *third*, that, in said suit mentioned, the defendant there, in her complaint, petition, or prayer, did not ask for any order, judgment, or decree against this plaintiff, and the court did not grant any order, judgment, or decree touching the rights of property of either of the parties, or any order or judgment affecting the property claimed, held, or owned by either of the parties to that suit; *fourth*, that said court had not jurisdiction of this plaintiff, or of the property in controversy in this suit. Wherefore plaintiff prays judgment as asked for in his petition, by reason of the premises therein."

The case was tried at the November term, 1886, of the Sedgwick district court, and the trial court made special findings of fact and conclusions of law, as follows:

"(1) That said plaintiff and defendant were married in Marshall county, Indiana, in the spring of 1880; (2) that, prior to said marriage, said parties resided in said county and state, and both had children living there by former marriages; (3) that said plaintiff, at the time of said marriage with said defendant, was about seventy years of age, of average health, a widower, and had been married twice before; (4) that said defendant, at the time of said marriage, was about fifty years of age, of good health, a widow, and had been married twice before; (5) that she had been divorced from her first husband, Straup, who is now living at said county and state, and afterwards married one Girard, who died, leaving her about sixty acres of land in said county;

(6) that, prior to said marriage with defendant, said plaintiff owned some land in said county, which he traded for the land in controversy, and in said trade obtained some farming implements and stock on said land, together with about five hundred dollars cash; (7) that said trade was made shortly before said marriage, and a deed of the land taken in the name of said plaintiff; (8) that, shortly after said marriage, said plaintiff and defendant moved from the state of Indiana to said farm in Sedgwick county, Kansas; (9) that, after their arrival in said Sedgwick county, Kansas, and while living on the land in controversy, said plaintiff and defendant executed a deed for the same to one T. B. Wall, who immediately executed a deed of same to said defendant; (10) that said deeds were executed as aforesaid, at the request of said parties, and that there was no monetary consideration for the same; (11) that said plaintiff, prior thereto, had had trouble with some of his children, and on the day said deeds were executed had trouble with his son Calvin; (12) that, fearing other trouble with his children, and expecting to live a happy and harmonious life with said defendant, he executed the deeds aforesaid, and said defendant, at the time she accepted said deed, knew that said plaintiff expected a happy and harmonious life with her; (13) that some time afterwards, and in the fall of 1880, said plaintiff and defendant moved back to the farm of said defendant, in said Marshall county, Indiana; (14) that said parties lived happy and harmoniously together until after their arrival in Indiana; (15) that, shortly after their arrival in Marshall county, Indiana, they commenced to have trouble between themselves, and thereafter had frequent trouble until the spring of 1883, when the plaintiff, with the assistance of his son Joshua, during the absence of said defendant, moved his stock and other property to the residence of his son Joshua, near the home of said defendant; (16) that, shortly afterwards, he returned to said defendant, and they lived together until the fall of 1883, when they had further trouble, which led to a final separation; (17) that during the time they lived together on defendant's farm in Marshall county, Indiana, said plaintiff did such work upon the place as he was capable of doing; (18) that after said separation mentioned, and in the fall of 1883, that said defendant commenced action for divorce against said plaintiff in the circuit court of Marshall county, Indiana, and a summons was issued therein, and left at the residence of Joshua Somers, a son of said plaintiff; (19) that afterwards, one Hess, a lawyer of Plymouth, in said county, at the request of said Joshua Somers, appeared in said action for said defendant, issues were joined, trial had, and defendant obtained a divorce against said plaintiff; (20) that no service was had in said action upon said plaintiff either personally or by publication; (21) that he never entered his appearance therein, and never authorized any one to appear for him; (22) that he had no knowledge of the fact that Joshua Somers employed said Hess to attend to said case, and never authorized said Joshua to employ any one to appear for him in said case; (23) that he never ratified the act of said employment; (24) that, since the execution of said deed, said defendant has received the rents arising from said land, over and above the expenses incurred from the same, to the amount of \$150; (25) that said plaintiff is now unable to support himself, and is living with his daughter and son-in-law at Newton, Kansas, and has in money not to exceed \$15; (26) that he has no means of support, and is living upon the charity of his children aforesaid; (27) that the land in controversy is of the value of \$3,200; (28) that after their return to Indiana, as aforesaid, said plaintiff expended \$50 in payment of taxes on said defendant's farm in Indiana, aforesaid.

"CONCLUSIONS OF LAW.

"(1) That no legal divorce was granted said defendant; (2) that said defendant does not hold said land in controversy in trust, but is the absolute owner of the same; (3) that the plaintiff cannot obtain alimony in his wife's property in this action; (4) that defendant is entitled to judgment for costs."

*Ady & Henry*, for plaintiff in error. *Sluss & Stanley and Peters, Lathy & Holliday*, for defendant in error.

SIMPSON, C. J., (*after stating the facts as above.*) The petition of the plaintiff in error (plaintiff below) contains two counts: the first for alimony alone, by reason of the aggression of the wife; and the second praying for a decree declaring a conveyance to land made by the husband to the wife, through a third party, to be in trust, and an assignment of this land as alimony. The blending of the two propositions in the statement of the second cause of action is somewhat peculiar, and we are in some doubt as to the proper construction to be given the pleadings; for, if the land is to be decreed as alimony, this is a recognition that it is the absolute property of the wife, unincumbered by a trust or any other equity, but, if it was conveyed in trust, the husband has the legal right to insist on the protection of his beneficial interest, without reference to the question of alimony. We will have to view the statement of the first cause of action as one for alimony by the husband as against the wife, and the second as an action to declare a trust. No question arose in the court below as to whether two such causes of action could be properly joined; nor is the matter referred to in the briefs of counsel filed in this court, and we express no opinion about it. As to the cause of action that asks alimony on behalf of the husband from the property of the wife, we can find no case that authorizes it. The domestic relations will have to be readjusted by the legislature, and an obligation cast upon the wife to support the husband, before such an action can be maintained. The only question is as to whether the conveyance of the Sedgwick county land by the husband to the wife was in trust. On its face, the conveyance was an absolute one. The deed was first made by husband and wife to Wall, and then a deed was executed by Wall to the wife. At the time of the execution of these conveyances it was distinctly stated by the husband to Wall that the object of the conveyance to the wife was to prevent the children of the husband by a former marriage from ever receiving any benefit from the property. Substantially the same statement was made by the husband as a witness in a former case pending between these parties. There is other evidence corroborative of this, and there is some that tends to support the theory that the property was deeded to the wife as a contribution to her future support. On the other hand, there is testimony tending to show that the wife had declared, before the marriage, that her sole object was to get control of her husband's property; and that, after the conveyance had been executed, the wife had declared that she had agreed to reconvey it whenever the husband desired it. The conveyance was made to the wife on the day following a very serious trouble between the husband and one of his sons. Analyzing the testimony; considering the evidence in the light of all the surrounding circumstances; recollecting that, while some of the testimony was in the form of depositions, the parties themselves were personally before the trial court; and fully recognizing the fact that there is evidence to sustain the findings and conclusions of the trial court on the particular question that the wife does not hold the land in trust,—we cannot, without a violation of the repeated declarations of this court, say that there was material error in these findings and conclusions. It is evident from the record that unusual effort has been expended in the preparation of the evidence, and much bad feeling generated by the litigation; but the trial seems to have been conducted in a spirit of fairness; some liberality was allowed in the admission of evidence on both sides; and probably every material fact presented that would tend to support the contentions of the respective parties. This being the case, and no prejudicial error being apparent, we can do nothing else but recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 121)

## COX v. COX.

*(Supreme Court of Kansas. April 7, 1888.)*

## 1. FRAUDULENT CONVEYANCES—PROOF OF FRAUD—CIRCUMSTANTIAL EVIDENCE.

Direct proof of fraud can seldom be obtained, nor is such evidence absolutely essential to establish the dishonest purpose of parties to a pretended transfer of property, but the same may be shown by the conduct and appearance of the parties, the details of the transaction, and the surrounding circumstances.

## 2. SAME.

The evidence in the present case examined and held to be sufficient to sustain a finding that an alleged transfer of real estate was made for the purpose of hindering, delaying, and defrauding a creditor, and was without consideration.

*(Syllabus by the Court.)*

Error to district court, Kingman county; T. B. WALL, Judge.

Action brought by William M. Cox against Martha Cox to set aside an alleged fraudulent conveyance. Judgment for plaintiff, and defendant brings error.

*Sankey & Campbell*, for plaintiff in error. *Gillett Bros. & Co.*, for defendant in error.

JOHNSTON, J. On April 30, 1886, William M. Cox instituted an action in the district court of Kingman county to set aside a conveyance of 160 acres of real estate, made October 6, 1885, by Elias L. Kennedy to Martha A. Cox, and to subject the property to the payment and satisfaction of a judgment recovered by William M. Cox against Kennedy. The petition charges that Kennedy and Martha A. Cox, brother and sister, intending to cheat and defraud William M. Cox, caused a conveyance of the property to be made, but that no consideration was paid to Kennedy for the land, and that the sale was a sham, and made for the sole purpose of placing the property beyond the reach of William M. Cox as a creditor of Kennedy; and that any payment of money or notes by Martha A. Cox to Kennedy was a pretense entered into for the purpose of enabling them to cover up the fraudulent purpose in the execution of the deed. It was further stated that Kennedy had no other property of any kind, and that the obligation upon the judgment could not be enforced against him except by a levy upon the land, and that Martha A. Cox accepted the deed, well knowing this fact, and with a view of defeating the plaintiff below in the enforcement and collection of his claim. The answer denied the allegations of the petition, and alleged that the purchase was made in good faith and for a valuable consideration; and there was the further allegation that Elias L. Kennedy was not indebted to William M. Cox in any sum. The court found that the conveyance was made for the purpose of hindering, delaying, and defrauding William M. Cox; that it was without consideration; and that Martha A. Cox was aware of the fraudulent purpose in the execution of the deed; and rendered a decree setting aside the conveyance, and subjecting the property to the satisfaction of the judgment.

The only complaint here made is that the evidence does not warrant the finding and decree of the court. After reading the testimony, we are unable to say that the result reached by the court is incorrect. The case turns largely on the credit to be given to the testimony of some of the witnesses, and the inferences to be drawn from the conduct and appearance of the parties; and of these the trial court could best judge. The indebtedness from Kennedy to William M. Cox arose from the sale of improvements made upon a tract of Osage trust or diminished reserve land, and amounted to \$800, for which Kennedy gave a note, which indebtedness was subsequently reduced to judgment. The existence of the debt was sufficiently established, and there is testimony to sustain the finding that the transfer of the land was made by Kennedy for the purpose of avoiding the payment of this debt and judgment. It is shown that he had no means in sight which could be subjected to the pay-

ment of the debt, except this land. He denied liability on the note, and threatened that if Cox did not compromise and accept a certain proposition which he made he would never pay him anything; and there are circumstances connected with the transfer of the land to his sister which tend to impeach his good faith. It is argued that there is no evidence directly connecting Martha A. Cox with any fraud in the transfer. It is true, as contended, that honesty and fair dealing are presumed, and that one charging fraud must prove the same; but direct proof of a dishonest transfer of property can seldom be procured. "A fraudulent purpose is known only to the parties to the transaction, and they do not hasten to tell it." As a rule, fraud, therefore, only is disclosed by the condition of the parties, the details of the transaction, and the surrounding circumstances." *Kurtz v. Miller*, 26 Kan. 314; *Gollob v. Martin*, 33 Kan. 252, 6 Pac. Rep. 267. In this case, the plaintiff below depended largely upon the testimony of E. B. Cox, the husband of Martha A. Cox. He acted for his wife in the transaction, and she is bound by his knowledge and conduct concerning the same. He says his wife purchased the land from her brother for \$1,000, paying \$500 in cash, agreeing to pay two other smaller amounts, but a large part of the balance was to be credited on the board and washing of Kennedy. His attempt to show his wife's ability to purchase, and the source from which she derived the \$500, was not a success. He stated that she had a few head of young cattle; but when it was run down, he only accounted for \$45 derived by her from that source, out of which she had paid for a sewing-machine. He then undertook to account for the amount by stating that it was largely furnished by himself, some of which he derived from the sale of cattle, and some he borrowed. A considerable part was borrowed before the purchase of the land and when it was not anticipated. When asked his purpose in borrowing it, he said it was to use, but could not state to what use he intended to put it. Subsequently, he stated that the money was borrowed with the intention of building a house at some future but indefinite time. According to his statements, he was borrowing money when he had a considerable sum on hand and not in use. Kennedy lived with him, and together they went to Kingman the day before the sale to obtain the final receipt given by the United States land department, and although Cox claimed to have about \$500 on hand, Kennedy was compelled to borrow the money from a neighbor with which to pay the government charges in obtaining the final receipt. On the morning when the alleged sale was made, E. B. Cox and his wife formally executed and delivered a note to Kennedy for \$500, although they claimed to have the amount on hand at the time, and in the evening of the same day, when Kennedy delivered the deed, they say the sum was paid and the note taken up and canceled. William M. Cox was endeavoring to enforce the collection of his debt by attachment proceeding, and Martha A. Cox stated in substance to a witness that her brother was being wronged by William M. Cox; that the amount that he had given in payment for the improvements on the land was too much; and that her brother ought to keep the land, and she would fight for him. It is true, E. B. Cox testified that the transaction was honest, and that the purchase price was actually paid, but the court evidently did not believe him; and there are facts and circumstances in the case—only a part of which have been mentioned—which tend to show that there was neither good faith nor consideration to support the alleged transfer. In that view of the case, it is our duty to affirm the finding and judgment of the court, which will be done.

All the justices concurring.

(39 Kan. 133)

## GODFREY v. BLACK.

*(Supreme Court of Kansas. April 7, 1888.)*

## 1. LANDLORD AND TENANT—LEASE—SUBLETTING—INJUNCTION TO PREVENT.

Where a building is designed and constructed for use as an hotel, and the owner leases it to another for such purpose, and stipulates that the lessee shall not lease or underlet the premises unless the written consent of the owner is first obtained; and where the lessee, during the term, and without the consent of the lessor, sublets a portion of the hotel office to be used for carrying on a real-estate and brokerage business, which business detracts from the reputation and popularity of the house, and impairs its value as an hotel,—equity will interfere, on the application of the lessor, to prevent by injunction the lessee or sublessee from continuing such unauthorized use of the premises.

## 2. SAME.

Although the lessor may have the right to re-enter, he is not confined to this remedy. He may insist that the covenants of the lease shall be observed; and the action for the recovery of possession is not so ample as to preclude him from obtaining equitable relief to prevent a forbidden use of the premises.

## 3. SAME.

Neither is the right of the lessor to bring an action to recover compensatory damages for the trespass of the sublessee a sufficient ground for withholding the remedy of injunction.

*(Syllabus by the Court.)*

Error to district court, Sedgwick county; C. REED, Judge.

Action of injunction, commenced by Robert Black against F. S. Roberts and M. O. Roberts, partners as Roberts Bros., and C. E. Godfrey, to restrain Roberts Bros. from subletting any portion of the Manhattan Hotel, situated in the city of Wichita, and to restrain C. E. Godfrey from occupying the hotel office as a real-estate and brokerage office. In his petition, Black stated, in substance, that he was the owner of the premises, and had constructed the building thereon to be used as a first-class hotel, and that he let the same to the Roberts Bros., to be used as an hotel, from the 1st day of July, 1885, to the 1st day of July, 1886, for a stipulated rent, payable in monthly installments. It was further provided in the lease, which was in writing, that Roberts Bros. might elect to take the premises for the further period of four years after July 1, 1886, upon the same terms, by giving to Black a written notice of such election at any time prior to the 1st day of May, 1886. In pursuance of that stipulation, Roberts Bros., within the time, elected to retain the lease for the additional four years, and gave written notice to that effect to the plaintiff. It was further provided in the lease that Roberts Bros. might carry on any business in the building incident to the hotel business; but it was expressly stipulated that they should not lease nor underlet, nor permit any persons to occupy the premises, without the consent of the plaintiff in writing having been first obtained. He alleges that he has never given Roberts Bros. any consent to occupy the building for any purpose other than that of an hotel, nor to lease or underlet the building or any part thereof, nor to permit any persons to occupy the same except as guests of the hotel. He alleges that the premises were to be occupied only as an hotel, and that it is injurious to the hotel to carry on, in the office thereof, the business of a real-estate agency and brokerage, and that it is such an injury as cannot be compensated in damages. Notwithstanding the premises, he avers that Roberts Bros. have leased to C. E. Godfrey a portion of the hotel building used as the hotel office; and that Godfrey, his agents and employees, are occupying the same as a real-estate office and place of business. He further states that Roberts Bros. are threatening and intending to continue said lease and underletting to Godfrey, and that Godfrey intends to occupy the room in the transaction of the real-estate business, against the protest and without Black's consent, and to his irreparable injury. He asks that injunction issue prohibiting Roberts Bros. from leasing or underletting the hotel building and premises, or any part thereof,

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to Godfrey for a real-estate office, and restraining Godfrey and his agents and employes from occupying the office of the hotel, or any part thereof, as a real-estate office. The petition was verified and introduced in evidence in support of the application for a temporary injunction. In addition, the affidavits of several persons were offered, tending to show that the carrying on of a real-estate business in the office of a first-class hotel brings a crowd and an excitement which interferes with the convenience and comfort of guests, and tends to drive them away, and to render the hotel unpopular. C. E. Godfrey testified that he had leased from Roberts Bros. a space 8 by 20 feet, in the corner of the hotel office, and put a railing around and furnished the same, and was carrying on a real-estate business therein. Upon a hearing had upon due notice, a temporary injunction was granted against Godfrey during the pendency of the action, enjoining him, and his agents and employes, from further using any portion of the office of the hotel as a real-estate office. To reverse the order granting the temporary injunction, C. E. Godfrey brings the case to this court.

*Sankey & Campbell*, for plaintiff in error. *Campbell & Dyer*, for defendant in error.

JOHNSTON, J., (*after stating the facts as above.*) We see no reason to disturb the order granting the temporary injunction. The building in question was constructed for use as a first-class hotel, was rented for that purpose, and it was expressly specified in the lease that the lessee should not sublet the premises, or permit any one else to occupy the same, without the consent in writing of the lessor having first been obtained. In direct violation of the terms of the lease, Roberts Bros. sublet a portion of the hotel office, to be used by Godfrey in carrying on a business inconsistent with the hotel business, and which, the testimony says, detracts from the reputation and popularity of the house. They had no right to sublet or permit the hotel to be used by Godfrey, and he acquired no right by the agreement made with them.

It is claimed that injunction is not the proper remedy in such case; and actions to recover possession and to recover damages for trespass, where the defendants could have the issues submitted to a jury, are suggested. The lessor is not confined to these remedies, nor are they adequate. He has a right to insist that the covenants of the lease shall be observed, and that the premises shall be used only for the purposes agreed upon. It does not appear that the lease was to terminate upon a breach of the covenants; but, even if the lessor had a right to re-enter, that would not preclude him from obtaining equitable relief to prevent a forbidden use of the premises. Presumably, the continuance of the lease for the full term is beneficial to the lessor, and he is entitled to a performance in accordance with the contract made. Upon this ground the mere re-entry is held to be an inadequate remedy, as it does not leave the lessor in as good a position as the enforcement of performance by the tenant would leave him in. *Bodwell v. Crawford*, 26 Kan. 292, is cited as an authority against maintaining the action. The two cases are very dissimilar. There no contractual relation existed between the parties, and the possession of the premises by the defendant was wholly unauthorized. In giving the opinion in that case, the writer carefully distinguished it from those like the present one; holding that injunction to restrain parties from putting leased property to a use not authorized by the lease could be maintained. In speaking of a re-entry by the landlord, it was there remarked: "True, he may perhaps declare the lease forfeited, and recover the property; but he may not desire to do this. He may not be able to lease for the same rent, or to an equally responsible tenant; and the lessee ought not to be permitted to compel the lessor either to take back the property or tolerate a forbidden use." *Stees v. Krana* 32 Minn. 313, 20 N. W. Rep. 241; 2 High, Inj. §§ 1138, 1144.



Neither is the right of the lessor to bring an action to recover compensatory damages for the trespass a sufficient ground for withholding the remedy of injunction. Equitable relief may be properly extended in some cases against trespass. An action at law against the trespasser here would not be an adequate remedy. A new cause of action would arise every day for the constantly recurring grievance, which would lead to a multiplicity of suits; and the necessity of preventing these is an exception which warrants the exercise of the equitable jurisdiction of the court. Besides, the lessor has a right to insist upon his property being used in the manner fixed by agreement in the lease; and the testimony tends to show that the carrying on of the real-estate business in the office of the hotel will deteriorate its value, and seriously injure the hotel; and in such cases equity will interfere to restrain the continuance of the injury. 2 High, Inj. § 1142; *Steward v. Winters*, 4 Sandf. Ch. 587; *Macher v. Hospital*, 1 Ves. & B. 188; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. Rep. 241.

Under the pleadings and the proofs, the temporary injunction was properly allowed, and the order granting the same will be affirmed.

All the justices concurring.

(39 Kan. 166)

#### GAFFORD v. HALL.

(Supreme Court of Kansas. April 7, 1888.)

##### 1. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Where a question is submitted to a jury, and there is some competent evidence submitted to support the findings and verdict thereon, *held*, such findings and verdict, when approved by the trial court, are conclusive.

##### 2. NEGOTIABLE INSTRUMENTS—ACTION ON—DEFENSES—NOTICE OF EQUITIES BY HOLDER.

Where H. and L. are partners, and for the purpose of protecting the partnership property from being attached by the creditors of L., a contract is made between them that H. shall conduct the business in his own name, and account to L. for one-half of the proceeds thereof, and H., to secure L. in such arrangement, executes to L. his promissory note, and L. indorses said note as collateral security to G., and afterwards H. and L. make a settlement of their partnership, by the terms of which settlement L. is to turn over said note to H., and G. received the note with full knowledge of all the facts, *held*, in an action by G. against H., such allegations, if true, are a complete defense to the note.

##### 3. SAME—INSTRUCTION—BURDEN OF PROOF—WAIVER OF ERROR.

Where, in an action on a promissory note claimed to have been transferred by the payee before maturity, without notice of any defense thereto, and the court instructs the jury that the burden is upon the plaintiff to establish such facts, *held* error; and *further held* that, where no exceptions are saved to the instructions, the error is waived.

(Syllabus by Clogston, C.)

Commissioners' decision. Error to district court, Republic county; E. HUTCHINSON, Judge.

This was an action brought by J. A. Gafford, Jr., against L. B. Hall, defendant in error, on a promissory note executed by Hall to one Leslie, and afterwards transferred by Leslie as collateral security to the plaintiff in error. The defendant admitted the execution of the note sued on, but alleged, as defense thereto, that at the time of the execution of the note, and for a long time thereafter, he and Leslie were partners doing business under the firm name of Hall & Leslie; that Leslie had become involved in a grain speculation, and for the purpose of preventing said partnership from being disturbed, and the defendant from being annoyed by attachment proceedings, an agreement was made by and between defendant and Leslie by the terms of which the business was to be carried on in the name of the defendant, and Leslie was not to be known in the business, but was to retain his interest in the business and share in the profits; that this note was executed as security that defendant would so conduct said business and account for the proceeds; that afterwards said business was wound up, and a satisfactory settlement made by and be-

tween said defendant and Leslie, and Leslie was to surrender and deliver up said note; that the note was given without any other or further consideration; that all of said facts were known to said plaintiff long before the pretended transfer of the note from Leslie to plaintiff; and that said note was transferred by Leslie long after the settlement of said partnership business between defendant and Leslie. All of which was denied by the reply of the plaintiff. Trial by jury, and judgment for the defendant. Plaintiff now brings the case here.

*W. D. Webb, A. E. Taylor, and T. S. C. Cooper*, for plaintiff in error. *Lowe & Smith, and Hugin & Dillon*, for defendant in error.

CLOGSTON, C., (*after stating the facts as above.*) The plaintiff now insists that the record presents three substantial errors, either of which is sufficient to and requires a reversal of the judgment: *First*, that the evidence does not support the special findings of the jury; *second*, that the court committed error in refusing to render judgment on the pleadings, notwithstanding the verdict of the jury; and, *third*, that the court erred in the instructions to the jury.

The jury found substantially on all the issues in favor of the defendant, and found, in answer to the questions submitted to them, that the plaintiff did not take this note in question as collateral security for a *bona fide* indebtedness due from Leslie to him, and that plaintiff did not take the note in good faith, without knowledge, and that there was collusion and fraud between the plaintiff and Leslie at the time plaintiff received the note from Leslie. It is true that there is but little testimony to support these findings. The weight of evidence seems to be against them. But under the rule adopted by this court, that, before the findings of a court or jury will be set aside, it must be shown that there was no evidence to sustain such findings, all that is necessary to sustain the findings is that there be some competent evidence submitted to the jury upon each question found by them. Plaintiff claims that he was in possession of this note for about two years after it became due before he presented it for payment. There was evidence showing that fact. This was a circumstance that was competent to go to the jury. It was a question for them to answer whether or not, under the circumstances, a party holding a note as collateral security would hold the same two years after it became due, without making any demand or presenting the note for payment. The evidence shows that the plaintiff was on several occasions at the store of the defendant, and that he made no mention of the note, and did not ask for payment. He gave as a reason that he was requested by Leslie not to present it. This was a circumstance that the jury might say showed bad faith. Again, there was evidence tending to show that in the preparation of this case for trial, in the taking of depositions, that Leslie appeared at the different times when depositions were taken, prompted the attorneys, furnished information, and seemed to be interested in the result; while the plaintiff, being present only a part of the time, seemed to take no interest in the proceedings. This was substantially all the evidence the record discloses tending to show that there was any collusion between plaintiff and Leslie, or a knowledge on the part of the plaintiff of the circumstances surrounding the giving of this note; evidence upon which a jury, who saw the witnesses, their demeanor and appearance on the witness stand, might find sufficient to answer the questions as they did.

As to the second proposition, the answer, we think, discloses and sets out that which, if true, was a defense to the action. It alleged that this note was given in a transaction between defendant and Leslie. It is true, the note was given under such circumstances as would have rendered the transaction void under the statute of frauds. It was given in a transaction to prevent the collection of claims against Leslie, but afterwards this transaction was annulled,

the partnership property was sold, and a satisfactory agreement made by which this note was to be given up and canceled. If this was true, and plaintiff had full knowledge of the fact, the note would be of no avail.

The third error alleged is that the court erroneously instructed the jury. The record shows that the court instructed the jury substantially as follows: "That the burden of proof was on the plaintiff to establish the fact that he purchased the note in controversy before maturity, for a valuable consideration, without notice of any fraud or want of consideration." This instruction was erroneous. See *Mann v. Bank*, 34 Kan. 746, 10 Pac. Rep. 150. And while this instruction was wrong, and perhaps misled the jury, yet the record shows that no exception was taken to the giving of it, without which no error can be considered. This has been the rule laid down in this as well as all other courts. *Allen Co. v. Boyd*, 31 Kan. 765, 3 Pac. Rep. 523; *Crowther v. Elliott*, 7 Kan. 235; *Lalonde v. Collins*, 5 Kan. 361. We therefore think that, under the pleadings, evidence, and findings of the jury, the judgment of the court must be sustained. It is recommended that the judgment below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 176)

HARRINGTON v. STONE, Sheriff.

(*Supreme Court of Kansas*. April 7, 1883.)

**APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.**

A general finding and judgment for the defendant in error will not be reversed here because there is some conflict about a fact material to the issue, and necessarily embraced in the general finding, even if this court should be of the opinion that the weight of evidence was with the plaintiff in error; there being some evidence to sustain the finding of the trial court.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Brown county; R. C. BASSETT, Judge.

Action of replevin brought by Eldred Harrington against A. J. Stone, sheriff, to recover 328 bushels of corn. Judgment in favor of defendant, and plaintiff appeals.

*W. D. Webb*, for plaintiff in error. *James Falloon*, for defendant in error.

SIMPSON, C. This is an action of replevin, instituted by Harrington against Stone, who was a constable, and had possession of 328 bushels of corn, that was claimed to be the property of Harrington. One Herman was the owner of the corn, and had cribbed it on the farm of Beatty. Harrington was a buyer and shipper of corn at Baker, in Brown county. He claims to have bought this corn from Herman on or about the 19th day of December, 1884. As evidence of his purchase, he introduced the following written instrument: "This certifies that I have sold this day to E. Harrington 500 bushels of good, sound corn, to be delivered at Baker, in the ear, on or before January 10, 1885; price 19 cents. Received on the same \$60. [Signed] A. H. HERMAN." As there was no immediate delivery of the corn, and no change of possession, Harrington, for the purpose of identification, was permitted to state the conversation between Herman and himself, as explanatory of the written instrument as to what particular corn was sold, and the substance of that statement was that Herman claimed that "the corn was cribbed on Jeremiah Beatty's farm, Mission township, Brown county, and that it was raised on his farm." On the other side, there was some evidence tending to show that Harrington did not know where this corn was cribbed after his purchase from Herman. He testifies himself that he would have accepted any good corn, without reference to where it came from, if it had been offered by Herman as

a compliance with the written instrument. He stated to one witness that he supposed the corn that he bargained for with Herman was cribbed on the Hayes farm. He asked another witness where Herman's corn was cribbed,—whether on the Hayes or the Beatty farm? On this state of facts, the court below rendered a judgment for the defendant in error, and we are asked to reverse it, because "there was no evidence upon which to base it:" and because "Stone, the defendant in error, was a mere trespasser." The record shows that, while the trial court struck out all of the oral evidence tending to show that Stone held the property under an attachment, there is an admission that Stone had taken possession of the corn. The plaintiff in error must recover on the strength of his right to the possession of this particular corn by reason of his contract with Herman, and not on the weakness of Stone's right to the possession of the property. His written instrument is a contract by Herman to sell 500 bushels of corn, and could be complied with by the delivery of so much merchantable corn, no matter where raised or how produced. The effort of Harrington to render it certain and specific by explanatory evidence in aid of his claim, that it was the corn cribbed on the Beatty farm, is antagonized by his statements to the Neffs, father and son. In the estimation of the trial court, he failed in his attempt; and as there are no special findings of facts, and as there is evidence tending to support the general finding necessarily included in the judgment in favor of Stone, we cannot reverse. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 144)

**FURNEAUX v. FIRST NAT. BANK OF WHITEWATER.**

(*Supreme Court of Kansas. April 7, 1888.*)

**JUDGMENT—EFFECT OF—DEFENSE TO ONE OF SEVERAL NOTES.**

Where a defense is made to an action on a promissory note that was given in part payment of the purchase of machinery, and other notes were given as a part of the same transaction and for the same consideration, a defense to one of these notes must be conclusive as to all; and, as long as the judgment stands unreversed, a party cannot be heard to again urge that defense.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Brown county; D. MARTIN, Judge.

Action on a promissory note brought by the First National Bank of Whitewater, Wis., against John Furneaux. Judgment for plaintiff, and defendant brings error.

W. D. Webb, for plaintiff in error. James Falloon, for defendant in error.

CLOGSTON, C. This was an action on a promissory note, brought by the First National Bank of Whitewater, Wis., against John Furneaux, upon a note executed by Furneaux to Esterly & Son, and by them indorsed and transferred to the plaintiff, defendant in error. The execution of the note was admitted by the defendant, and in answer he alleged that this note was given in part payment for a harvester and twine-binder purchased of Esterly & Son; that said harvester was the sole and only consideration for said note, and was purchased under a warranty given by said Esterly & Son, by which said harvester and binder were warranted to be of good material, and would, if properly handled, do good work; and, in case of failure to do good work, defendant was to notify the agents through whom said harvester was purchased of that fact, and upon the receipt of said notice they were to either repair and put said harvester in good working order, so that it would do good work, or, if the same failed thereafter, then said machine was to be returned by defendant to the agents, and a new machine was to be furnished in its place, or the notes given in payment therefor were to be returned. Defend-

ant alleged that the machine was of poor material, and would not perform good work, and was wholly worthless, and that he notified Esterly & Son and said agents of that fact, and they attempted to repair the same, but said machine failed to do and perform as warranted, and that it was thereafter returned, according to said contract; but that said Esterly & Son and said agents refused to surrender and give up the notes, or furnish a new machine; that, by reason of said failure, the consideration of the notes wholly failed. Defendant also alleged that plaintiff received said note from Esterly & Son after maturity, and with a full knowledge of all the facts. In reply, among other things, the plaintiff alleged that the note in controversy was one of a series of three notes executed by defendant to Esterly & Son for the purchase of a harvester and twine-binder, as alleged in defendant's answer; that, when the first of these notes became due, the same was not paid, and suit was brought thereon by Esterly & Son in the district court of Brown county, Kan.; that in said action defendant alleged and set out the same want of consideration, and the same warranty, and the same defect, in the harvester and binder, and made identically the same defense, as in this action, and plaintiff alleged that said former adjudication was a complete bar to the defense alleged and set out in this action. Thereupon, and upon agreement, the action was submitted to the court without a jury upon the question of *res judicata*; and, in support of the reply, the files of the said former action were offered in evidence, being the petition, answer, and judgment, which showed that the same defense alleged and set out in this action was alleged and set out in defense of the action brought by Esterly & Son against the defendant upon the first note of the series of notes executed in payment of said harvester, and that said adjudication and judgment was rendered in favor of Esterly & Son, and against the defendant, for the amount of said note. Upon the evidence the court found that the former judgment was a complete bar to this action, and rendered judgment for the plaintiff for the amount of said note and interest.

The defendant now insists that this was error, for the reason that said action was not a bar; that, to constitute a bar, the subject of the action must be the same as well as the parties; and as this was an action upon a different promissory note, and between different parties, therefore defendant was not barred from pleading the same defense. In this we think the defendant is mistaken. It is true, the plaintiff's answer does not show when the transfer of this note was made,—before or after the former adjudication; but the defendant in his answer alleged that it was received by the plaintiff, or transferred by Esterly & Son to the plaintiff, after the maturity of the note. Taking the allegations of the defendant with the proofs, it must be held that this note was received by plaintiff from Esterly & Son after the former adjudication, or at least after the note became due. The plaintiff then stood in the same relation to the defendant in this action as though the suit had been brought by Esterly & Son, and he had the right to make the same defense to the answer that they could have made. Where a party makes a defense to an action on a note that was given in part payment of the purchase price of machinery, and other notes were given as a part of the same transaction and for the same consideration, a defense to one of these notes must be conclusive as to all. As long as the judgment stands unreversed, a party cannot be heard again to urge that defense. He has had his day in court, has had his grievances passed upon by a tribunal, and such decision is final. *Foster v. Konkright*, 70 Ind. 123; *Guest v. City of Brooklyn*, 79 N. Y. 624; *Machine Co. v. Farmer*, 27 Minn. 428, 8 N. W. Rep. 141; *Danziger v. Williams*, 91 Pa. St. 234; *Hanna v. Read*, 102 Ill. 596; *Whitaker v. Hawley*, 30 Kan. 317, 326, 327, 1 Pac. Rep. 508; *Freem. Judgm.* § 249. It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 163)

WHEELER *et al.* v. STATE *ex rel.* ROBBINS.

(Supreme Court of Kansas. April 7, 1888.)

## 1. RECOGNIZANCE—COMPLIANCE.

A recognizance given under section 5 of the act relating to illegitimate children, requiring the defendant to remain and abide the judgment and orders of the court, is complied with and fully performed when, after a verdict of guilty and judgment and an order of commitment to the jail of the county on the failure of the defendant to give the bond, he is taken to the county jail, and confined there in pursuance to the order of the court.

## 2. ESCAPE—WHAT CONSTITUTES—LIABILITY ON RECOGNIZANCE.

The facts that the defendant is taken by the sheriff or his deputy into the court-house yard to help trim the trees, or gather up and haul away the brush, and do other small jobs of work around the court-house, and is permitted by the sheriff to go across the street and vote at an election, do not constitute an escape for which any liability is created on the recognizance given in pursuance of section 5 of the act.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Brown county. D. MARTIN, Judge.

*B. F. Killey*, for plaintiffs in error. *R. F. Buckels*, *S. F. Newton*, and *James Falloon*, for defendant in error.

SIMPSON, C. This was an action upon a recognizance given in a prosecution under the bastardy act, in accordance with section 5, c. 47, Comp. Laws 1885, p. 469. The material part of the recognizance is in these words: "That is to say, that George H. Wheeler, against whom, on the complaint of Ida E. Robbins for bastardy, is now pending in this court, shall be and appear before this court on the 1st day of the next term thereof, to be holden in Hiawatha, Brown county, Kan., on the 3d Monday of January, 1885, there to remain and abide the orders and judgments of this court on pain of a present forfeiture herein." This was taken and approved in open court, and was signed and acknowledged by the plaintiffs in error. Wheeler appeared, stood trial, was convicted, and was adjudged to pay, for the support of the child, the sum of \$1,000 in 20 semi-annual payments, and the costs of suit, taxed at \$379.73. He was required to secure the payment of said judgment and costs; and, being unable to do so, was ordered into the custody of the jailer of the county, to be confined in the county jail. He was taken to the county jail, and has been confined there ever since the date of the commitment, up to and including the time at which this suit was tried. It was agreed, and was so found by the trial court, that Wheeler had never paid said judgment, or any part thereof, or secured the payment; that Wheeler has complied with all of the conditions of said recognizance, unless his failure to pay the judgment, or to secure the payment of the same, as therein provided, is not a compliance with the terms and conditions of the recognizance; that Wheeler was committed to the county jail, and has remained there ever since, except that on several occasions in April, 1885, the sheriff required him to accompany him for an hour or so into the courthouse yard, in which the jail is situated, to trim the trees, and haul away the brush from said yard; that in April, 1885, he was taken by the sheriff across the street from the court-house, to vote at an election; that in the latter part of April he assisted the sheriff for three hours in hauling brush from the court-house yard, about 1,140 feet from the jail, and was then returned to the jail; that on these occasions he was out of jail without any order or permission of the court, or the judge thereof, but was never out of jail except accompanied by the sheriff or a deputy. The trial court, on this state of facts, rendered a judgment for the full amount stated in the recognizance, with interest. All proper exceptions were saved, and we are asked to reverse this judgment.

The contention supporting the judgment is twofold: *First*, that the terms of the recognizance obligated those signing it to pay the judgment and costs;

second, that these absences from the jail were an escape, and rendered the recognizers liable.

The first contention is disposed of by the case of *McGarry v. State*, 37 Kan. 9, 14 Pac. Rep. 491.

The second contention is founded upon a strict technical definition of the word "escape," as given in a class of cases that have reference to persons confined for non-payment of debts, and not to the common legal definition of that term, that means "a violent or private evasion out of some lawful custody." The statutory definition of escape (see section 182, c. 31, Comp. Laws 1885) is still stronger. But it is useless to prolong this discussion. There was no escape as contemplated or defined by any modern authority. It may be, in view of the *McGarry Case*, that this last question is not involved, as the recognizance was fully complied with when Wheeler was committed to the county jail. The judgment is wrong. None of the matters alleged are violations of either the terms or conditions of the recognizance, and we recommend that the judgment be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(39 Kan. 31)

BOGLE v. GORDON.

(*Supreme Court of Kansas. April 7, 1888.*)

1. WRITS—PUBLICATION—SUFFICIENCY OF AFFIDAVIT.

An affidavit for publication, which states "that the defendant has property within this state sought to be taken by attachment in this action,—a provisional remedy,"—is sufficient to bring it within the provisions of section 72 of the Civil Code. It is not necessary that such affidavit should state that a cause of action exists against defendant. *Gillespie v. Thomas*, 23 Kan. 138.

2. SAME.

An affidavit for publication, which is made some time after the petition is filed, and which states that the defendant resides out of the state, and is a non-resident thereof, is sufficient.

3. PLEADING—AMENDMENT.

A petition on a contract for money had and received, may be amended by stating that "defendant wrongfully, knowingly, fraudulently, and unlawfully appropriated and converted the money to his own use," without changing the nature of the action, when it is evident that the amended petition is concerning the same transaction set forth in the original one.

4. ASSUMPSIT—MONEY HAD AND RECEIVED—DEMAND.

In an action for money collected, the failure to make demand for same before the action is brought, will not prevent a recovery when it is established that the defendant, before the commencement of the action, concealed the collection, and denied the receiving of the money, and afterwards in his answer admitted that he had collected the full amount, claimed that he was entitled to it as his own, and denied the plaintiff's right to it.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Allen county; L. STILLWELL, Judge.

This action was brought by J. C. Gordon against A. C. Bogle, after the dissolution of partnership between them, to recover one-half the amount of attorneys' fees collected by defendant in a suit undisposed of at the date of dissolution. Judgment for plaintiff, and defendant brings error.

*Henry A. Ewing and Richards & Benton*, for plaintiff in error. *Knight & Foust*, for defendant in error.

HOLT, C. On February 20, 1883, C. A. Bogle and J. C. Gordon, two young attorneys at Iola, Kan., formed a copartnership, which was dissolved by mutual consent in October of the same year. At the time of the dissolution, two cases against the St. Louis, Ft. Scott & Wichita Railroad Company, for damages, were undisposed of. All other business of the firm was settled. A. C. Bogle afterwards obtained fees to the amount of \$200 for services in these

cases, and then left Kansas for Mississippi. J. C. Gordon, as plaintiff, brought his action to recover one-half of the amount of the fees collected, and on February 9, 1885, attached some personal property of defendant in Allen county. A summons was issued, which was returned without personal service. In April following, the plaintiff made the following affidavit for publication: "*State of Kansas, County of Allen—ss.:* John C. Gordon, the plaintiff herein, being duly sworn, says that A. C. Bogle, the defendant in the above-entitled action, resides out of the state of Kansas, and is a non-resident thereof; further says, service of a summons cannot be made on him within the state of Kansas, and that defendant has property within this state sought to be taken by attachment in this action,—a provisional remedy." The defendant appeared specially to set aside the service. He claims the affidavit does not show that the case is one of those mentioned in section 72 of the Civil Code. We think it does. That section provides that publication may be made in actions against non-residents of the state, having in this state property or debts owing them sought to be taken by any of the provisional remedies. Attachment is one of the provisional remedies, and the affidavit followed almost exactly the words of the statute. It is not necessary that the affidavit should state that a cause of action exists against the defendant, as is required by the statutes of some of the states. *Gillespie v. Thomas*, 23 Kan. 138.

They make another objection to the affidavit,—that it does not relate back to the commencement of the action. We do not think that is essential. If service was not made at the time the petition was filed, and is made afterwards, when the facts authorize such an affidavit, it is sufficient to state the parties are non-residents of the state at the time the affidavit for publication was made.

The original petition filed in this action was very crude and defective, and afterwards several amended petitions were filed. The defendant claims that the petition upon which this case was tried, was so unlike the original that it is not an amended one. To understand his objection, it will be necessary to state the facts upon which this cause arose more at length. There was no question of the partnership, of the dissolution, the collection of the \$200, and that two cases were undisposed of; but there is a wide difference in the testimony of the parties concerning the agreement about the fees in these cases. The defendant claims that he was to prosecute them or compromise them, and was to have whatever he collected as fees for his services. Gordon contends that the fees to be collected were to be divided equally between them. The first petition states that defendant was owing the plaintiff the sum of \$100, money collected by the defendant for the plaintiff, which the said defendant refused to pay over to plaintiff. It was money collected for fees in the two cases. The petition on which the action was tried, stated more at length the formation of the partnership, the dissolution, and the agreement concerning the fees; that they were collected by defendant without the knowledge of plaintiff; that defendant concealed the fact of the collection from plaintiff, and represented that no fees had been collected; and then the plaintiff charged him with having received this money, and "wrongfully, knowingly, fraudulently, and unlawfully appropriated and converted the whole of said money, collected and received by him as aforesaid, to his own use and benefit." The contention of the defendant is that the first cause of action is on a contract, and the second in tort. We are unwilling to concede this. The words "converted the whole of said money, collected and received by him as aforesaid, to his own use and benefit," are usually employed in petitions in tort; still they may be used as a term of aggravation in an action upon a contract, and can be regarded as useless verbiage. *Whereatt v. Ellis*, (Wis.) 17 N. W. Rep. 301. It is plain, by comparing the crude and defective petition first filed, and the more formal one on which the parties went to trial, that they related to the same transaction.



The only other ground of complaint we shall notice is the alleged error in the instructions. It appears that no demand had ever been made by plaintiff upon defendant. Such a demand is usually necessary in an action to recover money, but the plaintiff excuses himself for want of demand by stating that he did not know the money had been collected until after defendant had left the state; that he concealed the fact of the collection, and for that reason it was not necessary to make the demand. The defendant in his answer denied generally, and also averred that all other matters of the partnership had been settled, and that the fees that came from these cases were to be his own. The testimony abundantly shows that he concealed the fact of the collection from the plaintiff; and, under the testimony tending to establish that fact, the court, among other instructions, in substance directed the jury, if the defendant falsely and fraudulently denied receiving said money, and deceitfully concealed the fact of his collecting said fees, and knowingly, wrongfully, and fraudulently appropriated said sums to his own use, and, after he had received it all, claimed all the moneys received as his own, and denied plaintiff's right to the same, then, in that event, the plaintiff would not be required to make demand upon defendant for his share of the moneys so collected, and his failure to do so will not prevent him from recovering, should the testimony establish the facts as above set forth. *Raper v. Harrison*, 37 Kan. 243, 15 Pac. Rep. 219. The mere statement of the instruction given is of itself sufficient to support it. The instruction is very clearly drawn, and very plainly and accurately lays down the law. If he had at all times claimed the money, it would have been an idle thing to have demanded of the defendant what he claimed to be his own. We find no errors in the record, and recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(16 Or. 123)

### HOLGATE v. OREGON PAC. RY. CO.

(*Supreme Court of Oregon.* March 7, 1888.)

#### 1. CORPORATIONS—ACTIONS AGAINST—STATUTORY PROVISIONS.

A private corporation, being the creature of the statute, may be sued in such manner as the legislature may provide.

#### 2. SAME.

The statutes of Oregon prescribe a mode for the commencement of an action against parties, including corporations, and it must be pursued, in order to confer jurisdiction upon the court over the person of the defendant.

#### 3. SAME—WHERE SUABLE.

Section 44 of the Civil Code of the state, which provides that "the action shall be commenced and tried in the county in which the defendants, or either of them, reside or may be found at the commencement of the action," applies to corporations, as well as to natural persons, except so far as the former are affected by subdivision 1, § 55, Code.

#### 4. SAME—RESIDENCE OF CORPORATION.

The residence of a corporation is deemed to be in the county where it has its principal office or place of business.

#### 5. SAME—VENUE.

A corporation organized under the laws of the state must be sued in the county where it has its principal office or place of business, or in the county where the cause of action arose.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county.

Whalley, Bronough & Northup, for appellant. George W. Yocum, for respondent.

THAYER, J. The appellant is a private corporation, constituted as such under the laws of the state, having its principal office at Corvallis, in the county of Benton. The respondent attempted to commence an action against

the appellant in the said circuit court to recover a small amount of indebtedness alleged to be due him from it. He filed his complaint thereon in the office of the clerk of said circuit court, and issued a summons in the usual form, notifying the appellant to appear and answer the complaint. The summons was delivered to the sheriff of said county of Multnomah, and thereafter, at said last-mentioned county, served upon Wallis Nash, second vice-president of the appellant, intending the same as a service upon the latter. The appellant failed to appear in accordance with the notice contained in the summons; whereupon a default and judgment for the amount claimed in the complaint were entered against it, and from which judgment this appeal was taken. The counsel for the appellant present two questions for the consideration of this court upon the appeal, viz.: "(1) Can a corporation, organized and incorporated under the laws of this state, and having its principal office or place of business in a certain county, be sued or served in transitory actions in a county other than that in which its principal office is situated? (2) If it can, was the attempted service upon Wallis Nash, second vice-president of the defendant corporation, service upon the head of the corporation, the president and first vice-president being absent, notwithstanding the affidavit and showing of Wallis Nash that he was not the head of the corporation at the time of the service?"

A corporation, being the creature of the legislative assembly, can be served with process, for the purpose of commencing an action against it, in such manner as that department may prescribe. *Railroad Co. v. Hecht*, 95 U. S. 168. It has prescribed the mode of service of such process; and the only question to be considered is whether the attempted service referred to was made in compliance therewith. Section 44 of the Code (last compilation) provides that "in all other cases [referring to transitory actions] the action shall be commenced and tried in the county in which the defendants, or either of them, reside or may be found at the commencement of the action; or, if none of the parties reside in this state, the same may be tried in any county which the plaintiff may designate in his complaint." Section 54 of the Code (same compilation) provides that the summons shall be served by the sheriff of the county where the defendant is found; and section 55, Id., provides that "the summons shall be served by delivering a copy thereof, together with a copy of the complaint, prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: (1) If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, or managing agent, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county, or, if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." These are all the provisions of the Code which bear upon the question, and we must ascertain therefrom what the legislature meant and intended by adopting them. They constitute separate sections of the Code, but, as they relate to the same subject, should be construed together. It cannot be maintained that, under said section 44, the service was sufficient to bind the corporation, as the action was not attempted to be commenced in the county where the defendant resided or was found. The residence of the corporation, if an artificial person can be said to have a residence, must be deemed to be in the county of Benton, where it has its principal office and place of business, and where it is required to pay its taxes. It has its entity in that county, which is permanently fixed until a change is made in its charter. Mr. Nash certainly did not take the corporation with him when he went to Portland, and was served with the summons, whatever his official position in the institution may have been; and by no fiction, even, can it be maintained that the appellant was found in Multnomah county upon that occasion. If the attempted service of the sum-

mons, therefore, was sufficient in law, it must be found to be so under said section 55 of the Code. In construing the latter section, the circumstance of its amendment in 1876 may be taken into consideration. The original provision upon the subject is included in section 54, as compiled in 1874. By the amendment all the language contained in subdivision 1 of said section 55, after the words "managing agent," was added thereto; and it is well understood by the older members of the bar why such addition was made. The business of railroad corporations, in particular, generally extended through other counties than the one in which the principal office was situated, where stations were established, and clerks and agents located, to transact the local business connected with their roads. Controversies between the corporations and individuals arose, of course, in these various counties, which had to be adjusted in the courts; but owing to the fact that the officers the legislature had designated as the persons upon whom service of summons is required to be made in such cases could not always be found in the county in which the controversy had its origin, it was difficult to commence the action there; and the right to do so in a county other than that in which the principal office was situated was then seriously controverted. In order, therefore, to avoid such inconvenience, and to settle the right to sue a corporation in the county where the action arose, without regard to the location of its principal office, the amendment was adopted. It authorizes, beyond question, the commencement of an action against a corporation in any county in which the cause of action arose; but as was said in *Parke v. Insurance Co.*, 44 Pa. St. 422, in construing a similar statute: "That corporations should be liable to be sued in any county \* \* \* by any plaintiff who may choose to sue them there, whether the claim originated there or not, is surely beyond the intention of the legislature."

It is necessary in the commencement of an action against a corporation, under the Civil Code of this state, in order to acquire jurisdiction over the person, that the return of service of summons show that a duly-authenticated copy thereof, and of a copy of the complaint, were delivered to one of the officers thereof designated in said subdivision 1, of said section 55 of the Code, either in the county where its principal office is situated, or in the county where the cause of action arose; or, in case none of such officers shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county where the cause of action arose; or, if no such officer be found, then by leaving such copies at the residence or usual place of abode of such clerk or agent. The action may be commenced in the county where the corporation has its principal office, whether the cause of action arose there or not; because that is its place of residence. In that case, however, the service must be made upon the president or other head of the corporation, secretary, cashier, or managing agent thereof; but, if commenced in a county where the cause of action arose, the service may be made upon a clerk or agent, under the circumstances and in the manner above mentioned. The return to the summons not showing the facts here indicated, the service was insufficient to give the circuit court jurisdiction over the appellant. Whether Mr. Nash comes within the designation of president or other head of the corporation, or managing agent thereof, it is not necessary to consider, as it was not attempted to commence the action in the county where the appellant has its principal office; and the service could not be made upon him as agent or clerk, as the cause of action did not arise in the county of Multnomah.

The judgment will therefore be reversed, and the complaint dismissed.

(24 Or. 581)

## HINDMAN v. EDGAR.

(Supreme Court of Oregon. March 12, 1888.)

## 1. EVIDENCE—PAROL—TO VARY WRITTEN CONTRACT.

In an action upon a note and written lease for the recovery of money, it is not competent for the defendant to prove upon the trial that, at the time the note and lease were made, the plaintiff agreed to take back from defendant such goods as he might have left, and such hay and grain as might be on the place, at the expiration of the lease.

## 2. SAME.

It is error for the court to instruct the jury that such agreement may be considered by the jury, or that it can add to or vary the written agreement between the parties.

## 3. ASSUMPSIT—ACCEPTANCE OF PROPERTY—QUANTUM MERUIT.

The plaintiff held liable for the value of such property as he actually accepted from defendant, and that it was not necessary that such value be settled by agreement.

## 4. LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR PROPERTY LEFT BY OUTGOING TENANT.

A landlord is not liable, as a purchaser, for property left on the leased premises by the outgoing tenant, and which the landlord never accepted.

## 5. PLEADING—ANSWER TO COMPLAINT CONTAINING SEVERAL CAUSES OF ACTION.

In answering a complaint which contains several causes of action, and such answer contains several defenses, each defense pleaded should refer to the cause of action to which it is intended to answer, as required by section 73 of the Code.

(Syllabus by the Court.)

Appeal from circuit court, Crook county.

Action on a promissory note, brought by S. M. W. Hindman, appellant, against Rank Edgar, respondent.

*Nichols & Johns*, for appellant. *Geo. W. Barnes and Tilmon Ford*, for respondent.

STRAHAN, J. This is an action to recover \$249, balance on a promissory note, and \$400 claimed to be due upon a written lease. The answer alleges payment of the note in full, and contains several separate defenses which were relied upon at the trial. It is alleged, by way of further and separate answer, "that, at the time of making the said note, and for some time prior thereto, the plaintiff was keeping and running a store on the premises described in the complaint, and at the time of making the lease the plaintiff and defendant entered into a verbal contract whereby the defendant sold all goods he had on hand, and received as pay therefor the note set out in plaintiff's complaint, and it was then and there agreed, and made part of said contract, that, if the defendant had any goods on hand at the time of the expiration of said lease, the plaintiff would buy the same of the defendant, and pay him therefor, and that the said agreement was a part of and an inducement for the making of said contract of sale of the said goods and store, and it was then and there agreed, by and between the plaintiff and defendant, that, at the expiration of said lease, the defendant should sell, and the plaintiff buy, and pay the defendant for, all hay and grain that the defendant should have at that time; that, in pursuance of said contract and agreement, the defendant tendered and delivered to the plaintiff, at the expiration of said lease, goods, wares, and merchandise to the full aggregate sum of \$68.48, and hay to the aggregate sum of \$308, and by agreement the plaintiff was to credit the amount on the defendant's note, and on said amount of rent. The answer contained another defense or two relied upon as counter-claims. The reply put the new matter in the answer in issue. The jury found for the plaintiff in the sum of \$68.48, for which judgment was duly entered, and from which this appeal was taken. The appellant makes several assignments of error, which we will proceed to notice.

1. The defendant being on the stand as a witness, his counsel asked him this question: "What were the circumstances under which the note set out in plaintiff's complaint was given?" To this plaintiff objected; and, his objections being overruled, he excepted, and the witness answered: "At the time of and before said note and contract of lease was signed, the plaintiff agreed to take back from him (defendant) such goods as he (defendant) might have left, and also such hay and grain as he (defendant) might have left on said place at the expiration of said lease." The plaintiff moved to strike out this answer, for the reason it was incompetent, because its effect was to vary the terms of the written agreement. This motion was overruled, to which an exception was taken. This evidence was clearly incompetent. It brought before the jury for their consideration a contemporaneous parol agreement, the effect of which was to vary and materially change the terms of the written agreement made between the parties. The Code, § 692, provides, in effect, that, when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms; and this is declaratory of an elementary rule of evidence. This evidence should have been excluded from the consideration of the jury, and, in refusing to do it, the court erred. There was other evidence of the same character offered and objected to, and admitted notwithstanding the objection, to which exceptions were duly taken. None of the evidence which sought to introduce either an antecedent or contemporaneous parol agreement was competent, and in admitting it the court erred.

2. The court gave the jury the following instruction: "The mere fact that the defendant left some store goods and hay on the place when he left would not make the plaintiff in any manner answerable to him therefor, unless you further find that the defendant's allegations in relation to the alleged agreement with the plaintiff concerning said goods and hay have been sustained by a preponderance of the evidence." This instruction was designed, and in effect said to the jury, that if the defendant had made the best case before them as to the existence of this alleged parol contemporaneous agreement, they should find according to the preponderance of the evidence on that subject, and give effect to such agreement. Such instruction was based on evidence that was incompetent, and was necessarily erroneous. It impliedly and in effect told the jury that such antecedent and contemporaneous parol agreement did add to and vary the written agreement, and that the liabilities of the parties were to be measured by such parol agreement, and not exclusively by the writing. This instruction was therefore clearly erroneous.

3. The appellant's counsel asked the court to instruct the jury as follows: "I charge you that any evidence tending to show that any undertaking or agreement was had between plaintiff and defendant, at the time of executing said written contracts herein sued on, or at any time prior thereto, tending in any manner to vary the terms of the aforesaid written contracts, must be by you wholly disregarded." This instruction was refused, and is a repetition of the same error already pointed out.

4. The plaintiff's counsel also asked the court to give to the jury the following instruction, which was refused: "I charge you that you must not allow any credits to defendants, on said contracts or otherwise, other than cash credits, unless you find that plaintiff agreed to receive and did receive the same at an agreed and stipulated price." This instruction was properly refused. If the plaintiff accepted property of the defendant to be applied in payment of said contracts, he thereby became chargeable with its value, and his liability does not depend on whether he had agreed to a stipulated price or not. If no price was agreed upon, the jury could ascertain the value of the property which the plaintiff received from the defendant.

5. The plaintiff also asked the court to instruct the jury as follows: "(3) If you find from the evidence that defendant abandoned the leased premises

named in said contract of lease, and left certain or any personal property there, and that the same was left there without the consent of plaintiff, and that the plaintiff had or has not accepted the same as payment or part payment, at a stipulated price or otherwise, then such personal property cannot be considered by you as a payment or a part payment in any manner." This instruction was also refused, and in this we think the court committed error. If the defendant abandoned the premises, and left property there which the plaintiff never accepted, then he was not liable for its value. This, in effect, was what the court refused to instruct the jury, and such refusal was clearly erroneous. If the defendant left any property on the place for the plaintiff when he left or abandoned it, and the plaintiff accepted such property, he thereby became liable to the defendant for its value, without any regard to the alleged contemporaneous parol agreement. In such case his liability depends upon the fact of his acceptance of the property, and in no way upon said alleged agreement.

6. The defendant, by his answer, has undertaken to plead a number of defenses and counter-claims, but they are presented in such a confused manner that it is somewhat difficult to apply the correct rule of law to each. In preparing the answer, no attention whatever seems to have been paid to that requirement of the Code, § 73, which provides: " \* \* \* The defendant may set forth by answer as many defenses and counter-claims as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished." It might happen that certain matters would constitute a good defense to one cause of action, but would be no defense whatever to another cause of action pleaded in the same complaint. In these, and in fact in every case where there are several causes of action set out in the complaint, and the answer contains a number of defenses, the particular causes of action which each defense is intended to meet, ought to be designated in the answer. We are led to make these observations by the manner in which counsel for respondent has presented the questions arising on the record in his brief. His argument seems to overlook the state of the record. Let the judgment be reversed, and a new trial be awarded.

(16 Or. 243)

SCHMEER *et al.* v. SCHMEER.

(Supreme Court of Oregon. April 22, 1888.)

**APPEAL—ABANDONMENT—EFFECT.**

When a party perfects an appeal and then abandons it, his right of appeal is exhausted; the power over the subject is *functus officio*, and cannot be exercised the second time.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county. On motion to dismiss.

*Caples & Mulkey*, for appellant. *Moreland & Fenton*, for respondents.

PER CURIAM. Prior to the last term of this court the appellant appealed from the decree in this cause, and omitted to file the transcript in this court within the time fixed by the Code. Thereafter, and during the term, the respondent brought into this court copies of the decree, notice of appeal with proof of service, and the undertaking, and moved for an order of affirmance, which was allowed, of course, and the same was sent by mandate to the court below. The appellant served another notice of appeal, and gave an undertaking, and has now brought the record into this court, and upon these facts the respondent has moved to dismiss this attempted appeal. When a party perfects an appeal, and then abandons it, his right of appeal is exhausted: the power over the subject is *functus officio*, and cannot be exercised the second time. *Brill v. Meek*, 20 Mo. 358. When a party attempts to appeal, but fails

to observe some formality by reason of which he does not obtain the benefit of an appeal, the rule is otherwise, and he may give another notice, and perfect his appeal. The decree has already been affirmed, and cannot be questioned by this proceeding. Let the appeal be dismissed.

(16 Or. 161)

WALKER v. GOLDSMITH *et al.*

(Supreme Court of Oregon. March 21, 1888.)

1. COSTS—TAXATION—REVIEW ON APPEAL—OBJECTIONS TO DISBURSEMENTS—HOW TAKEN.

Items claimed as disbursements must be itemized and verified, and objections thereto must be to each item separately, and the reason of such objection must be clearly and distinctly stated.

2. SAME—OBJECTIONS NOT RAISED BELOW.

No objection to any item claimed as a disbursement can be considered or entertained unless made before the taxing officer in the court below, and within the time allowed by law.

3. SAME.

When the item claimed was this: "To the clerk of the supreme court for copy of evidence and judgment roll in case of *T. vs. D.* composing Exhibit 30, \$359.50;" and was objected to for the reason that said copy of evidence and judgment roll was procured by the plaintiff for his own use as evidence in said cause upon an issue of fact tried therein, upon which plaintiff was defeated, and upon which final judgment was rendered against him, and in favor of the defendants in said cause: *held*, that said objections did not present the question sought to be raised on this appeal, namely, that the copy of evidence was incompetent upon the trial of this suit, and that the same was not used upon such trial.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county.

For opinion in original suit, see 12 Pac. Rep. 537.

*P. L. Willis*, for appellant. *Williams, Ach & Wood* and *James K. Kelly*, for respondents.

STRAHAN, J. This is an appeal from the judgment of the court below, given on appeal from the clerk's taxation of costs and disbursements. The objections filed with the clerk included the only item involved in this appeal, and are as follows: "Object to the following item in said statement: 'To clerk of supreme court for copy of evidence and judgment roll in case of *Teal vs. Dickenson et al.*, composing Exhibit 30, \$259.50,'—for the reason that said copy or evidence and judgment roll were procured by the plaintiff for his own use as evidence in said cause, upon an issue of fact tried therein, upon which plaintiff was defeated, and upon which final judgment was rendered against him, and in favor of defendants in said cause. None of the said witnesses or copies referred to in the above objections were used by these defendants, or were of any value or use to them in this litigation." The suit in which this controversy originated was for the purpose of obtaining partition of certain real property, and by the final decree the costs and disbursements in the suit were apportioned to be paid by the several parties according to their respective interests in the land. All disbursements in the cause, therefore, which were properly incurred or made in the cause, were taxable under the decree, and to be apportioned among the several parties according to the rule therein defined.

It was conceded upon the argument here that so much of the item objected to as was paid for a certified copy of the judgment roll in this court in *Teal vs. Dickenson et al.* might properly be allowed; but it was insisted that all of the evidence which accompanied the judgment roll was incompetent in this suit, and could not be, and was not, used upon the trial, and therefore no allowance ought to be made for it. If this objection had been taken before the clerk in the court below, I am inclined to think it ought to have prevailed; but it was not. The objections there made were placed on other and different

ground, and were virtually abandoned upon the argument here. Under our system of taxing costs and disbursements, each item claimed as a disbursement must be set down separately in the itemized statement, and the same must be verified. If objections be made to any one or more of such items, they must be made to each separate item to which exceptions are taken, and they must particularly specify and point out in what respect such claim is wrong, or why it should not be allowed; and no objection not thus made can be considered. If such objections be not made within proper time, the disbursements claimed are allowed, of course. *Wilson v. City of Salem*, 3 Or. 483.

The objections made in the court below were not sufficiently specific, and are untenable; and the objection which is now made in this court for the first time cannot be considered. It follows that the decree of the court below disallowing said item is reversed, and the same is allowed, and ordered to be taxed as a disbursement in said cause.

(16 Or. 163)

**WEBER v. WEBER.**

(*Supreme Court of Oregon.* March 28, 1888.)

**1. DIVORCE—POWER TO GRANT.**

The power to grant a divorce, and such other relief as is usually incidental thereto, is purely statutory.

**2. SAME—PLEADING—WIFE'S SEPARATE ESTATE.**

In a divorce suit by a wife, her pleading ought to allege what personal property of hers the husband has in his possession or control, to enable the court to make a decree in her favor therefor.

**3. SAME—DECREE NOT RESPONSIVE TO PLEADINGS.**

In a divorce suit by the wife, when she alleges that certain personal property is the property of her husband, a decree finding the same is her separate property will be reversed, as unauthorized and contrary to the pleadings.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county.

*Watson, Hume & Watson*, for appellant. *C. Taylor*, for respondent.

**STRAHAN, J.** At the last term of this court, another part of the decree in this case was here for review on *Rothchild's Appeal*, and the opinion of the court thereon is reported in 15 Pac. Rep. 650. Since that time the defendant, Weber, has perfected an appeal from so much of the same decree as adjudges that the plaintiff is the owner of the household furniture described in the amended complaint, and in the findings of the court, and from the further order and decree made in said cause on the 24th day of September, 1887, wherein and whereby it was ordered and decreed that the furniture in the dwelling-house situated on lot 8 in block 45 in Couch's addition to the city of Portland, Or., being the house where the plaintiff now resides, is the separate property of the plaintiff. The complaint, as well as the amended complaint, alleges that the property involved in this appeal is the property of appellant. This allegation is denied in the answer by appellant, and said property is alleged to be the property of his co-defendant, Rothchild. The only question presented by the appeal is whether or not the court could, under the pleadings, divest the title out of the appellant or his co-defendant, Rothchild, and by the decree invest it in the plaintiff.

1. It was conceded upon the argument by both parties that the power to grant a divorce, and such other relief as is usually incident thereto, is purely statutory. 1 Pom. Eq. Jur. §§ 98, 112, 171; 1 Bish. Mar. & Div. § 71. Section 501, Hill's Code, defines the power of the court in case a marriage is declared void or dissolved. It says: "Section 501. Whenever a marriage shall be declared void or dissolved, the court shall have power to further decree as follows: \* \* \* (2) For the recovery of the party in fault, and not allowed the care and custody of such children, such an amount of money, in gross or



in installments, as may be just and proper for such party to contribute towards the nurture and education thereof; (3) for the recovery of the party in fault such an amount of money, in gross or in installments, as may be just and proper for such party to contribute to the maintenance of the other; (4) for the delivery to the wife, when she is not the party in fault, of her personal property in possession or control of the husband at the time of giving the decree." An insuperable objection to this part of the decree is that it is not alleged in the complaint that the property in controversy was the property of the plaintiff, or that the same was in the possession or control of the husband; on the contrary, it is alleged that this property is the property of the defendant Weber, and that it is in the possession of the plaintiff. If the appellant owned the property, as the plaintiff alleged, the court had no power by its decree to divest his title and give it to the plaintiff; on the other hand, if the same was the separate property of the plaintiff, she failed to bring her case within the statute entitling her to any relief as to this property, but precluded herself by her own allegations from setting up title to the same. So that in neither view of the subject can this part of the decree be sustained.

2. A decree must be based upon, and in accordance with, the facts alleged in the pleadings. It cannot be upon a state of facts the exact opposite of what is alleged. This subject was under consideration in *Bender v. Bender*, 12 Pac. Rep. 718, and it is unnecessary to repeat what was there said. If the plaintiff is in fact the owner of this property, other provisions of the statute afford her an adequate remedy for its recovery, should she be deprived of it.

Let so much of the decree appealed from as is specified in the notice of appeal be reversed; but the appellant must pay the costs of this appeal, for the reason that, so far as appears, the entire litigation grew out of his misconduct, and the plaintiff is in every respect free from all fault.

(16 Or. 211)

MITCHELL v. SCHOONOVER.

(Supreme Court of Oregon. April 16, 1888.)

1. **ABATEMENT AND REVIVAL—DEATH OF PARTY—ATTACHMENT—DEATH AFTER LEVY.**  
The death of the defendant after levy of the attachment does not vacate or dissolve it.
2. **SAME—REVIVAL AGAINST PERSONAL REPRESENTATIVE.**  
If a party to an action die, and the cause of action survive, the adverse party may, at any time within one year thereafter, cause the action to be continued by or against the personal representative of such deceased party.
3. **SAME—JUDGMENT RENDERED AFTER DEATH—EFFECT.**  
A judgment rendered by a court of general jurisdiction against a party after his death is not for that reason void. It is erroneous, but, until reversed by some appropriate proceeding, it is valid.
4. **SAME—DELAY OF COURT IN ENTERING JUDGMENT.**  
Where a party has so prosecuted his action that he is entitled to a judgment without further contest, or where, by delay of the court, he fails to obtain judgment when he is entitled to it, and his adversary dies, it is the duty of the court, upon proper application, to render judgment in favor of such party as of a time when the adverse party was living.
5. **SAME—TIME OF DEATH—FRACTIONS OF A DAY.**  
For the purpose of defeating a judgment rendered by a court of general jurisdiction, the legal representative of a deceased party will not be heard to allege that his intestate died on the same day of the rendition of such judgment, but at an hour previous thereto.

(Syllabus by the Court.)

Appeal from circuit court, Union county.

*Baker, Shelton & Baker* and *Geo. G. Bingham*, for respondent. *J. R. Crites*, for appellant.

STRAHAN, J. On the 14th day of June, 1886, the plaintiff commenced this action against Thomas P. Baird and M. B. Baird to recover \$1,800 and inter-

est due on a promissory note, and on the same day sued out a writ of attachment against the property of the defendants. The summons as well as the attachment were served in Union county, Or., on the next day after they were issued. On the 27th day of June, 1886, the defendants appeared by their attorney in fact, Willis Skiff, and filed a demurrer to the complaint, which was on the 1st day of October, (it being the October term of said court,) 1886, overruled. On the 6th day of October, 1886, the plaintiff took judgment against the defendants for want of an answer. On the 26th day of November, 1886, Nelson Schoonover filed a petition, entitled in said action, reciting the above facts, and, further, that on the 6th day of October, 1886, M. B. Baird died at Union county, Or., and after his death plaintiff took judgment against said deceased, and an order for the sale of the attached property which belonged to said deceased; that the petitioner was on the 13th of October, 1886, duly appointed administrator of the estate of M. B. Baird, deceased, by the county court of Union county, Or. The prayer, in substance, is for an order allowing petitioner to appear in said action as the duly-qualified administrator and legal representative of said deceased, and the further proceedings in said action be taken as against the petitioner as such legal representative. Thereafter on the 10th day of December, 1886, the plaintiff, by his attorneys, filed a motion to strike Schoonover's petition from the files; which motion was denied, on the 14th day of December, 1886. Afterwards the plaintiff filed a motion to strike paragraph 5 from Schoonover's petition, which recited that judgment was taken against said M. B. Baird after his death. On the 21st day of February, 1887, this motion was allowed by the court, and paragraph 5 was stricken out, and it was further ordered that said cause, as to said M. B. Baird, deceased, be, and the same is hereby, continued in the name of Nelson Schoonover, as administrator of said estate of M. B. Baird, deceased. On the 23d day of February, 1887, Nelson Schoonover filed a motion to vacate the judgment as to M. B. Baird, deceased, for the reason that the judgment against said M. B. Baird is void, having been rendered after his death. In support of this motion, numerous affidavits are filed. If said affidavits are competent or material, or can be considered, they tend to show that M. B. Baird died at Union, in Union county, Or., on the 6th day of October, 1886, at about the hour of 5 o'clock A. M. of said day, and that the judgment was not entered until after the hour of 9 o'clock A. M. of the same day. The plaintiff filed a motion to strike out these affidavits. The same was overruled, and Nelson Schoonover, as administrator, was allowed 10 days in which to file an amended motion and affidavits. Within the time allowed, an amended motion and some additional affidavits were filed. Afterwards, on the 23d day of July, 1887, both motions were denied by the court, from which last-named order overruling his motion to vacate the judgment as to M. B. Baird, deceased, Nelson Schoonover has appealed, and assigns for error the action of the court in overruling his said motion. Schoonover's amended petition to vacate said judgment shows that said M. B. Baird was insolvent at the time of his death, and that the attachment was levied wholly upon the real property of said M. B. Baird, and not upon any of the property of Thomas P. Baird; that fully \$3,000 of M. B. Baird's debts were due to sureties of said M. B. Baird, who had made advances for him, etc. The application of Schoonover to vacate the judgment seems to be founded upon two theories: (1) That the death of M. B. Baird dissolved the attachment; and (2) that the judgment is void, because it is alleged that he died a few hours before the judgment was entered up. It may be doubted whether or not the order made in this case refusing to vacate this judgment is an appealable order. "A final order affecting a substantial right, and made in a proceeding after judgment or decree for the purpose of being reviewed, shall be deemed a judgment or decree." 1 Hill's Code, § 535. It is not perceived how this order affected a substantial right. No defense to the action was offered or proposed, nor did the appellant offer an

answer of any kind. But this question was not suggested at the argument, and the decision will not be placed on this ground.

1. It is conceded that there is no provision of the Code which declares that an attachment will be dissolved by the death of either party. If such a result follows death, it must be gathered inferentially from some provision of the Code, because it is nowhere expressed. But it will be most convenient to see, first, what effect the death of a party has upon a pending action. Section 38, Hill's Code, declares: "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, allow the action to be continued by or against his personal representatives or successor in interest." And by section 144 it is provided that "the plaintiff may at the time of issuing the summons, or any time afterwards, have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered. \* \* \* From the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith for a valuable consideration of the property, real and personal, attached. \* \* \* If effect be given to all of these provisions of the Code, the attachment is not dissolved by death. If a party die, the adverse party may, within one year thereafter, cause the action to be continued by or against the personal representatives of such deceased party; and the effect of a judgment in such action is to subject the property attached to its payment. There is some conflict among the authorities on the subject; but I think the decided weight of authority, as well as the better reason, is to the effect that an attachment is not dissolved by death unless some statute expressly so declares. In *More v. Thayer*, 10 Barb. 258, a complaint had been filed, and an attachment issued and served, but no summons had been served; but the court had acquired such jurisdiction of the action by the allowance of the provisional remedy of attachment that the defendant's administrator could be brought in, and the attached property subjected to the judgment. So, in *Perkins v. Norvell*, 6 Humph. 151, it was held that the death of the defendant did not dissolve the attachment, and that the attached property might be subjected to the payment of the debt by bringing in the heirs by means of a *scire facias*. In *Thacher v. Bancroft*, 15 Abb. Pr. 243, an attachment was issued, and on the same day the defendant died. Subsequently his executor appeared, and defended the action, and judgment was rendered in favor of the plaintiff. In passing on the question whether the attachment held the property or not, the court said: "The attachment remains in force notwithstanding the death of the defendant. The revival of the action by the appearance of the executor enables the plaintiff to obtain his judgment. Payment of such judgment out of the attached property can only be obtained through an execution by which the attached property is to be sold." So in *Kennedy v. Raquet*, 1 Bay, 484, an attachment was issued, and certain persons were garnished. The garnishees made default, and judgment went against them. About the time or immediately after the issuing execution it was discovered that Raquet, the principal debtor, had died at Bordeaux before the signing of judgment against the garnishees. They therefore moved to set aside the judgment and execution against them, for the reason that the death of the defendant before judgment abated the action, and dissolved the attachment. But their motion was disallowed, and they were held liable on the judgment. So, also, in *Holman v. Fisher*, 49 Miss. 472, it was held, in effect, that, if a defendant die after the service of a writ of attachment, the writ is not abated, but may proceed to judgment; the court holding that the proceedings thereby become strictly *in rem*, under the statute of that state. And the like rule was held in *White v. Heavner*, 7 W. Va. 324, the court saying: "The death of Henry O'Middleton, the debtor, after the attachment was levied on the real property,

did not dissolve the attachment, or the lien thereof upon the realty attached."

2. But it is argued that this judgment is void, and for that reason it ought to have been set aside. But the authorities do not sustain this position. It must be remembered that the judgment itself is not before us, for the reason the appellant took no appeal from it. We are not, therefore, required or permitted to say whether it is reversible for error or not. The only necessary point for us to consider on this branch of the case is whether or not the court below erred in overruling the appellant's motion for the reason stated therein. The decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but, until reversed by some appropriate proceeding, it is valid. In *Reid v. Holmes*, 127 Mass. 326, the question came before the supreme court of that state, and it was held the judgment was not void. The court said: "If the fact agreed in the case stated of the death of the defendant after the default, and before the judgment, is competent to be considered, it does not show that the judgment is absolutely void. The court at the time of bringing the former action had jurisdiction of the subject-matter and of the parties, and might after the death of the defendant have rendered judgment against him as of a previous term, (*Tapley v. Martin*, 116 Mass. 275; *Kelley v. Riley*, 106 Mass. 339, 341; *Tapley v. Goodsell*, 122 Mass. 176-181;) or the judgment actually entered might, on motion of the plaintiff, have been amended so as to stand as a judgment *nunc pro tunc*, or have been vacated, and the administrator summoned into to defend the action, (*Stickney v. Davis*, 17 Pick. 169.)" So, in *Case v. Ribelin*, 1 J. J. Marsh. 29, it was held that such a judgment was not void, but erroneous; that the error consisted of matter of fact which, not appearing on the record, the court could not notice, and that the same was to be corrected by a writ of error *coram vobis*. *Yaple v. Titus*, 41 Pa. St. 195, is to the same effect; and other authorities announce the same principle. *Hayes v. Shaw*, 20 Minn. 405, (Gil. 355;) *Coleman v. McAnulty*, 16 Mo. 173; *Camden v. Robertson*, 2 Scam. 507.

3. But under the state of this record at the time *M. B. Baird* is said to have died, it was the duty of the court to see that the plaintiff was not prejudiced by its delay in entering judgment. The court overruled the defendant's demurrer to the plaintiff's complaint on the first day of the October term. They did not apply for leave to answer or plead further. At the time the demurrer was overruled, the plaintiff was then entitled to a judgment according to the prayer of his complaint. His cause of action stood admitted upon the record, and it was the duty of the court to enter judgment against the defendants according to the facts as they were alleged in the complaint. If, while the cause is in this condition, the defendant dies, the plaintiff is not to lose the fruits of his litigation, and, if necessary, it is the duty of the court to enter judgment *nunc pro tunc* as of the previous term, or, under our practice, an earlier day in that term. This is the common-law rule of practice, and the Code has not changed it. In *Blaisdell v. Harris*, 52 N. H. 191, after verdict for the plaintiff, the case was transferred to the law term for the consideration of the full bench, upon exceptions taken by the defendant. While the cause was thus pending in the law term, the defendant died. Afterwards, the defendant's exceptions being overruled, it was held that the plaintiff should have judgment as of the previous term, when the verdict was rendered. In *Tapley v. Martin*, 116 Mass. 275, it was held that if, after verdict for the plaintiff, the defendant dies, the court has power to pass upon the exceptions alleged by him, and, if justice requires, to enter judgment *nunc pro tunc* as of the term when the verdict was rendered, although no administrator had been appointed in said state. And the same principle was announced in *Wilson v. Myers*, 15 Amer. Dec. 510. And this practice prevails generally. *McLean*

v. *Stale*, 8 Heisk. 22; *Spalding v. Congdon*, 18 Wend. 543; *Currier v. Inhabitants of Lowell*, 16 Pick. 170; *Griffith v. Ogle*, 1 Bin. 172; *Tooker v. Duke of Beaufort*, 1 Burrows, 146; 2 Tidd, Pr. 932. Generally, the law does not regard fractions of a day, except in cases where the hour itself is material; as in case where priority of judgments, or priority of lien, and the like, is in question. *Marvin v. Marvin*, 75 N. Y. 241; *Judd v. Fulton*, 4 How. Pr. 298; *Phelan v. Douglass*, 11 How. Pr. 193; *Turnpike Road v. Haywood*, 10 Wend. 422; *Hughes v. Patton*, 12 Wend. 234; *Small v. McChesnay*, 3 Cow. 19; *Clute v. Clute*, 8 Denio, 263; *Blydenburgh v. Cotheal*, 4 N. Y. 418; *Jones v. Porter*, 6 How. Pr. 286. Counsel for appellant have not cited a single authority from any book holding that, for the purpose of defeating a judgment of a court of general jurisdiction, the legal representative of a deceased defendant may allege that on the same day, and at a previous hour before the rendition of the judgment, his intestate had died, and my own researches have failed to find any authority for that position. Our views on the merits being adverse to the defendant, we have not thought it necessary to consider or decide the technical objections urged as to the form in which the questions are presented.

There being no error prejudicial to the rights of the appellant, the judgment appealed from must be affirmed.

(16 Or. 219)

CHE GONG *et al.* v. STEARNS, Judge.

(Supreme Court of Oregon. April 16, 1888.)

1. BILL OF EXCEPTIONS—TIME OF SIGNING.

There is no statute in this state fixing the time within which a circuit judge may sign a bill of exceptions.

2. SAME—POWER OF CIRCUIT JUDGE.

If, during the progress of a trial, a party took exceptions, which were reduced to writing, or noted on the judge's minutes, and for any satisfactory cause he was unable to have his bill of exceptions drawn out in form and signed during the term, the judge who presided at the trial has the power to sign the same afterwards, and it becomes a part of the record, with the same effect as if signed during the term.<sup>1</sup>

*Morgan v. Thompson*, 13 Or. 230, 9 Pac. Rep. 564. This case, so far as it is in conflict with this opinion, is overruled.

3. SAME—MANDAMUS TO COMPEL SETTLEMENT—POWER OF SUPREME COURT.

As incident to and in aid of its appellate jurisdiction, this court has the power, by writ of *mandamus*, to require a circuit judge to settle and allow a bill of exceptions.

(Syllabus by the Court.)

Original proceedings in *mandamus*.

*Williams & Wood* and *P. H. De Arcy*, for petitioners. *Henry F. McGuin* and *N. D. Simon*, *contra*.

<sup>1</sup> Bills of exceptions must be prepared and settled before the end of the term at which the cause was tried, *Sweet v. Perkins*, 24 Fed. Rep. 777; *Stave Co. v. Manufacturing Co.*, 32 Fed. Rep. 822; or within such time as the parties by their agreement, made part of the record, may stipulate, or within the time allowed by the court in its order to that effect, made in term-time and appearing in the record, *Hake v. Strubel*, (Ill.) 12 N. E. Rep. 676; *City of Westminster v. Shipley*, (Md.) 13 Atl. Rep. 366. A distinction is to be observed in this respect between the settling and allowance of a bill, which is an act judicial in its nature, and the act of signing and sealing the bill, which is merely ministerial. *Hake v. Strubel*, (Ill.) 12 N. E. Rep. 676. The bill must be signed during term-time, unless authorized to be signed after adjournment, by consent or agreement of counsel. *Markland v. Albes*, (Ala.) 2 South. Rep. 123; *State v. Smith*, (Kan.) 16 Pac. Rep. 254. Bills of exceptions filed more than 10 days after the expiration of the trial term of the court below will not be considered on appeal. *Stewart v. State*, (Tex.) 6 S. W. Rep. 317. But where one has done all in his power to procure the settlement of, and signature to, the bill, he cannot be prejudiced by the delay of the judge. *Davis v. Patrick*, 7 Sup. Ct. Rep. 1102; *Stave Co. v. Manufacturing Co.*, *supra*.

STRAHAN, J. During the present term the plaintiffs filed their petition in this court praying that an alternative writ of *mandamus* issue, directed to Hon. Loyal B. Stearns, judge of the Fourth judicial district, requiring him to settle and sign a bill of exceptions, or to show cause why he refuses. The writ was awarded, and the return is now before the court, and will be more particularly referred to presently. It appears from the petition and exhibits that on the 13th, 14th, and 15th days of December, 1887, the plaintiffs were tried for the crime of murder in the first degree in the circuit court of the state of Oregon for Multnomah county, and that Hon. L. B. Stearns presided as judge at said trial; that numerous exceptions were taken by the petitioners to the rulings of said court during the progress of said trial, but that the same were not then written out and signed by said judge; and that the trial resulted in a verdict of guilty as charged in the indictment, and the petitioners were sentenced to be hanged. At the conclusion of the trial, the attorneys for the petitioners asked and obtained leave of court to present a bill of exceptions to the judge for his signature within 10 days. No bill of exceptions appears to have been presented for the judge's signature within the time specified in the order. Thereafter other counsel appeared for petitioners, and tendered a bill of exceptions to the judge for his signature on the 16th day of February, 1888. The return is in the nature of a demurrer to the writ. It does not controvert any of the facts alleged, but alleges, in substance, that it affirmatively appears that no bill of exceptions was prepared or tendered to said judge within the term at which the trial was had, nor within any extension of time for that purpose, and that no bill of exceptions was tendered until after the final adjournment of the court for the term, and after said judge had lost all jurisdiction or control over the matter, and was and is wholly without power or authority to settle or sign said bill. The question as to the sufficiency of this return has been argued, and it is the only contested point before us. The question presented for determination is whether or not in any case, or under any circumstances, a circuit judge has the power to sign and allow a bill of exceptions embodying the exceptions taken and allowed during the progress of the trial, but not then written out for want of time, or other sufficient cause.

No time is fixed by any statute in this state within which a circuit judge may sign a bill of exceptions, or denying his right to sign it after the term. Hill's Code, § 231, provides: "The point of the exception shall be particularly stated, and may be delivered in writing to the judge, or entered in his minutes, and at the time, or afterwards, be corrected until made conformable to the truth;" and section 233 provides: "The statement of the exception, when settled and allowed, shall be signed by the judge, and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause. \* \* \*" In *Ah Lep v. Gong Choy*, 13 Or. 205, 9 Pac. Rep. 483, this court had under consideration the question presented by this record. In that case the judgment was entered on the 16th day of March, 1885, and the notice of appeal was served two days thereafter. On the 1st day of October, 1885, the bill of exceptions was settled and allowed by the judge who presided at the trial, and on the same day was filed with the clerk. This court will notice judicially that the terms of the circuit court of Multnomah county are on the third Monday in January, the first Monday in May, and the first Monday in September, so that two terms of court intervened between the date of the judgment and the signing of the bill of exceptions in *Ah Lep's Case*. In that case the language of GOLDTHWAITE, J., in *Etheridge v. Hall*, 7 Port. (Ala.) 47, is quoted with approbation, to the effect that the court did not wish to be considered as expressing the opinion that the practice of signing bills of exceptions after the termination of the court is proper; but cases may exist in which it is necessary to pursue this course, as it is not infrequent that sufficient time is not allowed to enable a judge to examine them during the term, or counsel

may be too busy to prepare them, etc. And THAYER, J., said: "I am unable to discover that the law has absolutely prescribed any definite time, in which the exceptions shall be put in form and signed. The bill of exceptions should be tendered to the judge immediately after the trial, unless a definite time is given therefor. The nature of the affair requires this to be done, but the settlement and allowance of the statement of it may necessarily occupy a long time. In my opinion, that matter should be left largely to the convenience of the trial judge." So, in considering the effect of a provision in the Code of California requiring a bill of exceptions to be made within 10 days after the trial, the supreme court of that state said: "We think that the statute directing a statement to be made within ten days, and signed by the judge, in a criminal case, is directory merely. The phraseology is different from that of the practice act in reference to like provisions in civil cases, and the reason of the rule is likewise different. It would be holding the rule with great rigor to hold a prisoner absolutely concluded of his rights by the failure of the judge to settle or sign a statement within a limited time." *People v. Woppner*, 14 Cal. 437. And the same principle is announced in *People v. Lee*, 14 Cal. 510. In *People v. White*, 34 Cal. 183, the bill of exceptions was not settled and allowed until nearly a year after the trial, and the attorney general suggested that the same should be disregarded; but the court refused to act upon this suggestion, and said: "Why there was so long delay does not appear; but it is settled that the statute in relation to the time within which bills of exceptions should be tendered and settled is directory, (Crim. Prac. Act, § 435,) and that this court will not inquire into the reasons which induced the judge below to sign them after the time fixed by the statute, but will presume they were sufficient." A similar statute in the state of Nevada has received the same construction. *State v. Salge*, 1 Nev. 455; *State v. Baker*, 8 Nev. 141. Many cases might be cited which hold that the power of the judge to sign a bill of exceptions ends with the term at which the trial was had; but a number of those cases hold that under very extraordinary circumstances the power to sign and seal a bill of exceptions may be exercised after the term. *Herbert v. Butler*, 14 Blatchf. 357; *Whalen v. Sheridan*, 18 Blatchf. 308, 5 Fed. Rep. 436; *U. S. v. Brettling*, 20 How. 252; *Marye v. Strouse*, 5 Fed. Rep. 494; *Coe v. Morgan*, 13 Fed. Rep. 844; *Dredge v. Forsyth*, 2 Black, 563; *Sheldon v. Wood*, 14 How. Pr. 19; *Bortle v. Mellen*, 14 Abb. Pr. 228. No doubt the better rule of practice is to have the bill of exceptions signed and filed during the term at which the judgment is rendered, or such further time as may be allowed by order for that purpose; but in a mere matter of practice, which may be affected by circumstances that cannot be foreseen, I am unwilling to lay down an unbending, inflexible rule which shall tie the hands of the circuit judges, and prevent them from completing the record in cases tried before them if not done during the term, or within some time to be fixed by order. It is a power that pertains to the records of the circuit courts, and I think its exercise may be safely left to the sound judicial discretion of the circuit judges. In their hands it is not likely to be abused, but will be used in furtherance of justice. A party has a right of appeal, to be exercised in a civil case within six months after the judgment, and in a criminal case within one year thereafter. If, during the trial, he took exceptions which were reduced to writing, or noted on the judge's minutes, and for any satisfactory cause was unable to have his bill of exceptions drawn out in form and signed during the term, there can be no doubt that the judge who presided at the trial has the power to sign the same afterwards, and it becomes a part of the record, with the same effect as if signed during the term.

The misapprehension of the learned circuit judge as to his power in this matter no doubt grew out of the decisions of this court in *Holcomb v. Teal*, 4 Or. 352, and *Morgan v. Thompson*, 13 Or. 230, 9 Pac. Rep. 564. *Holcomb v. Teal* cannot be considered as an authority on this point, after what was

said by THAYER, J., in *Ah Lep v. Gong Choy*, *supra*; and after a careful re-examination of the subject we feel constrained to say that in so far as *Morgan v. Thompson*, *supra*, is in conflict with what is here said, the same must be considered as overruled. No question is made as to the power of this court as incident to and in aid of its appellate authority to grant the relief prayed for, further than to say that it is the remedy provided by law to enforce the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Hill's Code, § 593; Mos. Mand. 19; High, Extr. Rem. §§ 199, 200. I think it proper to add that, if the bill of exceptions were only to be signed because the circumstances are extraordinary and unusual, enough is shown to entitle the petitioners to the writ. The prisoners are under sentence of death. Through some misunderstanding with their counsel, they failed to have their aid in the preparation of a bill of exceptions within the time fixed by the order of the court, and without the aid of counsel they were entirely helpless. The bill of exceptions tendered, if true, furnishes ample reason for placing this case in a condition to be heard before this court. In addition to these facts, the petitioners are imprisoned without bail, are Chinamen, and unable to speak or understand the English language to any considerable extent, and had no money with which to employ counsel after the trial ended. Nor can it be overlooked, in this connection, that the circuit judge has certified that in his opinion there was probable cause for an appeal.

It follows from what has been said that the return is insufficient. Let the writ issue requiring the circuit judge to settle, sign, and allow a bill of exceptions according to the facts as they occurred upon the trial of the petitioners before him.

(16 Or. 232)

STEFFIN v. HILL *et al.*

(Supreme Court of Oregon. April 16, 1888.)

INJUNCTION—TO MUNICIPAL BOARDS—PUBLIC IMPROVEMENTS—PLEADING.

Where, under a city charter, two modes are allowed in the improvement of the streets of the city,—by one of which the cost thereof may be paid out of the general funds of the city; and by the other, may be charged to the property adjacent to the improvements,—and the common counsel has caused a street to be improved, an injunction will not be granted, at the suit of a resident tax-payer, to restrain the city officers from paying the expenses thereof out of the general fund, without showing in his complaint that the street was proposed to be improved, and made a charge upon the property adjacent thereto.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county.

*F. B. Jolly*, for appellant. *E. B. Williams* for respondents.

THAYER, J. This appeal is from a decree of the circuit court for the county of Multnomah, recovered by the respondents against the appellant, upon demurrer to the appellant's complaint. It appears from the transcript that the appellant commenced a suit in the said circuit court against the respondents, who were alleged to have been the mayor, recorder, and councilmen of the city of Albina, to restrain them from issuing a warrant on the treasurer of said city for the sum of \$1,260, or any sum, to one O'Neil, or any one, for the improvement of a certain street of the city, known as "Russell Street," for certain reasons alleged in the complaint. The only question in the case is whether the complaint is sufficient to entitle the appellant to the relief claimed. The demurrer to the complaint was upon the ground that it did not state facts sufficient to constitute a cause of suit. The first objection to the complaint is that the respondents were sued personally, and not in their official characters. It seems to me that the suit should have been against the respondents in their official capacity; but that question is technical, and does not go to the merits of the case. The complaint is so loosely drawn that it is difficult to ascertain therefrom the real grounds upon which the respondents are sought to be en-



joined. The allegation is "that the defendants, mayor, recorder, and councilmen of said city before the commencement of this suit, claimed to have, but did not, let to O'Neil a contract for the improvement of Russell street from," etc.; "that said contract was not let by defendants in accordance with the provisions of section 18 of the charter of said city, or ordinance No. 9, as passed by the common council thereof on June 1, 1887, and approved by the mayor of said city on June 3, 1887." The pleader, after setting out section 2 of said ordinance, which is to the effect that the person, etc., to whom the contract is let will be required to enter into a stipulation that he will look for payment only to the fund to be assessed upon the property liable to pay for such improvement, and collected and paid into the city treasury for that purpose; and will not require the city, by any legal process or otherwise, to pay the same out of any other fund,—alleged that no one was authorized by the common council of said city to advertise for bids for the improvement of said Russell street. That said common council received bids contrary to notices posted up for 30 days, which set forth that said Russell street was proposed to be improved between certain points and in a certain manner. That said common council received bids and awarded the contract for grading only on said Russell street, and did so contrary to said notices, and to section 3 of said ordinance No. 9, and without giving any notice that it would advertise or let same, as said O'Neil knew; nor had it ordered that the notice required by section 2 of said ordinance No. 9, should not be published. That said common council has made no effort to levy an assessment on the property adjacent to and abutting on said Russell street for the improvement thereof. That said mayor, recorder, and common council of said city were about to, and would if not restrained by an order of the court, unlawfully, and contrary to the charter of said city, and to said ordinance No. 9, issue a warrant on the treasury of said city to O'Neil for \$1,260 for the alleged improvement of said Russell street.

The real grounds of the suit seem to be that the officers of the city were about to misapply its funds, and that the appellant, being a resident freeholder and tax-payer of the city, would be injured in consequence. It is almost impossible, however, to determine from the complaint wherein the said officers of the city were doing, or threatening to do, any act in violation of its charter or ordinances. The common council of the city have power and authority, within its corporate limits, subject to certain conditions, to grade, gravel, pave, plank, or otherwise improve and keep in repair highways, streets, and alleys. The conditions referred to, are that no property shall be assessed for the construction of such improvements for more than one-half of its last county assessed valuation; that if two-fifths of the property owners on such street, and adjacent thereto, shall oppose such improvement by remonstrance, then such improvement shall not be ordered; that no property shall be taxed more than once for such improvement; and that in case of proposed street improvement, where the improvement proposed is to be made at the expense of the property adjacent thereto, 30 days' notice of such intention shall be given by posting three notices thereof in public places of said city. Sub. 6, § 18, City Charter. It is obvious from the above provision that the common council of said city is authorized to adopt either of two modes in the improvement of streets therein. It may cause the improvement to be made, and pay the expense thereof out of the general fund, or it may cause it to be made, and charge the cost of the improvement upon the lots and blocks fronting and abutting upon the street improved; and it is evident to my mind that the conditions annexed to the power which are above set out apply only when the latter mode is adopted. I think the last one of the conditions referred to clearly indicates that view. If such is the correct construction of the said provision of the charter, then it would be necessary that the complaint, in order to state a cause of suit, should show that the said improvement of Russell street was made in accordance with said latter mode; for, if it were made under the

former mode, payment of the expense thereof out of the general fund in the city treasury would be entirely proper. That really is the only way in which it could be paid; but if the improvement in the beginning was proposed to be made at the expense of the lots and blocks fronting and abutting upon said street, and the common council had subsequently undertaken and threatened to pay it out of the general fund, there might be grounds for claiming that there was an unlawful attempt to divert the funds of the city improperly. In order, however, to make the improvement at the expense of the property adjacent thereto, 30 days' notice of such intention was required to be given by posting the three notices as before mentioned. It was necessary that the notices should express that intention, and the complaint should have shown such fact. It does show, inferentially, that notices were posted up 30 days setting forth that said Russell street was proposed to be improved from and to certain points, and in a certain manner; but contains no allegation that the intention to make such improvement at the expense of the property adjacent thereto was expressed in said notices. For anything which appears in the complaint, the common council may have intended at the outset to make the expense of the improvement a general charge upon the city, which it had the right to do under the charter. Nor does the provision of the ordinance set out in the complaint prevent that body from pursuing such a course. The common council could not curtail, by ordinance, its power, under the charter, if it were to attempt to do so. I do not think, however, that it attempted by the said provision, to do that.

The provision evidently only applies to the cases where the expense of the improvement is intended to be charged upon the adjacent property. If the common council; therefore, had let to O'Neil the contract for the improvement of Russell street, it does not follow that he was required to enter into the stipulation referred to in the said provision of the ordinance. It had the right to advertise for bids, and to enter into a contract for the improvement of the street under its power to make improvements, at the general expense of the city, which was unaffected by the city ordinance, or the conditions in the charter heretofore mentioned. Under this view of the said charter, the complaint was wholly defective, and the circuit court properly sustained the demurrer to it. If I am correct in the view which I have expressed, it follows that the charter of the city of Albina leaves it discretionary with its common council to improve its streets at the general expense of the city, which, from my observation and experience, I regard as a wise provision of the statute. In all ordinary cases of the improvement of streets in a town, the property adjacent thereto should be charged with the expense thereof; but there are instances, as has been shown, in the administration of municipal affairs of other towns where such a course is impractical and unjust. Bridges across gulches in Portland and East Portland serve as forcible illustrations of the truth of that proposition. When such an improvement is of but slight advantage to the adjacent lot-owners, but highly important to the general public, the cost thereof, or at least the greater portion of it, should be paid from the general funds of the city; and city charters should be so framed as to require such a course to be pursued. Whether the said improvement of Russell street was of the character last suggested we have no means of ascertaining; but it is not shown that the common council did not have the right to make it at the general expense of the city. The judgment appealed from will be affirmed.

(16 Or. 237)

#### UNION COUNTY v. SLOCUM.

(*Supreme Court of Oregon.* April 18, 1888.)

#### 1. REVIEW, WRIT OF—JUDGMENT BY DEFAULT BEFORE JUSTICE OF THE PEACE.

A writ of review, under the Code of this state, is the proper remedy to obtain a review of a judgment of a justice of the peace rendered against the plaintiff in the writ for the want of an answer.

## 2. COUNTIES—LIABILITIES—SERVICES RENDERED AT REQUEST OF COUNTY JUDGE.

Services performed by a party, at the request of a judge of a county, acting as a committing magistrate, in taking testimony in a case of the state against another party, do not constitute a claim against the county; and a judgment rendered against the county in justice's court upon such a claim, where it has not appeared and answered in the action, will be reversed upon writ of review.

(Syllabus by the Court.)

Appeal from circuit court, Union county.

The respondent commenced an action against the appellant in the justice's court for the precinct of Union, in said county, to recover \$11.75. The following is a copy of the body of the complaint: "(1) That on or about the 6th day of January, 1887, at the special instance and request of one O. P. Goodell, county judge of said Union county, Or., acting as a committing magistrate, rendered services for defendant amounting to the sum of \$21.75, which is more specially shown by bill of items hereto attached, marked 'Exhibit A,' and made a part of this complaint; (2) That said services were reasonably and legally worth the sum charged therefor; (3) that no part of the said sum of \$21.75 has been paid to plaintiff except the sum of \$10; (4) that there is now due and owing from said defendant to the plaintiff the sum of \$11.75. Wherefore," etc.

## "EXHIBIT A.

"Union County Dr. to F. M. Slocum:

"To take testimony in the case of the *State of Oregon v. Chas.*

*Herring*, 87 folios, 25 ct., - - - - - \$21 75

*Contra.*

By amt. paid, - - - - - \$10 10 00

To balance, - - - - - \$11 75"

Service of the summons was made upon the county clerk of said county of Union, together with a copy of the complaint certified by the justice of the peace of said precinct; but the appellant made no appearance in the action, as required by the summons, and judgment by default was taken against it for the amount claimed in the complaint. The appellant thereupon sued out of the said circuit court a writ of review to have the said judgment reviewed, alleging, in the petition therefor, that the said judgment was erroneous and void, in that, to-wit, that said complaint did not state facts sufficient to constitute a cause of action, or to give the justice jurisdiction to render the judgment against the appellant. Upon the return of the writ to the said circuit court the respondent filed a motion to dismiss the cause upon the ground that the court had no jurisdiction of it. Whereupon said circuit court dismissed the writ, and adjudged that the defendant therein (respondent herein) recover of and from the plaintiff therein (appellant herein) the costs and disbursements of the suit.

*Geo. G. Bingham and Baker, Shelton & Baker*, for appellant. *J. D. Slater*, for respondent.

THAYER, J., (after stating the facts as above.) The writ of review was properly brought. The appellant had no other remedy by which the judgment of the justice could be reviewed, and its dismissal by the circuit court was error. The judgment of the justice was erroneous. The facts set forth in the complaint did not constitute any cause of action. The services of the respondent, alleged therein to have been rendered, created no claim against the county of Union; and, if it had, the respondent could not have maintained an action thereon without presenting his account therefor to the county court of said county for audit and allowance. A judgment could not properly be rendered upon such complaint in favor of a plaintiff. The judgment appealed

from will be reversed, and the cause remanded to the said circuit court, with directions to that court to reverse the judgment of the justice, and to remand the cause to the justice's court, with directions to dismiss the action.

(16 Or. 239)

**TUCKER v. CONSTABLE et al.**

(*Supreme Court of Oregon. April 18, 1888.*)

**APPEAL—PRACTICE—FAILURE OF APPELLANT TO APPEAR AND FILE BRIEF.**

In a civil case, if the appellant fail to appear in this court, and files no brief, the judgment will be affirmed without any examination of the record, or the assignment of errors. This court cannot perform the duty of counsel.

(*Syllabus by the Court.*)

Appeal from circuit court, Union county.

*Baker, Shelton & Baker* and *Geo. G. Bingham*, for respondent. *T. C. Hyde* and *R. Eakin & Bros.*, for appellants.

**STRAHAN, J.** The notice of appeal contains 19 assignments of error; but counsel for appellants have failed to appear or file a brief in support of same. In such case the better practice is to affirm the judgment without an examination of the alleged errors, and this judgment will be affirmed for that reason. *Kelly v. McCormick*, 28 N. Y. 318; *Edmondson v. Alameda Co.*, 24 Cal. 349; *Hutton v. Reed*, 25 Cal. 478; *Hinkenbotham v. Monroe*, 28 Cal. 489; *Brewster v. Johnson*, 51 Cal. 222. In the last case cited the court say: "We decline to perform the duty of counsel by examining the record to ascertain if, possibly, error may not have intervened in the court below." Notwithstanding this rule of practice in this particular case, we have examined the record, and failed to find any error therein. Let the judgment be affirmed.

(3 Wash. T. 421)

**UNITED STATES v. KELLEY et al.**

(*Supreme Court of Washington Territory. January 25, 1888.*)

**TROVER AND CONVERSION—WHAT CONSTITUTES CONVERSION—ACCESSION.**

In an action for the conversion of lumber, it appeared that certain parties had cut and removed from public lands of plaintiff saw-logs, which were afterwards sold to defendants, and by them manufactured into lumber, without any knowledge on their part of plaintiff's title thereto, or of the trespass by their vendors in procuring the logs; that the value of the lumber was more than double the value of the logs. *Held*, that plaintiff could not recover.

Appeal from district court, Tacoma county.

Action by the United States against George O. Kelley and others for the value of lumber manufactured by Smith & Hatch from saw-logs cut by Shetler & Gimel on the public lands of plaintiff. The court directed the jury to find for defendants. Plaintiff appeals.

**TURNER, J.** The appellant brought suit in the court below for the conversion of a quantity of lumber, valued at \$18,225. We are all agreed that this is the true construction of the complaint. In order to sustain this complaint, it offered proof to the effect that certain persons had cut and removed from lands of the United States a quantity of saw-logs, and that said saw-logs were afterwards sold to the appellees, and were by them manufactured into lumber at their saw-mill. It was admitted at the trial that the appellees bought the saw-logs, and manufactured them into lumber, without knowledge of the title thereto of the United States, or of the trespass committed by the vendors of the appellees in their procurement.

Upon these facts, the direction of the court below to the jury to find for the appellees was clearly correct. The appellant had sued for the conversion of property that did not belong to it. It owned the logs which came into pos-

session of the appellees. It did not own the lumber into which they were cut. The latter, under the doctrine of accession, becomes the property of the appellees. This doctrine is stated by a well-known writer on the law of personal property thus: "Where no element of willfulness or intentional wrong appears on the part of him who applies another's materials, and the identity of those materials has finally disappeared in the new product, or where it can be shown that his own labor and materials contributed more to the value of the present chattel than those materials which he took without intentional wrong, he should keep the chattels as his own, making, however, due compensation to the owner of the materials for what he took." 2 Schouler Pers. Prop. § 37. The doctrine heretofore stated is abundantly sustained by adjudged cases, and by standard text writers. 2 Bl. Comm. 404; 1 Amer. & Eng. Cyclop. Law, tit. "Accession;" *Silsbury v. McCoon*, 3 N. Y. 379, 53 Amer. Dec. 307; *Wetherbee v. Green*, 22 Mich. 311, 7 Amer. Rep. 653; *Cross v. Marston*, 17 Vt. 533, 44 Amer. Dec. 353; *Lampton's Ex'rs v. Preston's Ex'rs*, 19 Amer. Dec. 111; *Peirce v. Goddard*, 22 Pick. 559, 33 Amer. Dec. 764. The title to the lumber, for the conversion of which the suit was brought in this case, was, in my opinion, fully vested upon the appellees upon both of the grounds stated by Schouler: *First*, the identity of the logs had disappeared in the new product; *second*, the labor bestowed upon the logs by the appellees, from which the new product resulted, contributed more to the value of the product than the logs did. The appellant, in his complaint, alleges the value of the logs to have been six dollars per thousand feet, board measure, at the mill. It alleges the value of the lumber to have been fifteen dollars per thousand, board measure, at the mill. As a matter of fact, the disparity in value was much greater. There is nothing in the case of *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398, which militates against the application of the doctrine of accession to cases such as this one. The only thing determined in that case was the proper rule of damages for the conversion of personal property, which confessedly belonged to the United States. I think the judgment of the court below must be affirmed.

JONES, C. J. The appellant commenced this action to recover the sum of \$18,225, the value of certain lumber manufactured by Smith & Hatch from certain saw-logs cut by Shettlero & Gimel, on lot 2 of section 24, township 20 N., range 1 W., in Pierce county, Wash. T. It is alleged that said lot was, at the time of said cutting, public lands of the United States; and that Smith & Hatch, who were operating a saw-mill at Tacoma, bought said saw-logs, knowing the same to have been cut on public lands. The value of the standing trees, of the saw-logs on the ground where cut, of said logs at the mill of Smith & Hatch, and of the manufactured lumber is alleged in detail. Defendants joined issue, denying knowledge or information as to cutting and removal of the logs in question, and denying the receipt by Smith & Hatch with knowledge, or at all, and denying value alleged. Plaintiff introduced evidence showing that in April, 1885, Shettlero & Gimel cut upon said lot 2, and removed therefrom, and sold to Smith & Hatch at Tacoma, from 70,000 to 121,500 feet of saw-logs; that Smith & Hatch admitted having bought about 90,000 feet of saw-logs, cut on said lot 2, and having manufactured the same into lumber at their mill. Evidence was also introduced to show the value of the logs and lumber as alleged. The evidence also showed that in March, 1885, before the cutting of said timber, Shettlero filed his application to purchase said lot 2 as timber land, under the act of congress of June 3, 1878; that on May 23, 1885, after said cutting, he made proof according to law, paid for said land, received his receipt therefor from the land-office at Olympia, and in 1887 received patent from the United States for said land, said patent being dated April 28, 1887. Plaintiff rested, and defendants moved for judgment of nonsuit, which was granted. Motion for new trial was made and denied, and judgment entered

dismissing the cause. Exceptions were duly taken and noted to the various rulings of the court, and appeal taken by the United States.

It seems quite manifest to us that the case was tried by both parties with sole reference to the question as to whether the plaintiff was entitled to recover the value of the lumber manufactured from the logs, although the value of the standing trees, and of the logs into which they were cut and sold, is alleged and proved, as well as the value of the lumber. Indeed, appellant, in his brief, claims the suit to be for the manufactured lumber, and it is not here intimated, and, quite clearly, was not in the trial court, that any other than a judgment for the value of the manufactured lumber was the relief to which plaintiff is entitled. It is not disputed but that in March, 1885, one Shettlero filed his application at the proper local land-office for the purchase of the timber land from which the logs were in fact cut during the next month and sold to Smith & Hatch, and that Shettlero did not make proof or pay for the land until May 23, 1885. This action was commenced in February, 1885, and the patent for the land issued to Shettlero in April, 1887. There can be no right in an applicant to purchase timber land under the act of congress to enter thereon, and cut and remove timber from the land for the purpose of sale as logs, or the manufacture thereof into lumber for commercial purposes, prior to his proof and payment therefor. No entry of any kind, and no cutting of timber for any purpose, is necessary to perfecting title, or permissible for any purpose whatever. The act of June 15, 1880, (Supp. Rev. St. c. 227,) at least negatively disallows such a claim of any right to cut the timber prior to proof and payment of the purchase price. The public land, so far as the sale of timber land is concerned, might be entirely denuded of all valuable timber thereon without payment therefor, if at once upon filing the application for entry the applicant might proceed to cut, remove, and sell the trees growing thereon before paying for the land. The fact that agents of the government knew that such unlawful acts were being committed, and did not interfere to prevent it, would not make such trespass lawful, or estop the government from claiming its own. The subsequent issue of a patent to the applicant could not change the title to the logs severed from the soil by his own act, while the government had the title, and payment had not been made. In this case it stands confessed that these logs were cut, removed, and sold, for the purpose of being manufactured into lumber, before payment for the land; and under such circumstances the logs were the absolute property of the government.

In this case, the appellees were innocent purchasers of the logs cut from the land; they manufactured the logs into lumber without notice, and the action is brought to recover the value of the lumber. It is conceded, in the argument, that, if such claim cannot be maintained, the nonsuit in the trial court must be affirmed. It appears, also, that the trial below took place with reference to that question, and the nonsuit was granted with that sole question in view. The supreme court of the United States determined that where the purchaser is without notice of wrong on the part of his vendor, who is a willful trespasser, the measure of damages is the value of the property at the time of the purchase. *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398. There is no evidence from which the value at that time can be ascertained; and if there were, under the circumstances of the trial below, as stated, and the point not being raised here that judgment might have been for such sum as the property was worth at the time and place of the purchase, or even for nominal damages, the judgment appealed from is correct, as a judgment of nonsuit merely, as it is admitted to be. The plaintiff might perhaps have claimed a judgment for nominal damages against some of the defendants, but none of the parties here make any such claim or raise the point.

I am satisfied to pass by the question as to whether in a case where a willful trespasser upon the public lands cuts and removes timber therefrom, and

manufactures it into lumber, is or is not liable for the value of the lumber, if it can be identified as the same manufactured from the timber so cut. That question is not necessarily involved here, in my judgment.

Let judgment be entered for a nonsuit without prejudice, with costs of both courts against appellant.

LANGFORD, J., (*concurring*.) I concur in the conclusions of the other members of the court as to the conclusions, and that the trial and verdict, if had, all would have been for lumber which those defendants did not convert, and not for logs. But there are other reasons for arriving at the conclusion, which I will mention. The complaint joins four defendants. It alleges facts against two of them which would entitle the plaintiff to recover trespass or trover,—trespass for entering upon the plaintiff's land, and cutting timber therefrom, or trover for converting the logs after they were cut, by making a sale thereof; all of which was willful wrong. These two defendants were never served or impleaded. The action, by the title, against the four, proceeded against two of them, who were served and impleaded; and the evidence shows that the latter two defendants were innocent purchasers from the first two willful trespassers, and that the said innocent purchasers converted the logs by sawing them into lumber. The complaint alleges that the four defendants jointly committed the trespass, the first conversion and the second conversion of the logs, and prays judgment for all of said wrongs as joint wrongs of the whole four defendants. Now, the two defendants against whom the verdict could have been rendered, if any were rendered, did not participate in the willful trespass or conversion. This willful trespass and conversion was complete and finished before the two defendants, who were innocent purchasers, had the logs, or converted them. A judgment upon the complaint would be conclusive that the innocent purchasers joined in the wrongful trespass of the other two, when in truth they did not so join, nor did they participate therein in any way. Such a judgment being against joint wrong-doers, the innocent purchasers would be estopped thereby from recovering from their vendors for the failure of title, upon account of the rule that joint wrong-doers cannot enforce contribution. Such a judgment ought to have been entered upon this complaint. If the plaintiff wished to recover from these two innocent purchasers, he should have amended his complaint, so that it would not charge them as joint wrong-doers in the first trespass and conversion; in fact, he must have dismissed the complaint as to the willful trespassers, so that the action would have been against the innocent purchasers only for what they did. It could have charged those served with the entire value of the logs which they entirely converted, after the complete conversion had been made by the other two defendants. The two different conversions were two separate wrongs, each committed by different parties, and no joint judgment against all could be entered, nor a judgment against either party, as of a joint wrong of the four. The first willful trespass and conversion was committed by the defendants not served or tried. They cut the trees and sold the logs. Had the action been against them, and had it been for trespass, the measure of damages would have been the diminished value of the land, with, perhaps, exemplary damages. If they proved that the value of the land had not been diminished, by proving that they paid the highest price for the land that plaintiff could have received if no trespass had been committed, then, perhaps, nominal damages only would have been recoverable. Perhaps the rule that a pleading must be construed most unfavorably to the pleader would have permitted those defendants to claim that the action was trespass, and claim this defense. However this may be, it is not in this case, and is not decided. Could the United States waive the trespass, and sue in trover? Could it recover the price of the land, its value before the trespass, and afterwards elect to pursue the logs which were the fruit of that trespass.

pass, and, by changing the form of action, recover satisfaction for the trespass, and yet recover the result thereof? I have much doubt as to this right upon the part of the government, and the United States district court of Oregon and the district court in this case were of opinion that the purchase of the land by the trespassers at its highest value before the trespass, and the United States accepting that value, operates as a complete release for the wrong. I will not now decide that those courts were wrong in this.

(3 Wash. A. 365)

THOMAS v. HILTON.

(*Supreme Court of Washington Territory. January 6, 1883.*)

CONSTITUTIONAL LAW—JURY TRIAL—NUMBER OF JURORS.

Code Wash. T. 1881, c. 143, § 2033, providing that a creditor may file written specifications of fraud on the part of an insolvent debtor, in opposition to his discharge under the insolvency act, and after the answer of the debtor to the charge of fraud has been received, a jury of not less than six shall be summoned to try the issue, is, so far as it provides for a less number than the constitutional jury of 12, unconstitutional and void. LANGFORD, J., dissenting.

Error to district court, Snohomish county.

Hiram Thomas filed his petition, under the insolvency act, to be discharged as an insolvent debtor. R. D. Hilton, a creditor, opposed his discharge, on the ground of fraud. Judgment for defendant, and plaintiff brings error.

ALLYN, J. Plaintiff in error filed his petition as an insolvent debtor, under chapter 143 of the Code of 1881, in the district court of Snohomish county. Notice was given, and the defendant in error, as a creditor, appeared and filed his specifications in opposition to the debtor's discharge, on the ground of fraud. The court, on motion of plaintiff in error, under section 2033, summoned a jury of six men to decide the charge of fraud as affecting the debtor's discharge. Under the direction of the court, and on motion of defendant in error, this jury returned a verdict that defendant was not guilty of fraud. Several minor questions are made as to the sufficiency of the notice, effect of an appearance, etc.; but these are in nowise controlling, and will not be considered. The important and decisive question is, could the court disregard (as it did) the verdict this jury returned, and refuse to be controlled by it? It is argued that this verdict, under section 2033, is final and conclusive until set aside or reversed; and, on the other hand, that it is merely special or advisory, and in no way excludes the court from making a different finding if the facts should demand it; further, that large property rights being involved, the question could not be submitted to or determined by a jury of six men.

We entirely agree with the principles asserted, that a jury in such a case must be composed of twelve men, and that a verdict rendered by six men, or any less number than twelve, is of no effect whatever, (see *Lamb v. Lane*, 4 Ohio St. 177; *Cruger v. Railroad Co.*, 12 N. Y. 190; *Cody v. State*, 8 How. (Miss.) 27;) and other citations made by defendant in error; and for this reason, that section 2033 provides for submission of this question to a jury of less than twelve, it is unconstitutional. It follows, therefore, that this verdict, thus rendered, was wholly void; that the courts below very properly refused to consider it, and made a finding entirely independent of such verdict. The decision below is affirmed.

TURNER, J., concurs.

LANGFORD, J., (*dissenting*.) I cannot agree with my brothers that the section of the statute referred to is void. The statute for the trial of civil actions by the district court requires twelve jurors. The constitution of the United States requires twelve jurors. Said section of the insolvency act says



the trial should be by jury, and not less than six. The section does not, in terms, provide that the trial shall be by six jurors. By construing the section to mean that the trial may be by six jurors, unless twelve be demanded, the section may stand with the constitution. When a statute is capable of two different constructions, one of which is consistent with the constitution and the other not, that consistent with the constitution should be adopted. Construing that said section as meaning six jurors unless twelve are demanded, it is constitutional. I think that construction should be given it, in order that the will of the legislature as to jury trial and the constitution of the United States shall both stand together, and neither be defeated. The construction adopted by my brothers defeats the jury trial intended by the legislature, when the other construction does not; and I think that the construction which carries out the constitutional will of the legislature should be adopted.

(3 Wash. T. 407)

FOUNTAIN v. LECKIE *et al.*

(Supreme Court of Washington Territory. January 4, 1888.)

Appeal from district court.

JONES, C. J. The defendants in error move to affirm the judgment in the district court, "for the reason that the plaintiff in error has failed and neglected to file and serve a brief herein as provided by rule eight of this court." The plaintiff does not appear. Let an order be made affirming the judgment below, with costs in this court.

ALLYN, TURNER, and LANGFORD, JJ., concur.

(3 Wash. T. 344)

CHARLESON *et al.* v. MCGRAW.

(Supreme Court of Washington Territory. January 13, 1888.)

PARTNERSHIP—LEVY OF EXECUTION ON FIRM ASSETS—LIEN OF.

Execution creditors of a partnership are subrogated to the lien which a partner has on all the assets of the firm to pay firm debts, and such creditor's lien takes precedence of any exemption rights claimed by the partners.<sup>1</sup>

Appeal from district court, Seattle county.

*Assumpsit* by John H. McGraw against Donald Charleson and Alexander Charleson. Plaintiff obtained judgment, and execution was issued. Defendants claimed that the property levied on was exempt from execution; and, the lower court refusing to sustain this position, the defendants appeal.

*Elwood Evans, C. H. Hanaford, and H. F. Garretson*, for appellants.  
*James M. Ashton*, for appellee.

LANGFORD, J. The transcript in this case shows that the appellants were copartners, and that a levy of execution was made upon their partnership property. It is admitted that the execution creditors were creditors of the partners. The appellants claim the property so levied upon as exempt from the execution. The legality of this claim is the only question before us. Each partner, by force of the relation between them, has a lien upon all the assets of the firm to pay the balance due him upon settlement, and to pay firm debts. As against this lien no exemption can prevail. The firm creditors may take advantage of this lien, and by levy are subrogated in law to the partner's right of lien, and hence an individual right of one or all the partners cannot be set up as against the levy. The lien on these assets takes pre-

<sup>1</sup>Respecting the doctrine of subrogation and its application, see *Dowdy v. Blake*, (Ark.) 6 S. W. Rep. 897, and note.

cedence of any several or joint right of the persons composing the partnership. Though property may be exempt as against debts simply as such, it cannot be exempt against debts to which is added this lien. If a receiver in equity should take possession of partnership property, no partner, nor all of them, have any right to it, but have only a prospective right to the distribution. The contract of partnership imports this lien, and public policy and the law maintains it. The partners neither severally nor jointly can assert any right against the lien after levy is made, because they have no right of any kind that can prevail against it. When the property levied upon is joint, but not copartnership, the case is quite different; for here no lien exists to cut off the right of the individual partners. Each of the owners, having an interest clear of any lien, has a several dominion over his undivided part, and by the mere will of the parties the property may, without let or hinderance, be divided. If a levy be made by a creditor of one tenant in common, only his undivided share alone can be sold, and the purchaser becomes co-tenant in the place of the debtor whose interest has been levied upon and sold. The common owner, not party to the case upon which the execution issues, is not affected by such sale. The owner in common sued might claim that his interest was exempt from sale, because his interest, though undivided, is his individual property; and, because joined physically with the property of another, is not less his individual property. So, if two tenants in common owe a joint but not partnership debt, and by virtue of this debt a levy is made upon their property so held in common, each might hold his interest therein as exempt. We do not decide that he can, for that is not this case; but yet a case that holds that he can is not authority as to what the decision should be in this case. We are not prepared to say that tenants in common, as against a joint execution levied upon their common property, may not, in a proper case, join in their claim to exemption; as if two persons held and used household furniture together, or the like. However that may be, we are satisfied that neither one nor all the members of a firm can deprive a firm creditor of his levy or partnership assets. Copartners are tenants in common as to assets, and added to the right as such tenants in common is the partnership right of lien, which is a unity of right inseverable. This partnership right of lien attaches to the entire partnership assets, and holds them for sale for firm debts; and, while existing, supersedes all right of each and every partner, whether joint or several, of each and all the partners, merged in this lien, which superseded them. If this lien be removed, then the partners lose that character, and become tenants in common only. This lien exists as long as the property is partnership property; and a levy of a firm creditor thereon is a levy to enforce the lien. Let the judgment be affirmed.

TURNER and ALLYN, JJ., concur.

(3 Wash. T. 396)

*TERRITORY v. HUI LEE et al.*

(*Supreme Court of Washington Territory. January 25, 1888.*)

CRIMINAL LAW—APPEAL AND ERROR—RIGHT OF STATE TO APPEAL—CODE WASH. T. § 1140.

Code Wash. T. § 1140, providing that "every final judgment, order, or decision of a district court in a criminal prosecution may be re-examined upon a writ of error in the same court for error in fact within one year, and in the supreme court for error in law within two years; the writ may be sued out by the defendant for all errors, and by the prosecuting attorney when the error complained of is in quashing the indictment, or where a judgment is arrested by reason of the facts as stated in the indictment, not constituting a crime or misdemeanor,"—does not give the territory a review of a criminal trial when the jury, under instructions, return a verdict of not guilty because of the insufficiency of the indictment.

Error to district court.

Code Wash. T. § 1140, under which this writ of error is brought, reads as follows: "Every final judgment, order, or decision of a district court in a criminal prosecution may be re-examined upon a writ of error in the same court for error in fact within one year, and in the supreme court for error in law within two years. The writ may be sued out by the defendant for all errors, and by the prosecuting attorney when the error complained of is in quashing the indictment, or when a judgment is arrested by reason of the facts, as stated in the indictment, not constituting a crime or misdemeanor."

*H. J. Snively*, for plaintiff in error. *Reavis, Mires & Graves*, for defendants in error.

JONES, C. J. The defendants were indicted for keeping a house in which persons inhaled opium. A jury was called to try the case; and, after being duly impaneled and sworn, an objection was made by defendants to the admission of any evidence because of the insufficiency of the indictment. The objection was sustained, and the jury, under instruction, found and returned a verdict of not guilty, and judgment was rendered thereon. The territory excepted, and bring the case here by writ of error. It is claimed that section 1140 of the Code allows the territory a review of this trial. It is clearly not within the statute, and the writ must be dismissed.

ALLYN and LANGFORD, JJ., concur.

(3 Wash. T. 392)

FRAZIER v. VENON.

SAME v. ANDERSON.

(*Supreme Court of Washington Territory. January 25, 1888.*)

APPEAL—DISMISSAL—FAILURE TO ASSIGN ERROR.

In an action at law, where appellant has failed to file or serve an assignment of errors, and where there is nothing in the complaint or answer to make the case one of equitable cognizance, an appeal will be dismissed.

Appeal from district court.

Action by Catharine A. Frazier against L. P. Venon, guardian, etc., and action by the same plaintiff against W. E. Anderson. The plaintiff appeals in each case.

TURNER, J. Appellees move to dismiss the appeal in the above cases because appellant has failed to file or serve an assignment of errors. We are of opinion that the motion must prevail. There is nothing in the complaint or answer to make the case one of equitable cognizance. The orders and judgments of the district court, in action at law, cannot be reviewed in this court without an assignment of errors. *Brown v. Hazard*, 2 Wash. T. 464, 8 Pac. Rep. 494. Let the appeal be dismissed.

JONES, C. J., and ALLYN and LANGFORD, JJ., concur.

(3 Wash. T. 393)

YAKIMA COUNTY v. TULLAR.

(*Supreme Court of Washington Territory. January 26, 1888.*)

HIGHWAYS—ESTABLISHMENT—INJURY TO TIMBER-CULTURE CLAIM.

Plaintiff entered a timber-culture claim upon which were three springs, and also entered, as a homestead, 160 adjoining acres; and the county commissioners, before he had acquired title, but while he was lawfully in possession, so located a road that the springs, which furnished water for plaintiff's dwelling and other purposes, were in the middle of the road. *Held*, the plaintiff is entitled to damages for such injury.

Appeal from district court.

Judgment was rendered for J. M. Tullar for damages for the location by defendant, Yakima county, of a road through his timber-culture claim, and defendant appeals.

*H. J. Snively*, for appellant. *Reavis, Mires & Graves*, for appellee.

ALLYN, J. Appellee, in 1885, entered a timber-culture claim on the N. W.  $\frac{1}{4}$  of section 30, township 9 N., range 26 E., in Yakima county, and thereafter cultivated said land under the timber-culture law. There were upon said claim three valuable springs. In the same year, appellee entered 160 acres adjoining as a homestead, and lives thereon. The water for appellee's dwelling and other purposes is derived from the springs above and upon said timber-culture entry. The following year, the county commissioners of said county ordered a road located directly through said timber-culture claim, and same was so located and opened as to place the said three springs in the middle of this road. Upon the report of appraisers appointed by the commissioners, appellee was allowed \$100 as damages, from which he appealed to the district court. In the district court the question was submitted to a jury, and appellant herein moved the court to find a verdict for the defendant, which was refused; and, instead, the court instructed the jury to "consider the value of plaintiff's [appellee's] timber culture as a timber culture, and not as land to which he had title, and determine the amount of damage to such timber culture." The jury assessed such damage at \$450. There was ample evidence to sustain the amount of the verdict.

The question, as presented, is, can the appellee recover anything as damages to this timber culture, to which he has not as yet acquired title? That appellee had only the right of possession, with a right of later acquiring title; that he could not have dedicated this piece of land to the public for a road; and that the right of way over public lands is granted to the public,—may all be conceded; and yet it by no means follows that a *bona fide* settler or entryman, because the legal title has not yet vested in him, can thus be deprived of valuable rights, as would be the case here. The right of way over "public lands" that is granted to the public for roads, etc., doubtless contemplates strictly public lands, such as are open to entry and settlement, and not those in which the rights of the public have passed, and which have become subject to some individual right of settler, or the like, as in this case. Under the laws of the United States, appellee was in possession, and such possession was good as against the world so long as he complied with the laws. From all that appears, he had possession in this way, and to say that valuable features of the land as springs, and the land itself, can thus be taken without compensation to the honest settler, for the use of the public, is to say a self-evident wrong. Any such theory in this case would ignore the maxim that "for every wrong there is a remedy." We do not believe the sections of the Code relied on by appellee contemplate such a possibility, or carry this intent in a case like this. The public have chosen to exercise their right of locating this road. They have the benefit. Let them pay the damage, which is fully proved. The judgment of the court below is affirmed.

LANGFORD, J., concurs. JONES, C. J., concurs in the result.

(3 Wash. T. 477)

MARSH v. WADE.

(Supreme Court of Washington Territory. January 30, 1888.)

APPEAL—SETTLING STATEMENT OF FACTS—WAIVER OF OBJECTIONS.

Act Wash. T. 1888, relative to the removal of causes to the supreme court, provides that the facts may be transmitted, with the transcript of the cause, by giving the required notice, and that the parties shall appear before the judge before whom

the cause was tried, who shall certify the settled facts. *Held*, that a party, appearing without objecting that the place of hearing was outside the district of the judge, and the district where the action was pending, waives such objection.

Appeal from district court, First district.

Motion to strike out the statement of facts. Act Wash. T. 1883, relative to the removal of causes to the supreme court, provides that the party removing a cause from the district to the supreme court may have the facts transmitted, with the transcript of the cause, by giving notice to the opposite party, and that the parties shall appear before the judge before whom the cause was tried, who shall certify the settled facts.

PER CURIAM. Appellee moved to strike out the statement of facts herein, upon the ground that the same was settled and signed at Olympia, outside the district of the judge who tried the same, and of the district where the action was pending. The statement referred to is that provided for in section 3 in the act relating to the removal of cases to this court, passed in 1883. Such statement is not jurisdictional; and the parties having appeared before the judge at Olympia, and there being heard without the objection being made, such objection, even if valid, was waived, and cannot now be raised. We do not determine the question as to the validity of the objection if taken in time, as it is not before us. Motion denied.

(3 Wash. T. 388)

#### SILSBY v. FROST.

(Supreme Court of Washington Territory. January 21, 1888.)

#### 1. FRAUDS, STATUTE OF—PROMISE TO ANSWER FOR DEBT OF ANOTHER—AGREEMENT BY PURCHASER TO PAY PRICE TO SELLER'S CREDITOR.

Defendant, with plaintiff's consent, purchased logs of the latter's debtor, agreeing orally that when he should sell the same he was to pay plaintiff the amount of his claim against said debtor. *Held*, that this is not a promise to answer for the debt of another, within the statute of frauds; but defendant having received a valuable consideration for his promise, makes the debt his own.<sup>1</sup>

#### 2. SAME—PROMISE TO ANSWER FOR DEBT OF ANOTHER—FINDINGS OF JURY.

The evidence in a case tended to show that defendant, with plaintiff's consent, purchased logs of the latter's debtor, under an oral agreement that when he should sell the property he was to pay plaintiff the amount of his claim against said debtor. The jury found specially that the sale to defendant was absolute; that, by assuming the debt, defendant implied an agreement that the debtor should be released from plaintiff; and that defendant agreed to pay absolutely when the logs were sold. *Held*, that these findings show a contract which will support a general verdict against defendant for amount of plaintiff's claim.

#### 3. APPEAL—REVIEW—DISCRETION OF TRIAL COURT—ALLOWANCE OF AMENDMENT.

A judgment on the merits of a cause will not be reversed on the ground that the court abused its discretion in allowing an amendment to a complaint without imposing terms, where it appears that defendant had an opportunity to meet and defend against such amended complaint.

Appeal from district court.

<sup>1</sup> When the main purpose of a promisor is, not to answer for another, but to subserve some pecuniary and business purpose of his own, involving either benefit to himself or damage to the other contracting party, his promise is not within the statute of frauds, although, in form, it is to pay the debt of another, and although the fulfillment of his promise may incidentally have the effect of extinguishing that liability. *Crawford v. Edison*, (Ohio,) 18 N. E. Rep. 80; *Wilson v. Smith*, (Iowa,) 35 N. W. Rep. 506; *Green v. Burton*, (Vt.) 10 Atl. Rep. 575; *Railroad Co. v. Houston*, (Tenn.) 2 S. W. Rep. 36, and note. An original undertaking to pay for goods to be delivered or services to be performed for another is not within the statute. *Maurin v. Fogelberg*, (Minn.) 82 N. W. Rep. 853, and note. A promise by an employer to pay for medical services rendered his employees, out of their wages, is not within the statute of frauds, being merely a promise to pay one's own debt in a particular way. *Woodruff v. Scaife*, (Ala.) 3 South. Rep. 811. But the mere fact that an advantage may result incidentally to one who orally promises to pay the debt of another is not sufficient to take it out of the statute of frauds. The resulting advantage must be the consideration upon which the promise was made. *Clapp v. Webb*, (Wis.) 9 N. W. Rep. 796.

*Assumpsit* by Robert Frost against J. A. Silsby. Judgment for plaintiff, and defendant appeals.

*Chas. H. Ayer*, for appellant. *J. W. Robinson*, for appellee.

JONES, C. J. The contention in this case grows out of these facts: Plaintiff alleges in his complaint that on September 1, 1885, one Vincent was indebted to him in the sum of \$59.05, for goods sold to and used by him in the logging business, in Thurston county, in securing a certain boom of logs then in the water ready to tow, which boom of logs was then of value sufficient to pay said and all debts incurred by Vincent in securing the same; that appellant (defendant below) was a creditor at that time of said Vincent, and on that day bought the boom of logs of him, and, in consideration of the sale thereof to him, he agreed to pay plaintiff (appellee) the said sum so owing to him by Vincent when he (appellant) sold the said logs; that appellant sold the logs in the spring of 1886, and, though requested, refuses to pay the said claim, for which amount judgment is asked. To this complaint the defendant in proper form made answer, denying all the material allegations thereof. The cause was tried in the district court to a jury, who returned a general verdict for plaintiff for the sum claimed and interest; and also, in response to interrogatories, made several special findings. The appellant here excepts (1) to the order of the district court allowing the filing of an amended complaint without imposing terms; (2) to the order overruling defendant's motion in arrest of judgment upon the ground that the complaint did not support the verdict; (3) that the fourth and fifth instructions given at plaintiff's request, and also one given by the court without request, were erroneous; (4) the special findings do not show a contract that will support the verdict, but do show the reverse, and control the general verdict, and therefore defendant's motion for judgment upon the special findings should have been granted.

The trial court had the power to allow an amendment to the complaint, and the imposition of terms was a discretionary matter. There is nothing here to show an abuse of discretion. The plaintiff in error does not here insist on this point, although it is made on the brief filed, and not in fact waived. It would be only an abuse of discretion of moment that would warrant the reversal of judgment on the merits; and it is difficult to imagine how such an abuse could occur in allowing an amendment to a complaint when the defendant had ample opportunity to meet and defend against it. No such case is pretended here. The instructions complained of are to the effect and purpose that if the jury found, from the evidence, that the defendant, in his contract of purchase of the logs in question from Vincent, undertook and agreed, in consideration thereof, to pay the plaintiff the amount of his claim against Vincent absolutely, and that, under such contract, the defendant received and sold said logs as his own, and that plaintiff consented to such agreement and promise, then the contract was not within the statute of frauds, but was a contract by which defendant made the debt of Vincent to plaintiff his own debt, and plaintiff would be entitled to a verdict.

The jury returned a general verdict for plaintiff in these words: "We, the jury, find for the plaintiff in the sum of \$59.05, and interest thereon from the 15th day of January, 1885." Among the special findings are these: "(4) Was the sale of logs to Silsby an absolute sale, or was it intended to be in the nature of a pledge to secure an indebtedness from Vincent to Silsby? *Answer*. Absolute." "(7) Did Silsby ever agree that Vincent might be discharged from his debt to Frost? *A*. By assuming the debt, Silsby implied an agreement that Vincent should be released from Frost." "(10) Did Silsby agree to pay Frost's bill against Vincent out of the proceeds of the logs, after paying the bills for labor and stumpage and his own bill? *A*. He agreed to pay when the logs were sold, without reference to any other claims." As to special findings, it is true they control a general verdict when they are inconsistent with

it, (Code, § 243;) but these findings are all consistent with the general verdict. The seventh special finding is an expression of the opinion of the jury upon a legal proposition, and is of no value in the form of the words used, and should not be allowed to control the facts found by the general verdict, and be held as vitiating it. All the other special findings harmonize with and support the verdict. We are satisfied that the law was correctly given to the jury.

Where a consideration of advantage or harm enters into the new contract as between the parties, and forms, in whole or in part, the consideration for the new agreement, it becomes new and valid agreement, upon sufficient consideration, and is not collateral to the contract which existed between the original debtor and creditor, so as to come within the terms or intent of the statute of frauds, which provides that an agreement to answer for the debt of another must be in writing. Here the defendant, as part of the terms of purchase of logs from Vincent agreed with Vincent and plaintiff what he would pay the plaintiff the amount of Vincent's debt to him when he (defendant) sold the logs. Plaintiff assented and agreed to this arrangement, and thereupon Vincent sold and delivered the logs to defendant, who received and sold them. To allow defendant now to escape the liability to pay Frost's claim on the plea that the contract was not in writing, and that it was one by which he was to answer for Vincent's debt, would be a perversion of the statute, which was made to prevent frauds and perjuries, and not to promote them. By the contract, for a valuable consideration received by him to his advantage from Vincent, he agrees to pay Frost \$59.05 that Vincent owes to him. This debt but served the purpose of fixing the amount defendant is to pay Frost, and by the agreement defendant makes it his own debt. It is no longer the debt of another.

It seems by the record that the jury made a mistake as to the date from which interest should be computed. The form of the verdict is bad, in that it does not find a gross sum, instead of a certain sum, and interest thereon from a certain date. The interest should have been computed, and added to the specific sum found, and the sum thus ascertained inserted in the verdict. In this case, however, the defendant suffered no injury from the error, as it appears from the record that in the judgment from which he appeals no interest whatever is included.

Let the judgment of the court below be affirmed, with costs.

LANGFORD and TURNER, JJ., concur.

(3 Wash. T. 498)

DILLON, Sheriff, v. SPOKANE COUNTY.

(Supreme Court of Washington Territory. January 31, 1883.)

1. PLEADING—ANSWER—DENIAL OF EXACT SUM CLAIMED BY PLAINTIFF.

In an action against a sheriff for default in paying over certain taxes, the complaint averred that defendant collected delinquent taxes in each year from 1880 to 1883, naming a specific sum of money. The answer denied that defendant collected exactly the sum alleged in the complaint. *Held*, that such an answer was virtually a confession of plaintiff's cause of action.

2. SHERIFF AND CONSTABLES—FAILURE TO PAY OVER TAXES COLLECTED—SETTLEMENT WITH COMMISSIONERS—ESTOPPEL.

In an action against a sheriff for default in accounting for certain taxes collected by him, a settlement for such taxes had with the board of county commissioners cannot be pleaded by defendant in estoppel, but is only matter of evidence on the trial.

Error to district court, Spokane county.

Action by Spokane county against T. P. Dillon, as sheriff and tax collector of such county, for his default in paying over certain taxes. Judgment for plaintiff, and defendant brings error.

LANGFORD, J. This is an action brought by the county against the defendant, Dillon, as sheriff and tax collector of said county, for default in paying over money collected by him as taxes. The bondsmen were joined as defendants in the complaint, but only the tax collector, Dillon, answered, and judgment was rendered against him alone. The complaint declares upon the bond, but its allegations are sufficient to constitute a cause of action against Dillon, if the bond and the allegation thereto were stricken out. The court entered judgment in the case against Dillon, for the ostensible reason that he failed to answer interrogatories filed and served upon him. The argument has been made against this reason for the judgment. If the judgment was right, though the reason erroneous, the judgment should be sustained. The allegations in the complaint are that defendant collected delinquent taxes in each year from 1880 to 1883,—a specific sum of money. The only denial of this in the answer is a denial of having collected exactly the sum the complaint alleges, but does not deny having collected any other than the exact sum alleged, whether more or less. This denial is worthless, and, by failure to deny, the defendant confessed the collection of all those sums, less, perhaps, a cent, or it may be a cent more. If there were nothing else in the case, these pleadings would justify the judgment.

There is nothing to modify this conclusion, except it may be the denial to the seventh paragraph to the complaint, or the new matter pleaded in the answer; and as to the receipt of \$274 for delinquent taxes for the years 1880, 1881, 1882, and 1883, as to which last the answer is good. The seventh paragraph is denied by a general denial, and is good as to that allegation. This allegation is simply an allegation of the sums received in totals. The items making these totals being admitted, the denials of the sums thereof is merely a denial of the correctness of the addition. The seventh allegation, and the denial thereof, form no issue of fact, and are superfluous and immaterial. We have seen that the material facts constituting a good cause of action for the amount of the judgment stand confessed. Does the affirmative matter avoid this confession? This affirmative matter is an allegation that defendant had had a settlement with the board of county commissioners. There is no law authorizing the county commissioners to release the defendant from paying taxes which he has collected, and failed to pay over. The language of the statute is simply intended to convey the idea that the board shall cause each officer to exhibit his accounts, and declare whether they are or are not correct. If it is found they are not correct, the board may prosecute the defaulting officers. If they are correct, the board so resolves, and spreads this resolution upon its minutes. The latter action of the commissioners is admissible as a matter of evidence for or against an officer, but is not conclusive or pleadable in estoppel. The minutes of the board are only *prima facie* evidence. The new matter pleaded is therefore evidence only, and has no effect as an estoppel. Having admitted that he has money belonging to the county, it is no defense to plead this new matter. Hence the judgment for the plaintiff was right. It is unnecessary to inquire whether the reasons given for the correct judgment are erroneous, as that is an irrelevant inquiry. There is a denial of \$274, however.

Let judgment be entered here as was entered in the district court, less the \$274, and execution issue to the sheriff of the county of Spokane.

JONES, C. J., and ALLYN, J., concur.

(3 Wash. T. 452)

NORTHERN PAC. R. CO. v. WHALEN *et al.*

(Supreme Court of Washington Territory. January 30, 1888.)

1. DISORDERLY HOUSE—COMPLAINT—DESCRIPTION OF HOUSE.

A complaint averring that there are a number of saloons and gambling-houses along the line of plaintiff's road, and that such houses are public and private nuisances.



sances, but failing to name any particular house, or to designate wherein it is disorderly and a nuisance, is fatally defective, in that it contains no allegation that would locate any particular house, or describe it as disorderly.

**2. INTOXICATING LIQUORS—LICENSE BY COUNTY BOARD—INJUNCTION TO RESTRAIN ISSUANCE.**

The act of the board of county commissioners in granting license for the sale of intoxicating liquors, which is exclusively within their jurisdiction, is a *quasi* judicial one; and, if erroneous, the remedy is by appeal or *certiorari*, and not by injunction.

**3. SAME—SALE TO EMPLOYEES—INJUNCTION TO RESTRAIN.**

An injunction will not lie to restrain the sale of intoxicating liquors to plaintiff's employes on the ground that some of such employes become intoxicated, and are disqualified from rendering services to their employer.

Appeal from district court, Kittitas county; GEORGE TURNER, Judge.

Complaint by the Northern Pacific Railroad Company, plaintiff, against W. Whalen, C. J. Brooks, and May Imbrie, doing business under the firm name of C. J. Brooks & Co.; M. Becker, Louis Shang, and Jacob Dorr, doing business under the firm name of M. Becker & Co.; E. Grunden, William Voen Hollen, and O. Peterson, doing business under the firm name of Grunden, Voen Hollen & Co.; Joseph Cleary and Josh Cleary, doing business under the firm name of Joseph Cleary & Co.; John Michaels and J. Bates, doing business under the firm name of Michaels & Bates; ——— Root and ——— Lewis, doing business under the firm name of Root & Lewis; ——— Nelson and ——— Keith, doing business under the firm name of Nelson & Keith; J. Emery and ——— Atkins, doing business under the firm name of Emery & Atkins; A. P. Holt and ——— Olney, doing business under the firm name of Holt & Olney; ——— Durr and ——— Sharp, doing business under the firm name of Durr & Sharp; ——— Olsen and ——— Pierson; John Tassier; Peter Holt; B. Richardson; Jacob Nauderbauer; O. R. Anderson; J. J. Imbrie; Andy Rosenburg, H. Y. Anderson; J. P. McCarthy; D. Jake; J. W. Arthur; W. Terrance; George W. Canfield; John Cleary; ——— Moore; J. B. Tassier; Mike Ferrell; E. Dodge; S. Settle; W. Haupton; J. B. Starr; John P. Bradley; May Imbrie; John Blomquist and ——— Nelson; J. S. Pysart; J. B. Van Olstine; and J. M. Shelton,—board of county commissioners of Kittitas county, defendants, and keepers of saloons and gambling-houses along the line of plaintiff's road,—praying a temporary, and on the hearing a permanent, injunction to restrain defendant the board of county commissioners from issuing licenses to the other defendants to retail spirituous liquors, and the other defendants from retailing such liquors, thereby making drunk plaintiff's employes, and incapacitating them from doing plaintiff's work. Judgment for defendants on demurrer. Plaintiff appeals.

*Mitchell, Ashton & Chapman*, for appellant. *H. J. Snively*, for appellees.

LANGFORD, J. This case comes before us upon the single question of whether the complaint states a cause of action. The complaint is as follows:

*"To the Hon. George Turner, Judge of the above-named Court:*

*"For supplemental and second amended complaint, plaintiff avers—*

*"(1) That it is a corporation duly created and incorporated under and by virtue of an act of congress dated July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound,' and the acts supplementary and amendatory thereof.*

*"(2) That, under and by virtue of said acts of congress, plaintiff is authorized and empowered to construct and maintain and operate a railroad and telegraph line from Lake Superior to Puget sound.*

*"(3) That, under and by virtue of said acts of congress, the said plaintiff is now constructing its said railroad line through Kittitas county, and through and over what is known as the Cascade mountains, at a place called 'Stampede Pass,' and that at the place where it is constructing the said road over the mountains, and in Kittitas county, is a village called 'Tunnel City;' that said*

Tunnel City is located at and adjoining the tunnel now being constructed, under and by virtue of said acts of congress, through said Cascade range of mountains.

"(4) That said railroad company has now in its employ, in constructing its road, as aforesaid, at Tunnel City, in Kittitas county, four thousand employes; and that, in the construction of its road as aforesaid, it is necessary that said plaintiff, and the contractors of said plaintiff, should use high explosives, such as dynamite, and machinery run by electricity, steam, and compressed air; and in the use of said explosives and running of said machinery, and in the construction of said road, it requires sober, skilled labor.

"(5) That the said defendants, except the board of county commissioners, at said tunnel, and on the public roads near thereto, and along the line of the road now being constructed by said plaintiff, for several months past have been running retail drinking and lager-beer saloons, and selling spirituous, malt, and fermented liquors to the said employes of said plaintiff, and that the said sales of said liquors to said employes has frequently and continuously caused drunkenness of said employes, and that the said drunkenness incapacitated the said employes so that they were not able to perform the labor assigned to them, and the labor they were expected to do, and for which they were employed; and that the said drunkenness increased the risk and danger incident to the necessary use of the said explosives and machinery, and increased the danger to the employes employed in constructing the road, as aforesaid, and to the officers and agents of said plaintiff, and has caused and is causing many of said employes to quit the employment thereof. That, during the four months last past, the said railroad company has employed and transported, in and upon said work, about eight thousand men, at an average expense of ten dollars for each man. That, about four thousand of said men, thus employed, for the reasons aforesaid, and to the great and irreparable damage of said railroad company, after being transported in, as aforesaid, quit and left the work of said plaintiff. That said plaintiff, had it not been for the sale of said liquor aforesaid, and drunkenness caused thereby, would have been able to complete, and would have completed, its road from Ellensburg to Tacoma during the present year; but, on account of the sales of said liquor aforesaid to said employes, the plaintiff was not and is not able to obtain and retain on said work sufficient employes to complete said road during said time. That plaintiff will be compelled to continue the construction of said road during the winter season. That a large portion of said work is of such a character that it cannot be performed during the winter season without extraordinary expense and delay; and that the extra expense, caused by the sale of said liquor as aforesaid, necessary to the completion of said road during the winter of 1886 and 1887, over that necessary to complete the road during the present summer and fall, all of which plaintiff could have done had it not been for said saloons and said sales of intoxicating liquors aforesaid, will exceed one hundred thousand dollars, and that said plaintiff has been damaged in said sum by said sale of liquors and intoxication caused thereby. That the delay in the completion of said road for said time, and damages incident thereto, in addition to said one hundred thousand dollars, will cause the said plaintiff damage and loss of the use of said road exceeding in amount one hundred thousand dollars. That said saloons have been so conducted, and drunkenness and gambling permitted and carried on to such extent, that they, the said saloons, have been for months, and are now, public nuisances, and also a private nuisance in so far as the said plaintiff is concerned. That the superintendents, officers, and families thereof are seriously discomfited, injured, and annoyed by said nuisance; and that the lives of the said officers, agents, and employes, and the property of said plaintiff has been diminished and injured in value in consequence of said sales of liquors, and drunkenness caused thereby; and that the said plaintiff, by said saloons, and the sale of intoxicating liquor

therein to said employees, and said drunkenness and said gambling, has sustained great and irreparable injury; and, if said saloons are allowed to run along the line of said road in future, will continue to sustain injuries in all the matters aforesaid; and that said sales of intoxicating liquors, and the said drunkenness caused thereby, will cause in the future all the damage and injury, discomfiture, and annoyance that it has caused in the past. That the said defendants are insolvent, and not able to respond in damages to the said plaintiff for the damages already incurred, and the damage that will be incurred in the future if said saloons are permitted to run. That said saloons and the said beer-halls have been and are now running, and selling at retail said intoxicating liquors, as aforesaid, to the employees of the plaintiff and others, without a license, and without any right or authority so to do. That said saloons, during the past, have, and will in the future unless enjoined, continuously and constantly continue to sell said intoxicating liquors to said employees, and constantly and continuously permit said drunkenness, and maintain said gambling-houses and said public and said private nuisances, to the great injury, danger, discomfiture, and annoyance of the said plaintiff, and the said plaintiff's employees, and the said property of plaintiff.

"(6) That the plaintiff has an interest in one-half of the land along the line of said road, for 40 miles distance, on either side thereof. That the lands upon which said saloons are located are unsurveyed lands. That plaintiff's interest in the lands cannot be ascertained or determined until the United States government surveys are extended thereover. That the lands upon which said saloons are and have been located are either the lands of the said plaintiff or public lands of the United States, and that it cannot now be ascertained whether the said lands are those of the plaintiff or those of the United States. That the said defendants, excepting the said board of county commissioners and the said Blomquist and Nelson, have been running and maintaining said saloons and nuisances under a paper writing purporting to be a license issued by the county auditor of Kittitas county. That the said paper writing was issued without right or authority therefor. That the board of Kittitas county, and the members therefor, as above named, intend, unless enjoined by this court, to grant to the said defendants, (except said commissioners,) and the said defendants intend to apply therefor, a retail license to sell liquors at the places, in the manner and to the persons aforesaid, and intend thereunder to maintain said constantly recurring and continuing nuisances; and that the said defendants intend and are now fraudulently applying for said licenses, without filing, or any one else for them filing, with the county auditor of Kittitas county, or the board of county commissioners of said county, the consent in writing of the owners of the buildings or premises upon which said saloons are run, and upon which they propose to allow the same to be run; and the said board of county commissioners were, at the time of said applications, and are now, well informed that the law requires such consent in writing to be filed, and remain on file, with the said board of county commissioners; and the said board of county commissioners are well and fully informed that the lands upon which said saloons are running, and upon which said defendants intend to run the same, is land over which the United States public surveys have never been extended; and that said board of county commissioners, with full knowledge that said defendants intend to fraudulently apply for said license without the filing of said consent in writing, and with the full knowledge that such consent in writing has not been filed, unless enjoined by this court, intend to grant said license. That the granting of said licenses still greatly complicates said matters, and injure and damage said plaintiff, and will deprive plaintiff, to a great extent, if not absolutely, of any remedy against said defendants, and cause the plaintiff great and irreparable damage. That said defendants, (excepting said board of county commissioners,) nor any one else for them, have filed, or intend to or can file, the consent in writ-

ing of the owner of the land upon which said saloons are located, with the county auditor or the board of county commissioners; and that said board of county commissioners have no right or authority to issue a license to any one to sell liquors at retail upon the public land of the United States. That the said government of the United States cannot be made responsible in damages for injuries caused by the sale of liquors thereon, and that the said government of the United States cannot consent to the issuing of the said licenses; and that plaintiff has not and will not consent to the issuing of said licenses, or the running of said saloons on said unsurveyed land. That the said sales of intoxicating liquors, and the said drunkenness and demoralization caused thereby, reduces the laboring capacity of the employees of said plaintiff to the extent, on an average, of one-quarter of said capacity daily, in addition to the items above named, is at least one thousand dollars per day. That, unless said temporary and perpetual injunction is granted, the defendants (excepting said county commissioners) will continue to sell intoxicating liquors and cause said drunkenness, and will continue to maintain and permit said public nuisance as aforesaid; and that the said sales, said drunkenness, and said nuisance will cause said employees to quit said employment in the future as in the past, and still cause the said plaintiff great injury in all the particulars and matters in the future that it has in the past.

"(7) That the said plaintiff has not an adequate remedy at law, and that the granting of said injunction will avoid a great multiplicity of suits.

"Wherefore, plaintiff prays for a temporary injunction enjoining the board of county commissioners from granting licenses to said defendants to retail spirituous, malt, and fermented liquors in Kittitas county, and enjoining said defendants from selling liquors at retail, and running said saloons and gambling-houses, where drunkenness is permitted and carried on, during the pendency of this suit, and that the defendants the board of county commissioners be perpetually enjoined from granting licenses to retail spirituous, malt, or fermented liquors on unsurveyed public land, and that said defendants be perpetually enjoined from selling intoxicating liquors at retail, and from running and continuing to operate gambling-houses and nuisances described in the complaint, and for such other and further relief as the court in the premises is competent to give."

We will consider first, what are the rights of the plaintiff which he claims are invaded and threatened. It is claimed to be a right to import men to be employed by them, and, in case they have them, that they should remain sober. Though the claim is to some uncertain aggregate of men, it is clear that the right cannot consist to the joint labor of the uncertain aggregate as an entirety, but, whatever it is, it is several as to each particular employee. When the right exists, it is to each employee; and the complaint is that some of them, not naming which, get drunk; and these several employees' getting drunk is the wrong complained of. Now, if one man employs another to work for him, he has a right to require that man to keep safely sober. If he does not, he may be discharged, and may be sued for damages. This is all the remedy which the law gives for this wrong. These several rights, as to each man employed, according to their very nature, cannot be joint or common as to all men employed. But the complaint is not against these several wrong-doers, either severally or jointly. It is against the 15 or 20 different men who sell, in different quantities, to each man, at his request, whisky. This is less a cause of action than there would be against the employee who made himself drunk. Selling the whisky does not necessarily make any man drunk. If the man who buys it performs his duty, it will not make him drunk. Indeed, if he uses it properly, it may do him good,—at least it will not make him drunk. If one sells dynamite powder, guns, or poison to another, it does not follow that the vendor is guilty of the result of the improper use of it by the vendee. Suppose it was a gun, powder, and balls that was sold to one

employee, who with it shoots another employee,—which is a similar case,—would the vendor be guilty of murder? If he were thus guilty of selling pistols to employes, and was continuing the business, could the employer have the vendor enjoined? Indeed, it would be admitted that the employer would have no cause of action against the vendor in law or in equity. Having no remedy against the vendor at law, it would not follow that he would have one in equity; for he would have no remedy at all except to discharge his bad employes and sue them for damages. This action is not against any proprietor of a house, but against 20 different proprietors of different houses. It is unnecessary to decide whether an action could be maintained against any one house or not, for this complaint does not describe any one house which is a nuisance. Indeed, it does not declare that any one house is a disorderly house, and that plaintiff is annoyed because the house is disorderly. It merely claims that each of 20 men sell liquor to employes of plaintiff. A tippling-house is not a nuisance at common law or by statute; but a tippling-house or any other house which is kept in such a disorderly manner as to seriously annoy neighbors might be a nuisance. A man might keep an orderly house, yet be selling therein large quantities of spirits. The men might get drunk outside the house, and there be noisy; or, if drunk inside, yet not noisy, the house would be no nuisance. We conclude that the plaintiff's right to the services of its employes rests in executory contract with each employe, and the only remedy that plaintiff has for this is for a breach of contract against its contractor; that if the employe, upon account of a tort to his person, cannot perform his services, such employe has his action against the person who committed the tort, but the employer has not an action; that the sale of liquor to an employe is not a tort against him nor his employer; that this action is brought, not for keeping a disorderly house, but merely for selling spirits to employes. We therefore conclude that the demurrer was rightly sustained.

Were not the above true, and were this action brought by the proprietor of one house to abate the disorderly house of another, there is no allegation which would locate the house, or describe wherein it was a disorderly house, as to any one of the numerous proprietors sued. This defect would be fatal as to each of the several proprietors. The cases cited that show that when many different persons, each by his own separate act, pollutes a stream, so that the pollution has joined and become common, and this common pollution injures the land and premises of another, that this person, thus injured, may bring a suit to abate this common nuisance against the several persons who created it, has no application to this case, (1) because there are no premises in this case which contribute to a common nuisance,—in fact, no premises or stationary thing or business which contributes to anything, and much less to a common thing which is a nuisance to plaintiff's premises. There is nothing like a common stream which each defendant contributes to corrupt. No one saloon does anything in common with another. If any is a nuisance, it is a separate nuisance of itself, unconnected with the nuisance of the other. Were they all joined in an indictment,—as the houses have separate proprietors, and what constitutes nuisance in one has nothing to do with the other,—none could be convicted. If this action can be maintained, then any ship coming in or leaving a port could maintain a bill against all the saloons, all the gambling-houses, and houses of ill fame in a city in which the ship landed. Every manufactory could maintain a joint action, in like manner, against all such houses in the city in which they were situate. Every railroad company could maintain a joint action against all such houses in towns where the trains stopped. This case is, indeed, a novel one, and the principles upon which it is sought to be maintained are as novel.

It is alleged that the county commissioners are threatening to issue licenses when the prerequisites therefor have not been performed. The county commissioners, in this matter, are acting and are to act, in a *quasi* judicial capac-

ity, on a matter exclusively within their jurisdiction. If the act of the board is erroneous, the remedy is by appeal or *certiorari*. It would be as reasonable to enjoin a justice of the peace because he threatened to enter judgment without a sufficient complaint as to enjoin the commissioners in this instance. Whether or not the consent of the proprietor of the premises is obtained, is a question for the board to decide in the capacity which the statute has given.

We find no error committed by the district court, and hence let its judgment be affirmed.

ALLYN, J., concurs. JONES, C. J., concurs in the result.

(3 Wash. T. 482)

#### THORNTON v. TERRITORY.

(Supreme Court of Washington Territory. January 31, 1888.)

**INTOXICATING LIQUORS—LOCAL OPTION LAWS—DELEGATION OF LEGISLATIVE AUTHORITY.**  
The local option act of Washington Territory, giving "to precincts of Washington Territory" the power to repeal the existing law, and prohibit the sale of liquor, by a petition and vote of a majority of the voters of any precinct, is invalid as a delegation of legislative authority; precincts not being municipal corporations capable of receiving such grant, or of exercising the power granted. *TURNER, J., dissenting.*<sup>1</sup>

Error to district court, Third district.

*Mr. Metcalfe, Mr. Rochester, and J. H. Lewis*, for plaintiff in error. *J. T. Ronald*, Pros. Atty., for defendant in error.

**LANGFORD, J.** The question before the court is whether the local option law, so called, is void under the provisions of the organic act and the constitution of the United States. The statute in force at the time the said local option law was passed, in terms prohibited all retail sale of spirituous liquors. The local option act provides that a vote in each precinct may do the same. In this there is no proposed change. The former act provides a penalty for selling; so does the latter. Each act provides a mode by which the penalty may be avoided, which operates under each act as an exemption from the prohibitory clause, and the penalty. The former act exempts from the prohibition those who prove moral character, give bond, and by paying a penalty procure a license. The local option act does not exempt this class, but exempts from the prohibition druggists alone. There is also in the local option act a provision to the effect that even druggists shall not sell liquor for a beverage; but this is more formal than real, as liquor is so sold by druggists or others for the profits of the sale, with no control of the use after the sale is made, whether it be for medicine or beverage. The purpose of the drunkard until he has drank, and even then, is not susceptible of proof. If a man says he drinks for medicine, there is no way to disprove it. Thus we see that the essential difference between the so-called license law and the local option act is that the former permits sale by all who conform to certain provisions, and the latter permits only druggists to sell. The local option act narrows the class of persons whom the former act permits to sell, and thus far purports to repeal the former statute. The former statute will prevail except by petition and vote. The law is repealed in the district voting, and this by the operation of the vote. It is well, when considering an act like this, to recur to the definition of law. Law is (1) a rule of action, (2) prescribed by the su-

<sup>1</sup> An act which provides that any county or town or city of a certain class may, by a majority vote, put such county, city, or town under its operation, is not a delegation of legislative power, *State v. Pond*, (Mo.) 6 S. W. Rep. 469; *State v. District Court*, (Minn.) 22 N. W. Rep. 625; nor a law conferring authority upon a municipality, to be exercised at its discretion, *City v. Hillis*, (Iowa,) 8 N. W. Rep. 638; nor a law which submits to the popular vote merely the question as to whether or not, in any given locality, liquor licenses shall be granted, *Savage v. Com.* (Va.) 5 S. E. Rep. 565.

preme power of the state, (3) commanding what is right, and prohibiting what is wrong. First, it is a rule of action. A rule of action does not relate to one act alone, but to all of a class of actions. An order to perform any particular action is a mandate or decree, but not a law. This rule of action is general, and applies to all of a class. This rule must be prescribed, or it is not a law; this, as to statute law, means that, as written, it must be approved by the legislature. The law must command; a mere request or permission is not a law. If the local option act conforms to all these three requisites, it is a law; if it fails to conform to one or more, it is not a law.

First, then, let us examine the act to perceive what, if anything, it commands to be done. It grants the power to petition and to vote, but it commands neither; and hence it, in this respect, is not a law. Strike this grant of power, which we have seen is not a law, nor any part of a law, out, and there is nothing left in the act which can have any effect. The act merely grants power to certain persons, by a petition and vote, to repeal the statute in each precinct wherein the people elect; then the repeal takes effect solely by those citizens electing to create a rule and a penalty. The rule and the penalty are the only parts of the statute which purport to be mandatory or law; and these have all the effect they do have, not by virtue of legislative act, but by virtue of petition and vote. The statute is repealed in each precinct voting "Yes;" in others it is not repealed; which clearly shows that the vote repeals the law. Is this repeal prescribed? If so, where will this prescription be found? Is the repeal in any precinct written anywhere? If so, where? Whether the statute is repealed in any precinct can only be determined by parol evidence. The courts take judicial knowledge of laws; but to find the rule of action and the penalty in any precinct the court can resort neither to judicial knowledge nor any statute, but must try the question of whether the law exists as a fact, by evidence. It will be seen that the local option act lacks one of the essential elements; it is not prescribed by the supreme power of the state; in fact it is not prescribed at all. If it exists, it exists by virtue of the petition and vote alone, and is to be found by proving the petition, the order of the board of commissioners, the posting of election notices, and the majority vote. It has been said that the law rules the vote, and not the vote the law. This misapprehension arises from misnaming the grant to vote a law, though it is not mandatory. It has been said that the law is in force from the date of its passage, but takes effect only upon the happening of the contingency of a petition and election resulting in a certain way. If this be the contingency, then a law can be made to go into effect at the option of those subject thereto. If a law goes into effect only at the option of those subject thereto, then it is not mandatory. Can that be a law which is not mandatory, and from the terms of which it cannot be discovered whether the rule of action exists, or whether there exists a penalty for the violation of this rule? If a man should go to any precinct in the territory, and ask whether a man, according to the law of the land, might, by making proof and payment, set up the business of selling spirits, or whether druggists might alone make such sales, he would be shown the local option statute. This giving no information, he would inquire whether there had been any election. Learning that there had, he would inquire whether or not it was legal; and, as this question involves the investigation of each step which must be a condition precedent to its legality, he would have to investigate both the facts as to what had been done, and the conditions of the grant of power establishing the rule. These uncertainties as to whether a man would be subject to fine or imprisonment are not the qualities of law, but rather the qualities of anarchy. Every state constitution and our organic act grants the power to make laws to the legislature alone; and that this power cannot be delegated is conceded by every decision of every court. This being conceded, it has also been conceded that towns and cities may be granted the power to

make laws for the inhabitants thereof. These two well-settled principles appear to be in conflict, but in reality are not so. The laws of the city or town are by-laws, and not state laws; the laws of the state are not by-laws, but state laws. If a man performs an act which violates an ordinance or by-law, and the same act is a violation of state law, he can be punished twice for the same act; once as the violator of the laws of one government, and again as a violator of the laws of the other government. In this respect the laws of the city or town are as distinct from the laws of the state as are the laws of the several states from the laws of the United States. Police powers are not delegated to cities or towns, but are or may be granted. The grant is an act of the legislature, but not a law thereof. The granting act, whether in one or many, is merely a power granted to and forming a government, containing, it may be, many conditions precedent to the right to exercise the power, but the charters are never rules of action prescribed for the government of the citizens of the state as such. When the power to make by-laws is granted, the power is as to some subject-matters; and history has not shown a single instance wherein the power to make by-laws on such subjects is also a power to repeal any ordinance, as well as make it. In fact, the power to make by-laws, when given, creates a local legislature as free to act within the scope of the power granted as is the state legislature to act upon the subject-matters which the state constitution grants to it. These by-laws must not only be passed by the local legislative body, but are of no force until they are duly authenticated and recorded. They, like other laws, must be prescribed before they have any effect, and be thus made certain in a form in which they can be read by subjects, who are compelled to obey them. Towns and cities are governments within the government, adding something to, but not taking anything from, the state government; not acting as the delegate of the state, but acting "by virtue of a power granted by the state." Towns and cities can in no manner enact or repeal or effect state laws. These city or town legislators meet, discuss, amend, enact, and repeal ordinances and the by-laws. Acts made are prescribed in the town or city record, so that all subject thereto may know the exact terms which they are bound to obey. The act of a precinct is not the act of a local legislature, in that the power granted to the precinct is not the power to pass by-laws upon a particular subject-matter, and repeal or modify such by-laws. There is no provision made as to how the by-law, when passed, shall be authenticated or prescribed. In fact, the act does not purport to grant the right to make a by-law, but attempts to give power to cause a state law to exist. It is an attempt to delegate the power to make a state law exist without its being prescribed at all, or without its being accepted or passed as a by-law by the local legislature.

From the above contrast between the granted power to a local legislature to make and amend by-laws and this statute, it will be seen that the former is a *quasi* government over the subject-matter granted, while the latter is not, but is a pretended power to cause one state law to live which was previously to the local action dead. The local option statute attempts to delegate power to the voters of a precinct to make a state law; the power granted to towns and cities is merely to make by-laws. The local option act is clearly, therefore, opposed to the rule that the power to make state laws cannot be delegated; the creation of local city or town governments, with power to make by-laws, not being a law, but a grant, is not subject to the same objection. So, while we think that all the decisions which hold that police power may be granted to towns and cities to pass by-laws to prohibit or regulate the sale of spirits are entirely inapplicable to the statute we are now considering, the validity of a power to make by-laws upon prohibition in no way proves, or tends to prove, that an election to make a state law exist is valid. Indeed, the word "election," until quite lately, when applied to political subjects, never connoted the choice of a principle or a rule of action, but merely a choice



of persons. To make the word "election" mean the choice of a state law is to invent for a word a new meaning which it never previously had. There are very few decisions which militate against the above very obvious distinction. That a city or town may accept or reject a statutory proposal of a grant and exercise of local power is not an exception, for, as we have seen, the power lies in grant; and it is not supposed that any set of persons are bound to accept or use a grant which they refuse to accept, although every one must obey a state law, whether he consents or does not consent. The only exception is where the inhabitants of a county have been permitted to vote whether there shall be fence laws within its borders. It is impossible to say what the nature of those counties was,—whether they had the power to make by-laws or not. If they had not the power to make by-laws, then the decisions were in favor of a delegation of power to make state laws; which is not only opposed to the vast weight of authority, but also to fundamental principles of our government. There are a number of other decisions which are cited as being in favor of the delegation of the power to make state laws. These are decisions which uphold statutes which provide that the vote of the people in a certain locality may locate a county line, county buildings, county roads, or the like. By an examination of all the statutes thus held valid, it will be found that none of them attempt to authorize a vote to establish a rule of action. To exactly locate anything is not a rule of action, inasmuch as it is no rule at all, but is a specific act; it is an act as to one particular thing, and concerning which an act of the legislature could not of itself be effective. The most that a specific act of the legislature could do would be to adopt a previous survey, or landmarks and courses. To locate anything, administrative officers are almost always required; and the act to be performed is not to make rules of action, not to impose penalties, but to do a particular act,—to choose places of location. As the board of county commissioners may locate and establish roads, or, as the commissioners of public buildings, may construct and locate buildings, so commissioners may be authorized to construct a code of laws, but not to pass them; none of these commissioners can enact a law.

It is established that a legislature may grant administrative powers to whomsoever it pleases; and the act of locating a county line, a county road, or a county building is essentially an administrative act. That the legislature may make all the people of any locality administrative officers to perform such acts must be admitted by all. Statutes of this class empower whom they choose to perform these administrative acts. The same acts generally prescribe conditions precedent to the exercise of the power, and they also contain rules of action to govern these administrative officers. The part of the act which conveys the power is in the nature of a grant; that part which prescribes rules of action is the only part of the act which is a law. Judges are but one kind of administrative officers; an act creates their power as courts. This grant of administrative power is not a delegation of power, for in the most part the legislature itself cannot of itself do what it empowers administrative officers to do; as, for instance, it grants judicial power, but itself cannot exercise it. Administrative officers are often empowered to exercise discretion as an assessor, a board of commissioners, or the like, but never can any of these prescribe rules of action. Courts may prescribe rules of practice; but this is a law-making power which clung to courts from their former power to make laws as well as to adjudicate them, before the strict line of division was made between legislative functions and judicial functions. Then the act of locating county-seats and county boundaries, being administrative in its nature, may be granted to one man, or to all the men in any locality; and such grant is not a delegation of power, much less of legislative power. For these reasons all decisions applicable to such statutes are irrelevant to this case at bar, and can shed no light for the decision of this case. Eliminate all the decisions in the two classes of cases above mentioned as to grants of power of govern-

ment to towns and cities and grants to administrative officers, there are hardly any which have been cited in favor of sustaining this law which can be considered; for all, or nearly all, apply to one or the other of these two classes. We see, therefore, that the fixed principle that legislative power cannot be delegated has no well-considered decision opposed to it, and very few decisions ill-considered opposed to it; while it is supported by a host of well-considered opinions.

The science of government, so far as it is a machine for the protection of the natural rights of the individual, is of comparatively late discovery. All ancient governments and most modern ones have been constructed upon the theory that sovereignty cannot be divided, but that executive, judicial, administrative, and legislative functions are all united in one body. The division of these functions, so that different bodies were each confined to the exercise of one, and no other body could interfere with it, is an invention to protect private right. No man's rights can be abated or impaired except three different bodies, each acting separately within its functions, have agreed to it. Ancient democracies were like a mob or vigilance committee; they prescribed few laws, but, upon the impulse of the moment, deprived any citizen of his country, his property, or his life. The ancient German tribes who conquered England thus acted. As civilization advanced, and the tribes were united into a kingdom, gradually it became a rule that no man should suffer in life, limb, or body, except for a violation of prescribed law. Indeed, the separation of power into different co-ordinate departments, and an independent judicacy, were not well established; and for this reason bills of attainder for past facts, and other oppression of the individual, still prevailed. Even in New England, the towns simulated the ancient absolute democratic form of the ancient German tribes. As people became enlightened, they sought to limit the powers of government by establishing constitutions which limited, defined, and separated the powers of government; and this was done to protect the individual citizen in his person and property. By this system, the legislative department was separated from each of the other departments, and its functions restricted to making laws; and it was prohibited from administering or enforcing them. This effectually protected the citizen from any laws which had not been previously written and enacted, except common law, which was prescribed by the decisions of courts. The judicial department was limited to deciding individual cases according to the law already prescribed. The legislative action was restrained—*First*, by express prohibitions; *second*, by being forced in each house to have three readings of bills; *third*, by the separate agreement to the exact words of the statute by the three distinct branches of the legislature; *fourth*, by a court which should decide whether the act was within the constitutional power of the legislature. The tendency of bodies of men is to tyrannize over the weaker or the minority. These checks were made to prevent this tendency. Learning ancient acts of government gives little light as to this system; it is the best that has been invented for human happiness. That laws shall exist which are not plainly in exact words prescribed, so that an individual may know them, which are not passed by the deliberation of each of the three legislative departments, each member in each branch sworn to exercise his best judgment for the people upon his own responsibility, is directly opposed to every principle of the American or any good government. The local option act attempts to violate these principles. The legislator, in this act, has sought to escape the responsibility of his trust by delegating power to an absolute democracy, who neither deliberate in three different bodies, nor have any mode of prescribing their action or their laws. If the legislature can delegate its powers, so may the executive and judiciary, and, each having resigned its trust, the government is revolutionized into an absolute democracy, unchecked in its impulses. We shall have abandoned all the salutary checks which alone protect private right, and each man holds his life, liberty,

and property at the mercy of the uncontrolled and hasty impulse of local majorities. To prevent such calamities was the judiciary created and made independent, and sworn to protect each individual's rights, in so far as he has not, by violating prescribed law, forfeited them. Let the decision below be reversed.

ALLYN, J., concurs. TURNER, J., dissents.

JONES, C. J. The act in question purports, by its title, to be one "to prohibit the sale of intoxicating liquors in the several precincts of Washington Territory, whenever a majority of the legal voters of any such precincts, at an election held for that purpose, vote in favor of such prohibition." The mere title imports an anomaly, and requires the exercise of strong presumption to sustain anything that may follow it; but as every reasonable intentment should be exercised in favor of the validity of an act of the legislature, we should not, unless compelled by the dictates of sound reason, declare them invalid. Passing by mere quibbles and fine distinctions, it must be conceded that the legislature has power, unless deprived of it by the supreme law of the land, to grant the power to municipal corporations to regulate their own internal local affairs as shall conduce to their own welfare and security; and it is no longer an open question in the United States that the several states and territories may make such grants relating to the licensing or not licensing the sale of intoxicating liquors; and all experience has proven that such local option laws are a wise and perhaps the very best system yet adopted to regulate and restrain the traffic in intoxicating beverages. In this act, however, there is no municipal corporation designated capable of receiving such grant, or exercising the power mentioned in the act. A precinct, under our system, has no existence in that sense, and in the only instances where the grant might otherwise have been sustained, the act in question very carefully disqualifies those municipal corporations from exercising the power or granting it to them. I have no doubt whatever that such a grant may be given to a city or incorporated town or village, or to a county; but instead of making such grant, the act studiously follows its title by declaring, in section 8, that "each incorporated city and town in this territory, for the purpose of this act, shall be deemed to be but one election precinct; but if any outlying territory, adjacent to a city or town, is not included in any other precinct, \* \* \* the electors residing in such outlying and adjacent territory shall be deemed electors of such city or town," and may vote on the question, and constitute part of such city or town "for the purposes of this act;" thus importing into every city or town so situated an element not governed by the by-laws and ordinances of the city or town, and establishing a rule for the inhabitants of the municipal corporation of which they are not members. As already said, the ground on which these grants are upheld is that of a local government being empowered to make its own regulations on this matter within their own limits, and it seems to me a more flagrant violation of that theory could not well be imagined. It is in keeping with this idea that the board of county commissioners of the county, for the convenience of the electors "mentioned in this section," may establish polling places in the city or town, and also in the "outlying and adjacent territory," forming part of the "precinct" thus created; and the same board shall at the same time call the election in this "precinct" as provided in preceding sections for other precincts, and "appoint the judges of election for such polling places." It is completely in harmony with this and the preceding sections that section 9 should require the county auditor of the county, on the tenth day after any "election under this act, \* \* \* to notify two county officers, one of whom shall be the judge of probate, to be present at the office of the auditor, and proceed with the auditor, at a time to be designated by him, "to canvass the votes" cast at such

election; and after taking an oath, they shall "proceed to canvass and tabulate such election returns" in a manner stated, and to "such tabulated statement they shall affix their certificates" to its truth. It is then provided in the same section that the auditor of the county shall record this statement and the certificates in a book, and from that time it is "notice to all the world" of its contents. Section 10 then prohibits the city or town authorities in this "precinct from granting licenses for the sale of liquors, if the election under this act" shall result in favor of prohibition; and, according to the provisions of section 11, all licenses before that time granted, and then in force, are "terminated and at an end." Section 14 prohibits the courts from inquiring into any irregularities regarding the election, or any of the proceedings leading up to it, in any prosecution instituted "under this act or any other act, but the tabulated statements of the canvassers provided for in section 9 of this act shall be conclusive of the facts therein stated, and of all the proceedings antecedent thereto." After this, in section 16 of the act, it is declared: "This act shall control, in so far as it conflicts with any general or local law already enacted, or hereafter to be enacted; and to the extent of its provisions so conflicting such general or local law" (already enacted, or hereafter to be enacted) "shall be deemed a modification of the same, unless in such law the legislature expressly declare a contrary intent." It would seem to be unnecessary to say, after this recital of the provisions of the act itself, that it is in no sense a grant of power to local municipal corporations to regulate or prohibit the matter of sale or license of sale of intoxicating liquors. It is not a delegation of police power; it annihilates, for the purposes of the act, the only corporate bodies mentioned in it; and leaves the court, however disposed to sustain a wise and well-considered local option law, no room on which to base an opinion in its favor.

The judgment i. e. this action must be reversed, with costs.

(11 Colo. 308)

#### KNIGHT v. PEOPLE.

(*Supreme Court of Colorado. April 27, 1888.*)

#### APPEAL—FROM CONVICTION BY JUSTICE OF THE PEACE—PROCEDURE.

A person convicted by a justice of the peace is given the right of appeal to the county court by Gen. St. Colo. 1883, § 3315, and the county clerk is the proper person with whom to file the record on appeal, and to approve the appeal-bond; section 1982 so providing in civil and section 2047 in criminal cases.

Commissioners' decision. Error to Gunnison county court.

Prosecution against William M. Knight for violation of a city ordinance before a justice of the peace. Judgment being rendered against him, defendant appealed to the county court, which appeal was dismissed, and defendant brings error.

*Goudy & Twitchell*, for plaintiff in error.

*T. H. Thomas*, Atty. Gen., *George H. Barnes*, and *J. M. Ricketts*, for defendant in error.

The right of appeal exists only when it is expressly given by statute. *Heiderer v. People*, 2 Colo. 672; *Edwards v. Vandemack*, 13 Ill. 633. Prior to act March 14, 1877, (Gen. St. 1883, p. 631, § 1978,) by the provisions of Rev. St. Colo. 1868, c. 50, appeals from judgments of justices of the peace were to the district court of the proper county. All the necessary regulations for perfecting and prosecuting such appeals then were and still are incorporated in that chapter. The mode of procedure therein provided were not repealed by the act of 1877, which intended merely to change the appellate forum from the district to the county court.

DE FRANCE, C. The plaintiff in error, Knight, was prosecuted before a justice of the peace for the violation of an ordinance of the town of Crested

Butte, and judgment was rendered against him that he pay a fine of \$200, and costs of suit. Within the time required by law, Knight appealed the case to the county court. The appeal-bond was presented to and approved and filed by the county judge, and a transcript of the proceedings before the justice, together with the papers in the case, were certified to the county court by such justice. On motion of the defendant in error, this appeal was dismissed by the county court. The appeal-bond reads as follows:

"Know all men by these presents that we, W. M. Knight, J. W. Carlisle, of the county of Gunnison and state of Colorado, are held and firmly bound unto the people of the state of Colorado in the penal sum of four hundred and seventy dollars, lawful money of the United States, for the payment of which well and truly to be made we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly, by these presents. Witness our hands and seals this 5th day of May, in the year of our Lord 1884. The condition of the above obligation is such that whereas, the said people of the state of Colorado did, on the 28th day of April, 1884, before Thomas Hookey, a justice of the peace, in and for the county of Gunnison and the state of Colorado, on the trial of the said W. M. Knight upon a charge pending before said justice of the peace against him for violating an ordinance of the town of Crested Butte, the said W. M. Knight being found guilty of said charge, recover judgment against said W. M. Knight, and judgment was rendered against him for the sum of two hundred dollars fine and costs of suit, from which judgment the said W. M. Knight has prayed for and obtained an appeal to the county court of said county; now, if the said W. M. Knight shall personally be and appear before said county court on the first day of the next term thereof, to be held at the court-house in Gunnison, in said county, on the 2d day of June, A. D. 1884, and attend said court from day to day, and from term to term, and from day to day of each term, and not depart the court without leave, and abide the final order and judgment of the court, and shall prosecute his said appeal with effect, and shall pay whatever judgment may be rendered against him by the said county court upon the trial of said appeal, or by the consent, or, in case the appeal is dismissed, will pay the judgment rendered against him by the said justice of the peace, and all costs occasioned by said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

W. M. KNIGHT. [L. s.]  
"J. W. CARLISLE." [L. s.]

Numerous reasons were incorporated in the motion to dismiss said appeal, and the same are reasserted here in support of the action of the county court in sustaining said motion. All of these which we deem it necessary to notice, may be embraced under the one general head, that the appeal was not taken and perfected according to law. Whether this is a civil or criminal suit matters not, for the appeal-bond contains sufficient to meet substantially all the requirements of the statute providing for an appeal in either case. The county court is given appellate jurisdiction in such cases. Section 3315, Gen. St. 1883. The mode of appeal is provided in sections 1981 and 1982 for civil cases, and in section 2047 for criminal cases. The appeal-bond was sufficient, the appeal was properly taken, and the court erred in dismissing the same. *Wike v. Campbell*, 5 Colo. 126. The judgment is reversed, and the cause remanded.

STALLCUP and RISING, CO., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment is reversed, and the cause remanded.

(11 Colo. 305)

## THORNELL v. PEOPLE.

(Supreme Court of Colorado. April 27, 1888.)

## 1. INDICTMENT AND INFORMATION—RETURN IN OPEN COURT—MUST BE SHOWN BY THE RECORD.

It is error to put a defendant on trial on an indictment which was not returned in open court, and this can only be shown by the record.

## 2. EMBEZZLEMENT—EVIDENCE—REFUSAL TO OBEY ORDER.

Where defendant was indicted for embezzling the funds of a corporation of which he was treasurer, evidence that he was directed to pay a certain debt in full, before paying other claims, and that he disobeyed the direction, was inadmissible as irrelevant, and tending to prejudice the jury.

## 3. CRIMINAL LAW—VENUE—PROOF.

A failure, on the trial of an indictment, to show where or in what county the offense was committed, is fatal.

Commissioners' decision. Error to district court, El Paso county.

William R. Thornell was indicted for embezzling the funds of the Colorado Springs Athletic Association, of which he was treasurer. There was a conviction, and defendant brings error.

*E. O. Wolcott*, for plaintiff in error. *Alvin Marsh*, Atty. Gen., *C. A. Wilkin*, Dist. Atty., and *F. H. Thomas*, for defendant in error.

DE FRANCE, C. The plaintiff in error, Thornell, was tried in the district court of El Paso county, at the April term, 1885, of said court, on a charge of embezzlement, and was convicted and sentenced to imprisonment in the state penitentiary for the period of one year. At the close of the testimony for the people, the plaintiff in error moved the court to direct the jury to return a verdict of acquittal, on the ground that no case had been made against him; but the court refused so to do. He afterwards moved for a new trial; and, this motion being denied, then moved in arrest of judgment, which motion was also denied. The record in this case is very imperfect. A certified copy of a bill of indictment against William R. Thornell is annexed to the record. It may, perhaps, be presumed to be the same upon which conviction was had, but it should have been embodied in the record. The indorsements thereon, if any, are not shown, and we have no knowledge as to whether the indictment was indorsed, "A true bill," and signed by the foreman of the grand jury which found the same or not. What effect should be given to such defects we need not say, as there are other errors upon which the case must be reversed.

The record fails to show that the indictment was returned into court while in session. "It is error to put a defendant on trial on an indictment, unless it is returned into open court, and the only evidence of that fact must be found in the record of the case." *Gardner v. People*, 20 Ill. 430, and cases there cited; *Sattler v. People*, 59 Ill. 68; Bish. Crim. Proc. (3d Ed.) § 1355, and authorities cited in note 1.

We find, in examining the evidence, that no testimony was given as to where or in what county the offense was committed. For aught that appears in the record, the offense may have been committed in another state, if committed at all. This error is fatal.

While the first count of the indictment, upon which the conviction was had, falls short of reaching the standard required by some very able and respectable authorities, and cannot be recommended as a model by any means, yet we are not prepared to say that it is insufficient to support a judgment of conviction under our law and practice.

The charge is for embezzling a certain sum of money belonging to a corporation called the "Colorado Springs Athletic Association," while the treasurer thereof. The court allowed the people to prove, over the defendant's objections, that the directors of said association directed the defendant to pay a cer-

tain claim of indebtedness against said association, before paying any other claim, and that he disobeyed this order of the directors by paying out some of the money in his hands on another claim, before paying the claim in full which he was so directed to pay. We think this evidence was not pertinent, and that it may have had a tendency to prejudice the jury. It should be excluded upon another trial.

For the reasons above stated, that the record contains no recital that the indictment was returned into open court, and that it was not shown in what county the offense charged was committed, the judgment should be reversed.

STALLOUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing, the judgment is reversed, and the cause remanded.

(11 Colo. 277)

*ATKINSON et al. v. TABOR et al.*

(*Supreme Court of Colorado. April 27, 1888.*)

1. VENDOR AND VENDEE—COMPLIANCE WITH ESCROW—CANCELLATION OF DEEDS.

Where a deed is deposited with a bank as an escrow to be delivered upon payment of the balance of the purchase money, and, a third party having brought suit to recover an undivided interest in the property conveyed, the vendees, at the time of making the payment to the bank, obtain an injunction to restrain the vendors from demanding or suing for the money so paid to the bank, or from obtaining redelivery or cancellation of their deeds, there is no abuse of process, and the vendors are not thereby entitled to a cancellation of their deeds, and a return of the property conveyed.

2. REFERENCE—SWEARING REFEREE—WAIVER OF OBJECTION.

Where, by stipulation, the evidence is taken by a notary public, and submitted to a referee, and the oath taken by the referee bears date only two days prior to the filing of his report, but objection to the taking of the oath is first raised on appeal, the objection is waived.

Commissioners' decision. Appeal from district court, Lake county.

A comprehensive statement of the facts of this case, as well as the final conclusions of the referee, are shown by such portions of the referee's report, which are as follows:

"The essential substantive facts found from the evidence in this cause are as follows: On the 7th day of May, 1880, Nicholas N. Atkinson, James F. Chaney, and S. E. Bruckman entered into an agreement in writing, by which Bruckman agreed to furnish to Atkinson and Chaney fifteen dollars per week, in return for which they were to prospect for mineral lodes or claims, and, upon discovery of such lodes, they were to locate and record the same according to law, in the names of the three parties to said agreement, and that such agreement was to continue as long as Bruckman paid the fifteen dollars per week, up till December 1, 1880. It was also agreed that report should be made of the progress of such work to Bruckman at least once in ten days. On this contract, Bruckman paid Atkinson and Chaney seventy-five dollars prior to July 5, 1880. On the 16th day of June, they located the Montezuma and Borealis lodes, and on the 22d the Elkhorn lode. The three lodes last mentioned were staked in the names of Chaney, Atkinson, and Bruckman. Subsequently, and after July 5th, Chaney discovered a vein in the lower part of the Elkhorn claim, and located the Tam O'Shanter on this vein, taking in about one-half of the Elkhorn. The date of the discovery of the Tam O'Shanter was put upon the stake as that of June 22d, the date of the Elkhorn discovery; and the names of Bruckman, Chaney, and Atkinson were put upon the Tam O'Shanter stake, and subsequently, after cancellation of agreement, Bruckman's name was cut off. On the 5th day of July, Atkinson left his work of prospecting, and went to Leadville, arriving on the 7th, carrying with him samples from the three mines located by them. On his arrival, he

found Bruckman unwilling to continue the agreement, and on the 12th of July Bruckman and Atkinson indorsed on the agreement these words: 'We, the undersigned, parties to the within contract, agree to cancel the same.' This was signed by Bruckman and Atkinson, and signed by Atkinson for Chaney. On the 30th of June, 1881, William Parker and Jacob Sanders entered into an agreement in writing, in consideration of money paid and to be paid by Parker and Sanders, by which Atkinson and Chaney agreed to sell to Parker and Sanders the Montezuma, Borealis, Tam O'Shanter, and other mines in Pitkin county, Colo. By the terms of this agreement, Parker and Sanders were to pay in cash one hundred dollars, to build a trail to the lodes, and the further sum of \$5,000 as a forfeiture if they failed to pay the balance, \$95,000, within ninety days from the date of the agreement; the purchase price being fixed at \$100,000. It was further agreed that the vendors should deposit a deed or deeds to said lodes in some bank in Leadville, and that such deeds should be delivered to Sanders and Parker on full payment of the \$100,000, the \$5,000 to be a part of such payment; and, further, that if the \$5,000 was not paid on the proper execution and deposit of such deeds, or if the \$100,000 was not paid in full within the time,—ninety days from the execution of the deeds,—then such contract was to be null and void. It was also agreed that vendees were to take possession of the lodes at once, and to work them as they saw fit, taking out and sacking the ore, which, in case of a failure on the part of the vendees to complete the purchase, was to remain the property of Atkinson and Chaney. At the time of making this agreement, Chaney represented to the purchasers that the entire property belonged to himself and Atkinson, and that there was no controversy in relation thereto, and that they were the sole owners thereof. On the 5th day of July, 1881, said Parker assigned his interest in the contract to Sanders, and on the same day Sanders entered into an agreement in writing with H. A. W. Tabor, by which Tabor undertook to furnish the \$5,100 called for by the contract, and sufficient money to work the lodes until the expiration of the ninety days, or until abandoned; said Sanders to superintend the work, and the payments therefor. It was further agreed that if, upon development, the property should prove to be worth \$100,000, then Tabor was to pay for the same in full within the said ninety days; Sanders to execute a deed to Tabor, to be placed in the same bank with those of Atkinson and Chaney, which deed, together with that to Sanders, were to be delivered to Tabor on payment of the amount due within the ninety days, and that, in case the title thus passed to Tabor, he was to work the property, making use of Sanders as superintendent, until such time as he should have been reimbursed for the purchase money, the expense of working the mine, and then deed to said Sanders one-half the mine. There were also other agreements between Tabor and Sanders; but, as they relate to contingencies that did not happen, no reference need be made to them. Tabor paid the \$5,100, and the deeds were put in escrow. On the 7th or 8th of July, 1881, Tabor took possession of some of these lodes, and especially of the Tam O'Shanter lode, and commenced to work the same; he and Joel W. Smith, who became interested in the property about the 5th of July, expending in such development, prior to October 3, 1881, about \$10,000. On the 8th day of August, 1881, Samuel E. Bruckman began an action in the district court of Pitkin county, Colo., against Chaney and Atkinson, setting up the prospecting agreement of May 1, 1880, above mentioned, and alleging that, under and in pursuance of such agreement, the defendants discovered the Tam O'Shanter, Montezuma, Borealis, Ivanhoe, Halcyon, Last Chance, and Green Lake lodes, but omitted to record the same in the name of the three, but recorded the same in the name of the defendants only; the defendants had entered into a contract to sell the entirety of such lodes, to convey the same upon payment of the price agreed upon; and prayed judgment therein that plaintiff might be adjudged to be the owner of an equal undi-



vided one-third of said claim, and that he might be declared to have a lien upon the interest of the defendants for one-third of the moneys received by them on account of such sale, and for other relief. On the same day a notice of *lis pendens* was filed in the office of the recorder of deeds of Pitkin county, setting forth that a suit had been begun to establish the right of the plaintiff to one-third of the lodes therein mentioned, including the Tam O'Shanter, and to have a lien declared in his favor, upon the interests of Atkinson and Chaney, for certain moneys received by them in contract for sale of plaintiff's interest in said lodes. This suit was begun, and *lis pendens* filed, without the knowledge of Tabor, Smith, Sanders, or Parker, and so without collusion with Bruckman; neither of these parties knowing anything about the suit, or the nature of Bruckman's claim, until after suit was brought.

"Some time in the latter part of September, 1881, Atkinson had a conversation with Sanders about the Bruckman claim, and a few days later, Tabor and Smith, and their attorneys, were shown the grub-stake contract with Bruckman, and the alleged cancellation indorsed thereon, and at this time Tabor and Smith suggested that Atkinson and Chaney might be willing to deduct something from the \$100,000 in consideration of getting the money before the expiration of the ninety days. No sum was mentioned by either party, and no agreement of any kind was made. It is a disputed point, but it was fairly established by the evidence of one witness, and want of recollection by another, that Atkinson told Sanders, about this time, that one-third of the purchase money might be left in the bank, and they would fight the Bruckman claim. There is, however, no evidence that this was ever communicated to either Smith or Tabor. On the 29th day of September, Smith and Tabor made a contract with Bruckman, by which the latter agreed to release to the former all his right in and to the lodes mentioned in his complaint against Atkinson and Chaney on payment of \$25,000, within thirty days, which agreement was carried out by the making and delivery of a deed to Tabor and Smith to the same property on the 28th day of October, 1881. On the 3d day of October, Smith and Tabor paid into the Bank of Leadville the sum of \$95,000, and this sum was deposited to the credit of the several parties mentioned in the escrow agreement left with the deeds, to-wit, \$42,600 each to Chaney and Atkinson, and \$4,900 each to J. D. Hooper and J. L. Hill; said several sums being also mentioned in the agreement of escrow. Before this amount was paid by Tabor and Smith, they had, under the advice of A. W. Bucker, Esq., and A. S. Weston, Esq., caused a complaint and other papers to be executed and filed in the district court of Lake county, and had procured an order for an injunction out of said court, directed to Chaney and Atkinson and the Bank of Leadville, restraining Chaney and Atkinson from demanding, suing for, or receiving from the bank any money deposited by plaintiffs in said bank, or from demanding, suing for, or receiving from the bank the deeds of Chaney and Atkinson to Parker and Sanders, or from suing for the cancellation of such deed, and also restraining the bank from paying over the money, or from delivering the deeds to Chaney and Atkinson. The complaint was filed, and the injunction issued, an hour or so before the money was paid to the bank; but the money was paid in, and the deposit to the said several parties was entered, before the injunction was served. Service was had on the case on the 3d of October, and defendants filed a general demurrer therein October 13, 1881. From this time down till January 31, 1882, no steps were taken by defendants to dissolve the injunction, or push the case for trial in any way. Within forty-eight hours after the injunction was served, defendants were advised by their counsel that the facts in the case entitled them to elect either to take the money paid in, or to refuse to receive it, and recover the property. In the meantime, Tabor and Smith, having received from the bank the deeds to the property, continued to work the same, and expended thereon, between October 3, 1881, and January 31, 1882, from \$9,000 to \$14,000. During this time the defendants on several

occasions, alleged they had not concluded whether they would go for the money or the property. The evidence shows defendants were poor men aside from their interest in these lodes, and the claim made is that they had no money to employ counsel to prosecute their claim until January 31, 1882, when they made arrangements with other parties to furnish means for that purpose. By this arrangement, Atkinson and Chaney sold three-fourths of the lode property in dispute for the sum of \$63,000, \$20,000 cash in hand, and the balance as provided for; and that, in case the property should be held to belong to Tabor and Smith, then the vendees should be entitled to three-fourths of the money then in the bank. On the same day, January 31, 1882, the defendants Atkinson and Chaney filed therein a cross-bill, setting up the facts above stated, or a portion of them, asking that Bruckman, Parker and Sanders be made parties thereto, and asking, by way of relief, that the deed from Atkinson and Chaney to Sanders and Parker might be ordered to be delivered up and canceled, and that the complainants in the cross-bill might be decreed to be the owners of the lode property free and clear of all claim of plaintiffs, Tabor and Smith, or of Sanders, Bruckman, or Parker, and that an account should be taken of the ore extracted by plaintiffs, and that they be decreed to pay to Atkinson and Chaney the value thereof, and that the possession of said property be delivered up, etc. To this cross-bill answer was made by Sanders, Smith, and Tabor, which puts in issue all the material facts set up in the cross-bill, and alleges new matter, to which replication was made by complainants in the cross-bill, and the said Bruckman disclaimed. The issues were thus joined May 6, 1882. On the 11th day of July, 1882, the plaintiffs, Smith and Tabor, entered an order in the cause dissolving the injunction therein, and served notice of such dissolution on the said Chaney, Atkinson, and the Bank of Leadville. The defendants Chaney and Atkinson refused to take the money, and still claim the right to receive the property. It should be further stated that, after the injunction was granted, it was discovered that it did not cover the moneys deposited to the credit of Hooper and Hill, and that, some days after, Jacob F. Sanders took an assignment of the claims of these men, and the money was transferred to his account; he obtaining them at a slight discount."

After a lengthy discussion and presentation of the questions arising upon these facts, the referee concluded his report as follows:

"From these facts and considerations, it follows, and, as a matter of law, is here found, that on the 3d day of October, 1881, the plaintiffs were, by virtue of the agreements made between Atkinson, Chaney, and Parker, Sanders, and between Parker and Sanders and the plaintiffs, entitled to the deeds to the property mentioned in plaintiffs' complaint and defendants' cross-bill, and were at that date, in equity, the rightful owners of the same. *Second*, that, even if it is true that plaintiffs had no right, after injunction was granted, to take delivery of the deeds, yet equity will not compel a redelivery thereof, since, by dismissal of all proceedings, they are now entitled to such deeds. *Third*, that if defendants ever had the right to call on the plaintiffs to surrender possession, and retake the title, they lost such right by their laches in neglecting to elect whether they would abide by the sale and take the purchase money, or recover the property. *Fourth*, that no fraud is shown in the evidence, and, as it cannot be presumed, the defendants' cross-bill is insufficient in fact and in law; they cannot have the relief demanded in such cross-bill. *Fifth*, that the relief prayed for in such cross-bill should be denied, and such cross-bill, together with the original bill, be dismissed."

"WILLARD TELLER, Referee."

Exceptions to the report were filed by appellants, and the same were overruled; whereupon the court gave judgment according to the conclusion reached by the referee, to reverse which this appeal was taken.

*Markham, Patterson & Thomas, Belford & Reed, and A. S. Blake*, for appellants. *L. C. Rockwell and A. W. Rucker*, for appellees.

STALLCUP, C., (*after stating the facts as above.*) Did the attempt of the appellees to detain in the hands of the bank the purchase money paid in the manner and for the purpose shown subject them to a cancellation of their deeds of conveyance, and a return of the property conveyed thereby? The appellants affirm the same, for the reasons, as they contend, that the said payment to the bank was not a *bona fide* payment, and that the said injunction order obtained was an "abuse of process." But, in view of the evidence, this position is untenable, for these reasons: The payment of the purchase money to the bank was for the appellants, and to their credit, was an unconditional payment, and was made according to the escrow conditions. By such payment the bank was authorized to deliver the deeds, and, when the bank was so authorized to deliver, the appellees were authorized to receive the same. Notwithstanding the proceedings for the writ of injunction were concurrent with the performance of the escrow conditions, the money, so paid by the appellees, was thereby, and ever since has been, treated by appellees as the money of appellants. There was no abuse of process in the premises, for the reason that no advantage was obtained by force of the writ itself; that is to say, the act complained of—the delivery of the deeds—was not procured thereby. The findings and the weight of the evidence are to the effect that the sole purpose of the writ was for indemnity for the deficit, and not for procuring the delivery of the deeds, and that the purchase money had been paid *bona fide* for delivery thereof.

The Bruckman claim was sufficient to cause apprehension, and a desire to avoid trouble and possible loss thereby. The acquisition thereof at an outlay of \$25,000, the voluntary and unqualified dissolution of the injunction, and offer of dismissal of the cause by appellees thereupon, leaving themselves liable upon their bond for any injury caused thereby, together with the direct and uncontradicted evidence of the appellees, seem to be sufficient to warrant the findings of the referee of the *bona fides* of the payment of the purchase money, as well as the entire want of equity to sustain the cross-complaint. Our Code of Civil Procedure provided for the speedy hearing of motions to dissolve such injunctions in term-time or in vacation, so that a speedy dissolution or modification of this injunction was at all times easily attainable if the same was wrongfully issued. Why this line of procedure was ignored by the appellants, and why they stood by and waited for nearly four months before electing to pursue the course they have pursued, are matters we need not consider, as they apply only to the question of laches; and, as we have seen, there never was any right to the relief demanded by appellants in their cross-complaint, that question is not necessary in the case.

By stipulation duly made, it was provided that the evidence should be taken by a notary public, and accordingly submitted to the referee. The hearing was accordingly had before the referee. It appears that the oath taken and subscribed to by the referee bears date only two days prior to the day upon which the report was filed. The objection is here made that the oath should have been taken and filed by the referee prior thereto. This objection was waived by action of the parties in proceeding without question thereof. *Keator v. Plank-Road Co.*, 7 How. Pr. 41. Besides, such incident would be insufficient to warrant a reversal here, for the reason that the judgment order of the court denying the relief demanded by appellants is sustained by the weight of the evidence, and therefore should be affirmed.

RISING and DE FRANCE, CC. We concur in the affirmance of the judgment, upon the sole ground that the deposit in the Bank of Leadville, to the credit of appellants, of the sum named in the contract of escrow, was an absolute and irrevocable payment of such money under the terms of the contract between the parties. This being so, a statement of facts covering more than this one proposition is unnecessary, and is liable to create an opinion

that the unimportant facts, so stated, enter into and form the basis for the affirmance of said judgment.

**PER CURIAM.** For the reasons given in the foregoing opinion of Commissioner STALLCUP, (excluding any such inference as is suggested in the majority opinion,) the judgment is affirmed.

(11 Colo. 287)

SCHLOSS v. WOOD *et al.*

(*Supreme Court of Colorado. April 27, 1888.*)

**CARRIERS—WHO ARE COMMON CARRIERS—PROVINCE OF JURY.**

On the trial of an issue as to whether parties acted as common carriers or as forwarders merely, along with evidence tending to establish that they acted in the latter capacity, there was testimony that such parties were engaged in the business of receiving merchandise from a railroad company, at the terminus of its line of road, and transporting the same to a neighboring town; that they had an office at such town where freight bills were collected and custom solicited; and that they were doing business for the general public. *Held*, that such issue should have been submitted to the jury under proper instructions.

Commissioners' decision. Appeal from Lake county court.

Action for services brought by H. M. Wood and G. S. Wood against J. Schloss. Defendant, in his answer, counter-claimed for damages. Judgment for plaintiff. Defendant appeals.

*J. L. Murphy*, for appellant. *Clinton Reed*, for appellees.

**STALLCUP, C.** This action was commenced by appellees upon a demand against appellant for certain services rendered and certain charges paid in forwarding, from Weston to Leadville, 120 half-barrel kegs of beer. The appellant, in his answer, counter-claimed for damages, occasioned, as alleged, by the fault of appellees in negligently failing to protect the beer from freezing, in consequence whereof 89 kegs of the said beer were lost and destroyed; and also alleged that appellees were common carriers, and as such received and carried the beer; and that while so carrying the beer from Weston to Leadville the said freezing and loss occurred. From the evidence it appears that in the month of February, 1880, the beer had been sent from St. Louis by railway to Weston, the end of the railway at that time, and there by appellees received and sent to Leadville by wagons. The evidence tended to show that the beer was in good order when received at Weston; that the weather was very cold; that the beer was taken out of the railway car by appellees at Weston about three hours before it was loaded on the wagons; that some hay was put around it in the wagons to protect it from freezing; that the kegs in the center, as loaded on the wagons, were the kegs that did not freeze; that 89 kegs were burst, and the beer lost therefrom, when the kegs were delivered at Leadville; that appellees presented to appellant their bill for the charges, including the freight from Weston to Leadville; that the appellees kept an agent in their business at Denver and at Leadville; that prior to the arrival of the beer at Weston one of the appellees called upon appellant at Leadville, when appellant said to him that the beer was on the road, and requested that appellees ship the beer on to Leadville on arrival at Weston, and that it should be protected from freezing by putting building-paper and hay around it. The jury returned a verdict for appellees for \$604, the amount of their demand. Judgment was given upon the verdict, and this appeal was taken to reverse this judgment.

Upon the trial appellees adduced evidence tending to show that they acted in the premises as forwarders merely, while the appellant adduced evidence tending to show that they were common carriers, and accordingly acted in the premises. The court took the question upon this issue from the jury by the following instruction: "The defendant sets up as a further defense that

the plaintiffs were common carriers, and consequently insurers of the goods, and that if any injury happened the beer in transit that they were responsible unless that damage was occasioned by the act of God, or the public enemy, I will take the liberty of saying to you that there is nothing in this case upon which you can hold these plaintiffs as common carriers." Had the evidence all been in support of the appellees upon this issue, this action of the court would have been warranted, but the evidence was not all this way upon this issue. Witness May testified as follows: "*Question.* Where did you reside in the months of January and February, 1880? *Answer.* In Leadville, Colo. *Q.* Were you engaged in any business at that time? If so, what was it? *A.* I was in the clothing business. *Q.* Do you know the plaintiffs, Wood Bros.? *A.* Yes, sir; have known them for three years. They were in the transfer business from Weston and Buena Vista to Leadville. They were engaged in this business about the latter part of 1879 and 1880. *Q.* What do you mean by transfer business? *A.* To receive merchandise from the railroad company and deliver them to parties consigned. *Q.* When goods were consigned to persons here in Leadville, which goods came over some of the roads leading to Weston or Buena Vista, where did Wood Bros. deliver the goods? At what place? *A.* They delivered them at Leadville. *Q.* Did the Wood Bros. carry any goods for you, from the end of the track at Weston to Leadville? *A.* They did. *Q.* In what manner, and to what extent did they carry goods for you from the end of the track, at Weston? *A.* They brought them in wagons. *Q.* You may give the manner of collecting for the carrying of goods. *A.* The money was collected by their collector. *Q.* Did they have any houses or offices for carrying on their business? And if so, where? *A.* They had an office in this city, corner Sixth and Poplar streets, and one at the end of the track. *Q.* What part of the business was transacted at the Leadville end of the line by plaintiffs? *A.* Collecting freight bills and soliciting patronage. *Q.* What was the extent of their business? *A.* They were doing business for the general public. *Q.* How do you know they were doing business for the general public? *A.* Mr. Wood told me they were hauling for a great many of our neighbors, and would like to haul for us." There was considerable other evidence to the same effect.

A common carrier is one who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage. Hutch. Carr. § 47, and note. And the same author, at section 62, states the distinction between forwarders and common carriers, as follows: "Warehousemen, wharfingers, and forwarders of freight, so long as they confine themselves to the business which their names import, cannot be held liable as common carriers. If goods are deposited with them merely as the initiatory step towards starting them *in itinere*, they having undertaken to do no more than to safely keep them and forward them when opportunity offers; and being in no wise interested in their carriage after delivery to the carrier, it would be contrary to the well-settled principles of the law to hold them to the responsibilities of common carriers. But if they combine the two characters, treating the deposit with them as being merely for the convenience of further carriage, or to encourage or promote their business as common carriers, they will be held to a strict liability as such from the time of the delivery to them. In such cases the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, and the liability as carrier begins with the receipt of the goods." And Bouvier defines a forwarder as "a person who receives and forwards goods, taking upon himself the expense of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight." Whether a person is a common carrier depends wholly upon whether he holds himself out to the world as such, and he can hold himself out as a common carrier by engaging in the business gen-

erally, or by announcing or proclaiming it by cards, advertisements, or by any other means that would let the public know that he intended to be a common or general carrier for the public. *Railway Co. v. Nichols*, 9 Kan. 252, 253. Were the appellees acting in the premises as common carriers, or forwarders merely? This question should have been submitted to the jury with proper instructions. The error of the court in not doing so was prejudicial to appellant, as his counter-claim rested upon the alleged facts that appellees were common carriers and accordingly received and carried the beer from Weston to Leadville, and upon the law imposing the liability upon common carriers in such cases. This court has defined such liability in the case of *Express Co. v. Carroll*, 7 Colo. 43, 1 Pac. Rep. 682.

The judgment should be reversed, and the case remanded.

DE FRANCE and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment is reversed, and the cause remanded.

(11 Colo. 333)

MCALL v. FRANCE.

(*Supreme Court of Colorado*. April 27, 1888.)

APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action for a balance due for labor, where there is some conflict as to the terms of the employment, the damages to defendant by plaintiff's quitting work when he did, and the balance due, and the evidence is sufficient to support the court's finding, the judgment will be sustained.

Commissioner's decision. Appeal from Arapahoe county court.

*I. W. Adams* and *W. J. Weeber*, for appellant. *F. A. Williams*, for appellee.

STALLCUP, C. This was an action by appellee against appellant for balance due for work done by appellee for appellant in his vegetable garden during the spring and summer of 1884, and was commenced before a justice of the peace. The appellee recovered judgment there for the sum of \$67.61. Appeal was taken to the county court by appellant. Upon trial there appellee recovered judgment for the same sum, together with interest thereon. Whereupon appeal was taken to this court by appellant.

Upon the trial, the appellant claimed that appellee quit work before the expiration of the time for which he had employed him; that he was thereby unable to gather some tomatoes in time to save them, and was thereby damaged in the sum of \$100. The appellee claimed that no specific time had been agreed upon in the contract of employment, and that no damages were occasioned by his quitting work at the time he did. There was some conflict in the evidence upon this issue, but the evidence was ample to sustain the court's finding in favor of the appellee thereon. There was also some dispute as to the amount of the balance due appellee; the appellant claiming that the balance in favor of appellee was some \$20 less than the amount allowed by the court, but the court's finding thereon is sustained by the evidence. The judgment is right, and should be affirmed.

DE FRANCE and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment is affirmed.

(11 Colo. 319)

SYLVIS v. SYLVIS.

(*Supreme Court of Colorado*. April 27, 1888.)

1. DIVORCE—PLEADING—ALLEGATIONS OF CRUELTY—SPECIFIC CHARGES.

In an action for divorce, allegations in the complaint that defendant was constantly subject to uncontrollable paroxysms of rage, and that during such par-

oxysms abused plaintiff in the most opprobrious manner, falsely accusing him of illegal acts "too vile to be set forth," charge specific acts of cruelty; and, though the language used is not given, evidence in support of the charge is admissible.

2. **SAME.**

Allegations, in a complaint for divorce, that defendant, after retiring for the night, would, in a paroxysm, suddenly spring from the bed, lay hold of it, and attempt to drag it about the room, all the time raging against plaintiff, and that this conduct was of daily occurrence for years, charge specific acts, properly proven upon the charge of extreme cruelty.

3. **SAME—ALLEGATIONS OF CRUELTY—PLEADING AND PROOF.**

The complaint, in an action for divorce, alleged acts of extreme cruelty by defendant, making plaintiff's life a burden, and endangering his personal safety. The evidence, given without objection, showed that, while plaintiff was sick, on his failure to comply with defendant's wishes, she would fly into a rage, abuse and falsely charge him of violations of his marriage vows, and violently shake the bed on which he was lying; that her manifestations of temper rendered his life with her unbearable, tended to permanently destroy his peace, and caused him to fear for his personal safety, and that he was harassed by her for years before he left her. *Held*, that the proof supported the allegations of the complaint.

4. **SAME—PLEADING—UNCONTROLLABLE VIOLENCE.**

In an action for divorce, allegations in the complaint that defendant was subject to uncontrollable paroxysms of rage and violence should be construed to charge that such paroxysms were beyond the control of the plaintiff.

5. **SAME—PLEADING—NEW MATTER IN ANSWER—WHAT IS.**

Where plaintiff, in an action for divorce, alleges that he left his wife because of certain acts committed by her, an allegation, in defendant's answer or cross-complaint, of desertion without cause, does not require a reply, under Code Colo. § 65, providing that plaintiff shall reply to an answer or cross-complaint containing new matter.

6. **SAME—EVIDENCE—ADMISSIONS—LETTERS WRITTEN AFTER SEPARATION.**

In an action for divorce, the uncontradicted testimony showed that, for several years before the separation, defendant was subject to frequent manifestations of temper against plaintiff; that she falsely accused him of unfaithfulness; and that often, at such times, when plaintiff was confined to his bed, defendant would violently shake the bed on which he was lying. Letters written by plaintiff to his wife, after he left her, to the effect that she could get a divorce on any ground she might have on the testimony of her family, and he would submit, to save her name, and that he could not get a divorce if opposed, were in evidence. *Held*, that the letters not being admissions of any fact constituting a ground for divorce, the evidence was sufficient to warrant a divorce on the ground of cruelty.

7. **SAME—UNCORROBORATED EVIDENCE—FACTS WITHIN KNOWLEDGE OF ADVERSE PARTY.**

In an action for divorce, where the uncorroborated testimony of the plaintiff as to the acts of defendant, constituting the ground of divorce, is uncontradicted, and the acts must be within the personal knowledge of the defendant, such facts may be taken into consideration in determining the sufficiency of the evidence to warrant a decree.

8. **SAME—EVIDENCE—DECREE IN FORMER ACTION.**

In an action for divorce, defendant alleged in her answer that she had obtained, in another court, a decree awarding her the custody of their child, and ordering plaintiff herein to pay a certain sum for its support. The only affirmative relief asked for was that plaintiff be ordered to pay her the alleged sum due under said decree. The decree did not show the nature of the issues on which it was based, and no attempt was made to supplement this proof. *Held*, that the decree could not be considered as an adjudication of any issues made in said action, and, under the pleadings, was not admissible for the purpose of obtaining the affirmative relief asked for.

9. **SAME—REVIEW—VARIANCE.**

Where plaintiff, in an action for divorce, alleges in his complaint that defendant had been guilty of numberless acts of extreme cruelty which rendered life a burden, and endangered his personal safety, and evidence is received, without objection, showing acts which tend to render life a burden, and thereby endanger health, it cannot be said, on appeal, that the proof does not correspond with the allegations of the complaint.

DE FRANCE, C., dissenting.

Commissioners' decision. Error to superior court of Denver.

This is an action brought by Pauling B. Sylvis against his wife, Frances J. Sylvis, for a divorce on the ground of extreme cruelty. The allegations of the complaint, charging such cruelty, are contained in the fourth and fifth paragraphs,

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which paragraphs are as follows: "*Fourth.* That, during the time he lived with his said wife, he treated her with uniform kindness, and supplied her with all the necessaries of life, as became persons in their station in life; but that the defendant, disregarding her duty as a wife, for the period of more than five years prior to their separation was guilty of numberless acts of extreme cruelty to plaintiff, whereby his life was rendered burdensome to him, and his personal safety endangered; that, for the period last aforesaid, she was constantly subject to uncontrollable paroxysms of rage and violence, and that, during these attacks, defendant would abuse plaintiff in the most vile and opprobrious manner, accusing him of vile and illegal acts, of which he was wholly innocent, and which were wholly without foundation, and would rage about the house, uttering these vile accusations, too vile to be set forth herein, and threaten the personal security of plaintiff; that, after retiring for the night, she would suddenly, in these paroxysms, spring from her bed, lay hold of it, and attempt to drag it about the room,—all the time raging against plaintiff in loud tones, and threatening his safety; that this conduct of defendant continued year after year, and for years before said separation was a daily occurrence when plaintiff was at home, until finally plaintiff, fearing for his life, was forced to leave her, which he did for these causes and no other; that, when he so left, he was the owner of property of the value of about twelve hundred dollars, every cent of which he gave her for her support. *Fifth.* And plaintiff further avers that the longer continuance of the cohabitation between plaintiff and defendant, for the causes aforesaid, would, as he believes, [have] been attended with bodily harm to the plaintiff."

That portion of defendant's answer answering the foregoing allegations of the complaint is as follows: "Defendant denies that, during the time, he, the plaintiff, lived with defendant, his wife, he treated defendant with uniform kindness; and denied that he supplied her with all the necessaries of life, as became persons in their station in life; and denies that she, disregarding her duties as a wife, for the period of more than five years prior to their separation was guilty of numberless acts of extreme cruelty to plaintiff, whereby his life was rendered burdensome to him, and his personal safety endangered; and denies that, for the period mentioned in said complaint, the defendant was continually subject to uncontrollable paroxysms of rage and violence; and denies that she ever had such attacks; and denies that she abused plaintiff in the most vile and opprobrious manner; and denies that she accused him of vile and illegal acts of which he was wholly innocent or guilty; and denies that she would or did rage about the house uttering vile accusations, too vile to be set forth in plaintiff's complaint; and denies that she threatened the personal security of plaintiff; and denies that, after retiring for the night, she would suddenly, in paroxysms, spring from her bed, lay hold of it, and attempt to drag it about the room; and denies that she raged against plaintiff in loud tones, and threatened his safety; and denies that any such conduct of defendant continued year after year, and for years before said separation was a daily occurrence; and denies that plaintiff, fearing for his life, was forced to leave this defendant, for the pretended causes set out in his said complaint, or for any other cause; and denies that, when he so left her, he was the owner of property of the value of about twelve hundred dollars, every cent of which he gave to this defendant for her support; and defendant denies that the longer continuance of the cohabitation between this defendant and plaintiff, for the pretended causes set forth in his said complaint, or for any other cause, would be attended with bodily harm to the plaintiff." For a second defense and cross-complaint, the defendant, in a separate paragraph of her answer, alleged that on the 5th day of January, 1878, the plaintiff, disregarding his marital duties towards the defendant, willfully and without any cause deserted and abandoned the defendant, and has ever since willfully remained absent from her. For a third defense and cross-complaint, the defendant, in



a separate paragraph of her answer, alleged that on the 16th day of October, 1883, in an action then pending in the court of common pleas of the state of Ohio within and for the county of Montgomery, in which the defendant herein was plaintiff, and the plaintiff herein was defendant, the defendant herein obtained a decree of said court awarding the custody of their child, Howard Paulding Sylvis, to the plaintiff, and ordering the defendant in said suit to pay for the support of said Howard Paulding Sylvis the sum of \$10 per month until the further order of the court, and that said decree still remained in full force and effect. The defendant prayed that a divorce be denied to the plaintiff; that plaintiff be ordered to pay her the sum of \$150, due on the decree of said court of common pleas; and for such other alimony and relief as equity may require.

Code Colo. § 65, provides that plaintiff shall reply to an answer or cross-complaint containing new matter. Judgment dismissing the plaintiff's bill.

*Browne & Putnam* and *E. O. Wolcott*, for plaintiff in error. *Rogers & McCord*, for defendant in error.

**RISING, C.** (*after stating the facts as above.*) Appellant seeks a reversal of the judgment on the ground that the evidence in the case is sufficient to entitle him to a decree of divorce. Appellee resists the reversal of the judgment, upon the following grounds: *First*, that the proof made by the plaintiff does not correspond with the allegations of his complaint, and therefore he is not entitled to a decree as prayed; *second*, that a divorce should not be granted on the uncorroborated testimony of the plaintiff; *third*, that it is shown by the admissions of the plaintiff that he is not entitled to a divorce. The proper consideration of the contention by appellant and by appellee requires an examination of the pleadings before we consider the evidence.

1. The plaintiff charges that the defendant was, for a period of more than five years prior to his separation from her, guilty of numberless acts of extreme cruelty, which rendered life a burden to him, and endangered his personal safety. This statement is very general, and, had objection been made thereto on that ground, the plaintiff could have been required to make the statement more definite and certain; but, if the defendant did not care to have such general statement made definite and certain, we cannot, upon appeal, say that such statement is insufficient to permit the giving of any testimony in support of it, and certainly, if evidence is received without objection, showing acts which tended to render life a burden to the plaintiff, and thereby endanger his health, we cannot say that such proof does not correspond to the allegations of the complaint. *Berdell v. Bissell*, 6 Colo. 162-164.

2. The plaintiff further charges that, during the five years preceding his separation from her, defendant was constantly subject to uncontrollable paroxysms of rage and violence; and that, during such paroxysms, she abused the plaintiff in the most vile and opprobrious manner, and accused him of vile and illegal acts of which he was innocent, and would rage about the house uttering such vile accusations, which were too vile to be set forth by plaintiff in his complaint. It has been suggested, of this allegation, that, if the paroxysms of rage and violence were uncontrollable, then defendant was not accountable therefor, and hence nothing done by her at such times could afford any grounds for divorce for cruelty. We do not so construe this allegation. To so construe it would be to make it meaningless, and this should not be done if it can be given a construction which makes the allegation consistent with the object sought by the pleading, and also harmonious with the other allegations of the complaint; and this can be done by construing the allegation to mean that such paroxysms of rage and violence were beyond the control of the plaintiff, and that the pleader so intended to charge, we have no doubt. We think the allegations last set forth charge specific acts of

cruelty, and that the failure to give the language used does not render the charge so indefinite that evidence should not be received to support it. Instead of condemning the pleading for this omission, we feel that, in view of the character of the testimony given, it is deserving of commendation for the respect shown to decency.

3. The plaintiff further charges that the defendant, after retiring for the night, would, in these paroxysms, suddenly spring from the bed, lay hold of it, and attempt to drag it about the room, all the time raging against the plaintiff. Can it be doubted that these allegations charge specific acts, proper to be proven upon the charge of extreme cruelty? And especially so when taken in connection with the further allegation, made by plaintiff, that this conduct of defendant continued year after year, and was of daily occurrence for years before said separation, when plaintiff was at home. Acts which tend to destroy the peace of mind are well calculated to impair health and endanger life.

That portion of the answer consisting of denials is insufficient to put in issue many of the most material allegations of the complaint.

We will now examine the evidence, for the purpose of ascertaining whether the proofs correspond with the allegations, and in so doing must bear in mind that no objection was made to the reception of the evidence under consideration. In our examination of and comments upon the evidence, by reason of the character of such evidence, we shall omit all allusion to the cause which produced the ebullitions of temper on the part of the defendant, testified to by the plaintiff. The determination of any question arising upon the evidence does not depend upon what caused the commission of the acts that are complained of, for no claim is or can be made upon the evidence that the cause of such acts was the fault of the plaintiff. It appears from the evidence that the plaintiff was a railroad conductor, and that while engaged in such employment was severely injured in a collision; that, by reason of such injuries, he lost two of the fingers on his right hand, and that one of his ankles was so badly crushed as to require amputation, and that, by reason of such injuries, he was confined to his bed a little over 11 months; that often, while plaintiff was so sick, upon his failure to comply with all the requests made by defendant, she would fly into a rage of passion, and abuse the plaintiff, and would seize hold of the bed upon which the plaintiff was lying, and violently shake the same; that the defendant did so demean and conduct herself as to make the plaintiff entertain fears for his personal safety. It further appears, from the testimony of the plaintiff, that, at other times than when plaintiff was so confined to his bed, when plaintiff failed to comply with requests made by her, defendant would abuse him, and accuse him falsely of criminal violations of his marriage vows, and her manifestations of ill-temper and impatience, at such times, was such as to render the life of plaintiff with her unbearable, and to permanently destroy his peace and happiness; that there was a continual harassing of the plaintiff by the defendant, as above described, from about the year 1871 up to the time plaintiff left her, in 1878. We think the evidence tended to prove the allegations of the complaint, and that the point made by appellee, that the proof offered does not correspond to the allegations made, is not well taken.

We know of no inflexible rule in this state which precludes the granting of a divorce upon the uncorroborated testimony of the plaintiff in the suit. Each case must depend upon the facts shown, whether by one or more than one witness. When the evidence is sufficient to convince the mind of the truthfulness of the allegations upon which the divorce is asked, such evidence is all that the law requires. When the testimony of the plaintiff, as to the particular acts of the defendant constituting the grounds for divorce, is contradicted, and such acts are such as must be within the personal knowledge of the defendant, such facts may be taken into consideration in determining

the sufficiency of the evidence to warrant a decree. We do not think the second point made by counsel for appellee is well taken.

The sufficiency of the evidence to entitle the plaintiff to a decree of divorce, and the third point made by counsel for appellee, will be considered together. The testimony of the plaintiff was taken before Hon. James A. Dawson as referee, and by him reported to the court. An examination of the testimony, so reported to the court, will show that the referee made but little attempt to give the language of the witness, and it is quite apparent that, as reported, the testimony of the plaintiff presents some conclusions of fact. By this manner of reporting the testimony, we are presented with some statements of fact by the witness, and some conclusions which may be the conclusions of the witness, or may be the conclusions of the referee. The fact that the report should give the statements of the witness favors the first view, but the language used shows the conclusions to be the conclusions of the referee. Under the circumstances, no objection having been made by either party to this method of reporting the testimony, we think that, in considering such testimony, the conclusions stated should be deemed as having been properly drawn from the facts sworn to; and this, not only because of the manner in which such testimony is reported, but because there are sufficient statements of specific facts reported in said testimony to warrant such conclusions. The evidence, showing the frequent violent exhibitions of rage and ill temper of the defendant against the plaintiff, and her false accusations against him of criminal unfaithfulness to the marriage vow, frequently made during the last five years that plaintiff and defendant lived together, and her conduct towards him when confined to his bed by reason of injuries received in a railroad collision, is sufficient to show that the defendant's conduct was such as to permanently destroy the plaintiff's peace and happiness, and to render life with her almost unbearable. The plaintiff swears that he entertained fears for his personal safety, and who shall say that his statement is untrue? The conduct of the defendant, in often flying into a rage, and seizing hold of the bed, and violently shaking it, when the plaintiff was confined thereto by reason of the amputation of his leg, exhibits such a disregard for the plaintiff's well-being as to warrant him in entertaining a belief that his personal safety would be endangered by living with defendant. To properly consider the conduct of defendant towards plaintiff at the time of his sickness, and its effect upon him, it must be remembered that, during the 11 months he was confined to his bed, his leg was amputated three times. There is no conflicting testimony in relation to the conduct of the defendant, and there is no evidence tending to show any provocation therefor; therefore the defendant must be held accountable for such conduct, and for its effect upon the plaintiff. The natural effect of such conduct upon an ordinary sensitive person would be to destroy his peace and happiness, and from the destruction of peace and happiness the impairment of health is a natural consequence; and the presumption is that the conduct of the defendant produced the natural and usual result of such conduct. *Haley v. Haley*, 14 Pac. Rep. 92. To authorize a divorce on the ground of cruelty the evidence should show that the acts complained of are such as that danger to life, limb, or health will naturally arise from the continued commission of such acts, but it is not necessary that the evidence should show that actual physical violence has been used. Extreme cruelty may be as effectually caused by conduct which produces mental suffering, and robs complainant of his or her peace of mind, as by blows inflicted; and to many persons the burden of the mental suffering will be much harder to bear than the burden of any ordinary physical suffering. These views are sustained by many recent and well-reasoned decisions. *Carpenter v. Carpenter*, 30 Kan. 712-744, 2 Pac. Rep. 122; *Palmer v. Palmer*, 45 Mich. 150, 7 N. W. Rep. 760; *Friend v. Friend*, 53 Mich. 543, 19 N. W. Rep. 176; *Berryman v. Berryman*, 59 Mich. 605, 26 N. W. Rep. 789; *Wheeler v. Wheeler*, 53 Iowa,

511-515, 5 N. W. Rep. 689; *Kelly v. Kelly*, 18 Nev. 49-55, 1 Pac. Rep. 194.

But it is contended by counsel for appellee that it is shown by the admissions of plaintiff that he is not entitled to a divorce; and this contention is based solely upon the effect to be given to letters written by the plaintiff to the defendant after their separation, and about a year and nine months before the commencement of this action. Upon a careful examination of these letters, we fail to find anything that militates in the least against the truth of plaintiff's testimony; but we do think that the letters strongly go to show that the character and disposition of the plaintiff is such that the conduct of the defendant, as shown by the uncontradicted evidence in the case, would destroy the plaintiff's peace of mind, and render life a burden to him; and that, if the poor condition of the plaintiff's health, as shown by said letters, was not the direct result of such conduct, the inevitable result of a continuance of such conduct would be to prevent the plaintiff from recovering his health, if not to seriously endanger his life. In these letters the plaintiff says to the defendant that she can apply in the Dayton courts for a divorce for his failure to support her, or for his desertion of her, or for any other ground she may think she has, and that he will not oppose her, no matter what plea she makes. He also says to her that she can sustain the grounds for failure to support and for desertion by members of her own family, and by others in Richmond; that he will submit to anything in order to prevent a stain upon her good name. In these statements of the plaintiff to defendant, there is no admission of any fact constituting a ground for divorce by defendant, but rather a statement that defendant could make proof of facts which, if unexplained, would enable her to obtain a divorce. In other words, it is an admission that defendant might show that he did not support her, and that he had deserted her; but it is no admission that he could not show good reasons for his failure to support her, and good cause for his leaving her. Plaintiff also says in one of the letters: "I know I am not able to get a divorce myself, if you oppose it, in Indiana or Ohio." The very most that can be claimed from this, as an admission, is that plaintiff did not, at that time, think he could get a divorce under the laws of Indiana or under the laws of Ohio. It is not an admission of any fact, and it is not an admission of any kind that tends to contradict the testimony given by the plaintiff. The plaintiff may have been advised, and may have believed, that, under the laws of either Indiana or Ohio, he could not make a case, but his belief in no manner affected the facts.

We have discussed all the questions raised in the arguments, but, in the examination of the case, other questions have been raised which we will now proceed to consider. It is urged that the matter set up in defendant's answer as a second defense and cross-complaint is purely a cross-complaint, and that, the plaintiff not having replied thereto, the allegation of desertion without cause stands admitted. The proper consideration of this question requires an examination of the third paragraph of the complaint, which alleges "that plaintiff and defendant lived and cohabited together as husband and wife from the date of said marriage until the month of January, A. D. 1878, when he left her because of the acts of defendant hereinafter complained of, and that since said last-named day, for the same causes, he has remained absent from the defendant, and has refused to cohabit with her since." After setting out, in the fourth paragraph of said complaint, the conduct of defendant of which he complains, he alleges "that fearing for his life, he was forced to leave her, which he did for these causes, and no other." From these allegations in the complaint it clearly appears that the allegation of desertion without cause, contained in defendant's answer as a second defense and cross-complaint, is not new matter, and, not being new matter, a replication is not required. Code, § 65. What is new matter, and why it may be said to be new matter, is well stated in Pom. Rem. § 691, from which we quote: "The general de-

nial puts in issue all the material averments of the complaint or petition, and permits the defendant to prove any and all facts which tend to negative those averments, or some one or more of them. Whatever fact, if proved, would not thus tend to contradict some allegation of the plaintiff's first pleading, but would tend to establish some circumstance, transaction, or conclusion of fact not inconsistent with the truth of all of those allegations, is new matter. It is said to be new, because it is not embraced within the statements of fact made by the plaintiff; it exists outside of the narrative which he had given; and proving it to be true does not disprove a single averment of fact in the complaint or petition, but merely prevents or destroys the legal conclusion as to the plaintiff's rights and the defendant's duties which would otherwise have resulted from all those averments admitted or proved to be true." The plaintiff alleges that he left the defendant because of certain acts committed by her. The defendant alleges that the plaintiff left her without cause. The defendant's allegation amounts to a denial of plaintiff's allegation, and to nothing more. To call such allegation a cross-complaint is a misnomer. It has no semblance to a cross-complaint, in that no affirmative relief is asked which is based upon said allegation. It is not new matter, in that new matter must, in effect, confess and avoid. Pom. Rem. § 630. "A statement of facts by way of defense, which are merely inconsistent with those stated by the plaintiff, is in effect, a denial." Bliss, Code Pl. § 333. When the plaintiff has alleged that he left the defendant for certain causes, and defendant has answered that plaintiff left her without cause, it seems almost an absurdity to say that unless the plaintiff, in a replication to such answer, again states the causes for which he left the defendant, he must be held to have admitted that he left her without cause. We do not think the Code requires any such useless proceeding.

Another question raised relates to the effect, as evidence, to be given to a certain decree of the court of common pleas within and for Montgomery county and state of Ohio, which decree was given in evidence by the defendant, and which decree is as follows:

*"Fanny J. Sylvis, Plff., vs. Paulding B. Sylvis, Deft.*

"This cause coming on to be heard on the petition of plaintiff and the answer of the defendant, after hearing the evidence therein, the court, on consideration thereof, finds the allegations of the petition to be true; that the defendant has been guilty of willful absense for more than three years; and awards the custody of the child named in plaintiff's petition, Howard Paulding Sylvis, to the plaintiff, and orders that the defendant Paulding B. Sylvis pay, for the support of the plaintiff and the child, Howard Paulding Sylvis, named in the petition, the said plaintiff the sum of \$10 per month at the end of each month, beginning October 31, 1882, subject to the further order of the court."

This decree was rendered October 16, 1882. For a third defense and cross-complaint the defendant alleges that she obtained a decree in said court on the 16th day of October, 1882, awarding to her the custody of their child, Howard Paulding Sylvis, and the sum of \$10 per month at the end of each month, beginning October 31, 1882, subject to the further order of said court. Upon the consideration of this case it is urged that the presumption fairly arises from this decree that the fact whether the plaintiff had separated from the defendant with or without cause was tried and settled in that action. There are many reasons why no such presumption can arise. There is no proof of the nature of the issue in the case in which the decree was rendered. The decree is absolutely barren of any statement or conclusion showing expressly or by implication that any such issue was tried in that action. But, even if the decree disclosed that such issue was determined by the court, the effect of the decree, as evidence in this case, could not be extended so as to make it evidence of any fact not alleged in defendant's third defense and cross-complaint; and, applying it to that defense, as the pleader intended it, and not as he stated

it, the decree would be evidence simply that defendant had, in a court of competent jurisdiction, obtained a decree awarding to her the custody of the child, and requiring defendant in that action to pay to plaintiff the sum of \$10 per month for the support of herself and the said child. It would not be evidence for this purpose, even, without an amendment to the pleading. The decree cannot be considered as evidence of an adjudication upon any issue made in said action. "The general rule is that, where a party intends to avail himself of a decree as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must show the proceedings upon which the decree was founded." 1 Greenl. Ev. (13th Ed.) 511. There is no attempt made to show the proceedings upon which the decree given in evidence was founded. The fact that the decree was received in evidence without objection is urged as a reason why it should be held evidence of a desertion of defendant by plaintiff without cause, but we do not see the force of this reasoning. The decree is in evidence for what it is worth, but it is valueless to prove desertion without cause. The only affirmative relief prayed for by the defendant, except in the general prayer, is based upon the third defense and cross-complaint in her answer, and the relief so demanded is that the plaintiff be ordered to pay her the sum of \$150 due on the decree of the court of common pleas of Montgomery county, Ohio. For the purpose of obtaining this relief, proof that a decree was rendered was sufficient, without showing upon what issues the decree passed; and it was for this purpose, and this purpose only, that the decree was offered, and for this purpose only is it evidence.

There is no conflict in the evidence, and we deem it sufficient to authorize a decree for the plaintiff. The judgment should be reversed.

STALLCUP, C., concurs. DE FRANCE, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the superior court is reversed, and the cause remanded, with directions to enter up a decree of divorce in favor of the plaintiff in error in accordance with the prayer of the complaint.

(75 Cal. 620)

HUNT v. STEESE *et al.* (No. 11,664.)

(Supreme Court of California. April 26, 1883.)

1. INJUNCTION—TO RESTRAIN TRESPASS PENDING EJECTMENT—TITLE OF PLAINTIFF.

Plaintiff in ejectment averred that he held certain lands for agricultural purposes, under a patent excepting from the grant any mineral land which might be found on the tract; that defendants were mining on the land; also that they were insolvent, and were doing irreparable injury. Defendants, without denying plaintiff's averments, maintained that the land was known to be mineral land at the date of the patent, and therefore plaintiff had no title; and that they had filed a location thereon, and complied with the mining laws. *Held*, that defendants, not having proved with reasonable certainty that plaintiff's title was not good by showing that the land at the date of the patent was more valuable for mining than for agricultural purposes, and was known to be so at that time, an injunction against defendant should issue pending a trial on the merits.

2. APPEAL—PRACTICE—NOTICE—ORDER REFUSING INJUNCTION.

Under Code Civil Proc. Cal. § 951, providing that on appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of papers used in the hearing below, on appeal from an order refusing an injunction, the particulars in which the evidence is considered insufficient need not be set out in a bill of exceptions.

In bank. Appeal from superior court, Yuba county; PHILLIP W. KEYSER, Judge.

This was an action of ejectment for certain lands in Yuba county. Plaintiff, Francis Hunt, moved for an injunction *pendente lite* restraining the de-

fendants, B. F. Steese and others, from doing certain acts to the destruction of the inheritance. The court granted a temporary restraining order, but, on the hearing of the motion, refused to grant an injunction, and dissolved the temporary restraining order. From this order plaintiff appeals. Code Civil Proc. Cal. § 951, provides: "On appeal \* \* \* from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the \* \* \* order appealed from, and of papers used on the hearing in the court below."

*Forbes & Dinsmore, (W. C. Belcher, of counsel,) for appellant. J. H. Craddock, for respondents.*

PATERSON, J. Plaintiff moved for an injunction *pendente lite*, restraining the defendants from washing away the soil for mining purposes. The court granted a temporary restraining order, but on the hearing of the motion refused to grant an injunction, and the order first made was revoked. On the hearing plaintiff introduced his verified complaint and a patent for certain lands, including the lands in controversy from the United States to the Central Pacific Railroad Company, issued under a grant to that company by act of congress passed July 1, 1862, and the amendment thereto of July 2, 1864. This patent is dated February, 1875, and contains after the granting clause the following provision: "Yet excluding and excepting from the transfer by these presents all mineral lands, should any be found to exist in the tracts described in the foregoing." Plaintiff also introduced in evidence a deed from the Central Pacific Railroad Company to himself dated June 5, 1883, conveying the lands in controversy. This deed contains, after the description, these words: "Reserving, however, all claim of the United States to the same as mineral land." It was shown by the plaintiff that he went into possession of the lands granted in 1877, and had used the lands for grazing purposes. In the winter of 1883-84 the land was inclosed by plaintiff with a fence. He testified that the defendants had deprived him of the use of the land since the fall of 1884; that the defendants were mining and digging up and washing away good soil without authority. It was shown on behalf of the defendants that they had filed a notice of location under the Revised Statutes of the United States, and had complied with the local mining laws and regulations; that they had entered upon the land for mining purposes under their claim of right. They were permitted, against the plaintiff's objection, to introduce parol testimony to show that the land was mineral land, and the court found "that at the time the patent of the United States issued to the plaintiff's grantor, the land in controversy was known, and had been for several years prior thereto, to be valuable for minerals. That being the fact, no title to said land passed by said patent to plaintiff's grantor, and of course none passed to plaintiff from the deed from said company." The court denied the application for an injunction upon the ground stated. The complaint alleged in substance that the plaintiff was the owner of the land; that the defendants were trespassing on his possession, washing away the soil and removing gold therefrom; that they were insolvent, and threatened and intended to continue their trespasses; that the land is valuable for agricultural and grazing purposes; that defendants are "stripping away from its natural places of deposit the alluvium deposits of the soil, plowing up the soil, and scraping and piling it up to make reservoirs on the land, and digging ditches on the land to carry water to wash the soil therefrom." The defendants filed no answer, but introduced affidavits and the testimony of witnesses showing that the land was valuable for mining purposes at the time of the issuance of the patent; that it had been profitably worked for gold, and was well known to be mineral in character. They did not deny that they were washing away the soil for gold, or that they were insolvent, or that they intended to continue their mining operations, or that the injury was irreparable.

We think that the injunction should have been granted. It is unnecessary for us to determine on this appeal whether we shall adhere to the rule of decision that a patent may be collaterally attacked under such circumstances. In all cases of this kind an injunction should be granted pending the determination of the issue as to ownership, unless it appear that the plaintiff's title is bad, or at least that there is no reasonable ground for the assertion of title by the plaintiff. The mere existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction. *Kerr Inj.* (2d Amer. Ed.) 13; *Hess v. Winder*, 34 Cal. 270. "It is the common practice at this day for the court to issue injunctions where the title is in dispute. \* \* \* The jurisdiction of the court in these cases is asserted for the preservation of the property pending proceedings at law for the determination of the title of the parties." *Le Roy v. Wright*, 4 Sawy. 535. "The injuries which are the subject of the complaint are of a character calculated to destroy the entire value of the land for all useful purposes. Those which consist in excavating ditches and digging up the soil are irreparable in the sense that the former condition of the property could not probably be restored without an expenditure exceeding the original value of the land. \* \* \* A denial of the preventive remedy by injunction in such case would be tantamount to a denial of all protection." *Henshaw v. Clark*, 14 Cal. 465. Not only should there be an answer to the merits, but it should be made reasonably certain by the pleadings and the affidavits, that the attack upon the patent will be ultimately successful, or the injunction should be granted. Such is not the case here. It is not sufficient to show that the land had been profitably worked for gold prior to the issuance of the patent. It should clearly appear that the lands were at the date of the grant more valuable for mining than for agriculture, and were known to be such; that they were more valuable under the conditions existing at the time of sale for mining than for agricultural purposes. *Iron Co. v. U. S.*, 8 Sup. Ct. Rep. 131.

In the case at bar the plaintiff's patent made for him a *prima facie* case as to title, and the most that is shown by the defendants is that the land is now, and was prior to the issuance of the patent, valuable for mining purposes when water could be had to work it. It was shown that from 1864 until after the patent had been issued no mining of any importance had been done for want of water. One witness for the defendant testified that "after 1864 there was no water there to work with, except from rains, and it took very heavy rains to accumulate water sufficient to amount to anything." That water has since been secured for the purpose of working the land cannot be taken into consideration in determining the rights of the parties. Present contingencies or probabilities have no bearing upon the question. *U. S. v. Reed*, 28 Fed. Rep. 486. The issue is confined to the time when the lands were sold and patented by the government. "It is quite possible that land settled upon as suitable only for agricultural purposes entered by the settler and patented by the government under the pre-emption laws, may be found years after the patent has been issued to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term known to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made, and the patent issued." *Deffeback v. Hawke*, 115 U. S. 404, 6 Sup. Ct. Rep. 95. If, on account of the absence of water, and sources of water, the lands in controversy were not more valuable for mining purposes than for agricultural purposes at the time of the sale, we think that the same principle should be applied, and the fact that other sources of water supply have been discovered or become accessible and can now be used in the profitable working of the mines, should not operate to the prejudice of the plaintiff, whose rights to the land were determined upon the conditions existing at the time of the sale. If it were otherwise, "the



proprietor would never be secure in his possessions, and without security there would be little development, for the incentive to improvement would be wanting. What value would there be to a title in one man with a right of invasion in the whole world," upon a subsequent change in the conditions, contingencies or probabilities? *Boggs v. Mining Co.*, 14 Cal. 380. But however that may be, unless, under such circumstances as we find here, it be held that the plaintiff under his patent is entitled to an injunction until the question of the character of the land is determined in the action, "the spoliation of landed estates under the pretense of mining without possibility of protection or redress on the part of the owner" will follow.

This appeal is from an order revoking the temporary restraining order and refusing an injunction; it is unnecessary, therefore, to specify in the bill of exceptions the particulars in which the evidence is alleged to be insufficient. The court is not required to file findings in a matter of this kind. Motions for injunction are regularly heard upon complaint, answer, and affidavits, and and no bill of exceptions is necessary unless it be to identify the papers used on the hearing. The appeal is heard upon the papers used on the hearing in the court below. Code Civil Proc. § 951. The testimony of witnesses, which we find in the record, we treat as written affidavits, identified by the judge, and as such to be considered by this court in the same manner as if in the form of affidavits.

It follows from the views expressed above that the order refusing to grant an injunction should be reversed, and the court below be directed to issue the injunction asked for by the plaintiff until the final hearing, when the propriety of either dissolving it or of rendering it perpetual will be determined according to the merits of the case. Ordered accordingly.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.

(77 Cal. 220)

*In re* COOK'S ESTATE. (No. 12,200.)

(Supreme Court of California. April 26, 1888.)

1. DIVORCE—ORDER FOR DECREE—FAILURE TO ENTER DECREE.

An order that a decree of divorce be entered is not such final decree as to divorce the parties, and render a subsequent marriage of one of them a legal marriage, where such decree was in fact never entered.

2. SAME—DEATH OF PARTY—ENTERING DECREE NUNC PRO TUNC.

Where an order for a decree of divorce was obtained, but the decree was never entered, such decree cannot, after the death of the party who obtained it, be entered *nunc pro tunc*; and thus render the divorce, and a subsequent marriage of deceased, valid as against the heirs of the defendant in the divorce proceedings.

MCFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Emma Cook, since deceased, obtained judgment for divorce against Theodore T. Cook. The decree, however, was not entered during her life-time. After her death, upon application of William W. Richards, who had subsequently married her, the court ordered judgment to be entered *nunc pro tunc*, which was accordingly done. Richards assigned all his interest in the estate of deceased to William E. Miller, he settling the estate. The court held that Theodore T. Cook was the surviving husband of the deceased, and from a decree of distribution issued accordingly, and from an order denying his motion for a new trial, Miller prosecutes this appeal.

Henry C. McPike and James M. Seawell, for appellants. Tilden & Tilden, Eugene Deuprey, L. M. Hoefler, and Jas. G. Carson, for respondents.

THORNTON, J. Emma Cook was never divorced from Theodore T. Cook. A divorce is not granted until the final decree is entered, and in the case of

*Cook v. Cook* there was no entry of a final decree. The order of the 23d of April, 1880, in *Cook v. Cook*, was a direction that a decree dissolving the bonds of matrimony be entered, but it does not appear that this order was ever complied with. The attempt of the court on the 7th of September, 1885, to impart validity to the alleged marriage of Emma Cook with William W. Richards, after the 23d of April, 1880, by a *nunc pro tunc* decree dissolving the bonds of matrimony between Emma Cook and Theodore T. Cook, could not have any such effect. As there was no decree dissolving the bonds of matrimony between the Cooks on the 3d of May, 1880, when it is claimed a marriage was had between Emma Cook and William W. Richards, and no such decree was ever entered during the life-time of Emma Cook, after which a marriage was celebrated between Richards and Emma Cook, it cannot be held that there was ever a valid marriage between the parties last named. The *nunc pro tunc* decree was made long after the death of Emma Cook, which took place in November, 1883. She was not divorced at the time of her death, and we cannot perceive how, after that time, the relation of Emma Cook to Theodore T. Cook could be changed by any decree of the court. The court below did not err in holding Theodore T. Cook the husband of Emma Cook at the time of her death, and in ruling out the judgment roll in *Cook v. Cook*. This appeal is prosecuted by William E. Miller, as the assignee of William W. Richards of the share of Emma Cook's estate claimed by Richards as her husband, and, as it appears that Richards was never the husband of the decedent, the appellant, Miller, can have no interest in any other question presented on this appeal.

We find no errors in the record, and the decree and order must be affirmed. So ordered.

We concur: SEARLS, C. J.; SHARPSTEIN, J.

MCKINSTRY, J. I concur in the judgment. I express no opinion, however, as to what would have been the effect of a judgment dissolving the marriage between Emma Cook and Theodore T. Cook, had the same been entered in the life-time of the former.

I dissent: MCFARLAND, J.

(75 Cal. 631)

#### CRYSTAL LAKE ICE CO. v. MCCAULAY. (No. 11,341.)

(Supreme Court of California. April 27, 1888.)

#### APPEAL—REVIEW—WRIGHT AND SUFFICIENCY OF EVIDENCE.

An order denying a new trial, asked on the grounds of insufficiency of evidence and of newly-discovered evidence, will not be disturbed where there is a substantial conflict in the testimony, nor where the new evidence presents substantially no new facts, and is merely cumulative.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

H. A. Powell, for appellant. Van Ness & Roach, for respondent.

BELCHER, C. C. This is an action to recover the value of ice alleged to have been sold and delivered by plaintiff to defendant. The court below gave judgment for the plaintiff, from which, and from an order denying a new trial, defendant has appealed. No exceptions were taken at the trial, and no errors of law were assigned. The new trial was asked on the ground of the insufficiency of the evidence to justify the decision, and the further ground of newly-discovered evidence. It is admitted for the appellant that there was some evidence to support the findings, but it is claimed that a clear preponderance of it was against them. After carefully going over the record, we are of the opinion that there was a substantial conflict in the testimony, and that the

well-settled rule in such cases must be followed. In regard to the evidence alleged to be newly discovered, it is enough to say that it presents nothing new. It contradicts the plaintiff's testimony in some respects, and is merely cumulative. Besides, it was squarely contradicted by a counter-affidavit. Applications for new trial on this ground are addressed to the discretion of the trial court, and we are unable to see that that discretion was in any way abused. In our opinion, the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(75 Cal. 632)

BLASINGAME v. HOME INS. CO. *et al.* (No. 9,915.)

(*Supreme Court of California.* April 27, 1888.)

1. INSURANCE—ACTIONS ON POLICIES—ALLEGATIONS OF LOSS.

In an action on a fire insurance policy which excepts loss from certain causes, it is sufficient that the complaint alleges destruction by fire, without denying that it was caused in any of the excepted ways.

2. SAME—ALLEGING PERFORMANCE OF CONDITIONS—NOTICE OF LOSS.

In an action on a fire insurance policy, it is a sufficient allegation of notice of the loss, as required by the policy, when the complaint alleges that due proof of the loss was furnished the company, and that all the conditions of said policy were duly performed, under Code Civil Proc. Cal. § 457, providing that it is only necessary to state generally that the party has performed the conditions precedent in a contract.

3. SAME—ACTION BY MORTGAGEE—ALLEGATIONS OF LOSS.

In an action on a fire insurance policy by a mortgagee, the complaint alleged that R. was the owner at the time of the insurance and the fire, the value of the property at those times, and total destruction. *Held* a sufficient allegation of loss to the owner.

4. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

In an action on a fire insurance policy, the complaint alleged that plaintiff held a mortgage on the property insured, and that by the policy, "a copy of which is made a part of the complaint," the loss was made payable to plaintiff, but this fact did not appear in the copy. *Held* that, no objection having been made by defendants in the court below, the point cannot be taken advantage of under a general demurrer when the question is raised for the first time in the appellate court.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by J. S. Blasingame against the Home Insurance Company of the city of New York, and the Phoenix Insurance Company of the city of Hartford, upon a fire insurance policy. Judgment for defendants, and plaintiff appeals. Code Civil Proc. Cal. § 457, provides that, "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part."

*P. D. Wiggington*, for appellant. *William Barber*, for respondents.

BELCHER, C. C. This is an action upon a policy of insurance against fire executed by the two companies named as defendants. The defendants separately demurred to the complaint, upon the grounds—*First*, that there was a misjoinder of parties defendant, because no joint liability was shown; and, *second*, that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrers upon both grounds, holding that there was a misjoinder, and that the complaint did not state sufficient facts, because it failed to allege that the loss did not occur from any of the excepted causes specified in the policy. The plaintiff was given 10 days to amend his complaint, but neglected to make any amendment, and thereupon judgment was entered dismissing the action.

It is now admitted by counsel for respondents, that the objection of misjoinder cannot be maintained. This admission was made necessary by the provision of the Code, to the effect that parties severally liable upon the same obligation or instrument may all or any of them be included in the same action, at the option of the plaintiff. Section 383, Code Civil Proc.; and see, also, *Bernero v. Insurance Co.*, 65 Cal. 386, 4 Pac. Rep. 382.

It is, however, insisted that the complaint was bad on general demurrer for several reasons. And first, it is said that it was bad for the reason which the court below assigned in making its ruling. The ruling was rested upon the supposed authority of *Ferrer v. Insurance Co.*, 47 Cal. 416. That was an action upon a policy of fire insurance, and one of the conditions specified in the policy was that the company should not be liable "for loss caused by the falling of any building insured, or containing property insured, by this policy, or by fire ensuing therefrom." The complaint alleged that the property insured was totally destroyed by fire, and also alleged that the loss was not caused "by the falling of any building," but omitted the words "or by fire ensuing therefrom." The complaint was demurred to specially upon the ground that it failed to state that the loss was not occasioned by one of the excepted causes specified in the policy. The court, after stating that the allegation was substantially sufficient to meet the objection, added: "The averment on this point is, perhaps, not as explicit as accurate pleading would have required, but we think it is sufficient, and no good could result from reversing the case on so slight a defect in a pleading, which could be amended on another trial." We do not think that case decides the point presented here; and, if it did, in our opinion it ought not to be followed. In the policy declared on in this case it is provided that the companies shall not be liable "for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder, or any explosive substance." In the complaint it is alleged that all of the property insured was totally destroyed by fire, but it is not alleged that the loss did not occur in any of the excepted ways or from any of the excepted causes. In our opinion, the complaint was sufficient in the respect referred to. Every complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, but it is not necessary to insert in it allegations for the purpose of meeting or cutting off a defense. Thus one seeking to recover on an insurance policy must aver the loss, and show that it occurred by reason of a peril insured against, but he need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks. *Lounsbury v. Insurance Co.*, 8 Conn. 466; *Hunt v. Insurance Co.*, 2 Duer. 481; May, Ins. p. 891, § 587; 1 Estee, Pl. & Pr. (Pom. Ed.) § 740, and cases cited.

It is further claimed that the complaint states no cause of action in favor of the plaintiff, and for that reason the demurrer was properly sustained. This objection is rested upon the following ground: In the complaint it is alleged that the policy was issued to one A. J. Rhodes upon a certain building and certain personal property owned by him, and that at the time of its issuance, and at the time of the fire, the plaintiff held a mortgage, executed by Rhodes, upon all of the property insured, to secure the payment of about \$2,000, which sum of money was, at all the periods mentioned, wholly unpaid. It is also further alleged that in and by the policy, a copy of which is attached to and made a part of the complaint, the loss, if any, was made payable and is payable to the plaintiff. But, looking at the attached copy, there is nothing to show that the loss was thereby made payable to the plaintiff. It is there-

fore urged by counsel for respondent that the loss was in fact payable to Rhodes, and not to the plaintiff; that the plaintiff had consequently no interest in it or right to recover it; and that the averment that it was made payable to plaintiff is contradicted by the policy, and should be disregarded. In answer to this objection it is said by counsel for appellant, in the reply brief, that the original policy did contain the words: "Loss, if any, payable in United States gold coin to J. A. Blasingame;" and in support of this assertion a photographic copy of the policy is inserted in the brief showing those words to be a part of it. It is further said that the words "to J. A. Blasingame" were omitted from the copy attached to the complaint by inadvertence or mistake, but that the omission was never referred to in the court below, or called to the attention of appellant's counsel, until the point was made in the brief filed by respondent in this court. There can be no doubt that if the policy was made payable, in case of loss, to the plaintiff, he could sue on it in his own name. *Motley v. Insurance Co.*, 29 Me. 337; *Cone v. Insurance Co.*, 60 N. Y. 619; *Hadley v. Insurance Co.*, 55 N. H. 110. But it was necessary for him to allege and prove that it was so made payable. Was the complaint sufficient, in this respect, when tested by a general demurrer? In *Mendocino Co. v. Morris*, 32 Cal. 145, the same point was raised, and decided against the views of respondent here. That was an action against the principal and his sureties on an official bond. It was alleged in the complaint that the bond was signed by all of the defendants, but a copy of the bond was attached to the complaint, and on that copy the name of the principal did not appear. A demurrer was interposed, and overruled in the court below. Of this, SAWYER, J., delivering the opinion of this court, said: "Upon the demurrer in the form adopted in this case the direct averment of the execution of the bond in the body of the complaint must prevail, as against the omission of the signature in the copy. It may be that there is a want of correspondence between the averment in the body of the complaint and the copy annexed; but, if so, the most that can be said is that the complaint is ambiguous in this respect, and this objection was not specified as a ground of the demurrer under any head. The grounds of the demurrer relied on were all particularly specified, and this was not one of them. The objection is raised for the first time in this court. The demurrer is not general that the complaint does not state facts sufficient to constitute a cause of action in certain particulars. There was a good averment of the execution of the bond in the body of the complaint, and no objection appears to have been taken in the court below on the ground of want of correspondence between the bond set out and the averment, and we think the complaint good, at least after verdict. Had the objection been taken in the court below, the clerical omission of the signature of the principal in the copy, if it be one, might have been corrected." See, also, *Frazer v. Barlow*, 63 Cal. 71. It follows from the rule announced in the foregoing cases that the point now raised by the respondent here cannot be taken advantage of under a general demurrer.

It is also claimed by the respondent that the complaint was insufficient, because it did not allege that Rhodes sustained any damage by reason of the fire. But it did allege that Rhodes was the owner of the property insured at the time of the insurance and at the time of the fire, and its value at those times, and also that it was totally destroyed by the fire. These facts were fully stated, and from them the loss and damage must of necessity result. We think the complaint sufficient in this respect.

Finally, it is urged that the complaint was insufficient, because it did not allege that notice of the loss, in writing, was forthwith given to the general agent of the companies at San Francisco, as required by the policy. The complaint alleged that the fire occurred on the 9th of December, 1882, and that "on or about the 5th day of February, 1883, due proof of said loss by fire was presented and furnished to each of said corporations by this plaintiff and the

said Rhodes, and that all the conditions of said policy of insurance were duly performed and kept by this plaintiff and the said Rhodes." We think this averment of the performance of the conditions precedent sufficient, under the provisions of section 457 of the Code of Civil Procedure.

It results that the judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and cause remanded, with directions to the court below to overrule the demurrer.

(75 Cal. 642)

HODGDON v. SOUTHERN PAC. R. CO. *et al.* (No. 11,265.)

(Supreme Court of California. April 27, 1888.)

1. EMINENT DOMAIN—CONVEYANCE OF WARD'S REALTY BY GUARDIAN—VALIDITY—ACT MAY 20, 1861.

General railroad act, May 20, 1861, § 23, as amended April 27, 1863, authorizing guardians of infants to convey their ward's land to railroads if it is necessary for the purposes of the road, and requiring the examination and approval of the probate judge to such conveyance before the same shall become valid, is constitutional; and a guardian's deed, accompanied by the certificate of the probate judge that he has examined the deed and the sale, has found the land necessary for the purposes of the railroad, the consideration fair and equivalent, and the sale just and proper; and that he approves and confirms the same, is a sufficient compliance with the statute.

2. JUDGMENT—APPOINTMENT OF GUARDIAN BY PROBATE COURT—COLLATERAL ATTACK.

The judgment of a probate court, regular upon its face, appointing a guardian of an infant, cannot be attacked collaterally for fraud or other matter *alunde*, in an action to quiet the title to the ward's land, which the guardian has sold.<sup>1</sup>

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MCGUIRE, Judge.

Action in the nature of an action to quiet title brought by Alexander Lewis Hodgdon against the Southern Pacific Railroad Company, Leland Stanford, C. P. Huntington, Moses Hopkins, administrator of the estate of Mark Hopkins, deceased, and Charles Crocker. Judgment for plaintiff and defendants appeal.

*McAllister & Bergin*, for appellants. *D. Wm. Douthitt*, for respondent.

McFARLAND, J. Judgment in the lower court went for plaintiff, and from the judgment and an order denying a new trial defendants appeal. Plaintiff avers in the complaint substantially, and the court finds, that in April, 1862, James H. Hodgdon died seized as owner in fee of certain land in the city and county of San Francisco, described in the complaint; that plaintiff was born in lawful wedlock on June 23, 1860, and was and is the sole child of said James H. Hodgdon, deceased; that said James H. Hodgdon, on October 12, 1859, made and published his last will, by which he devised and bequeathed all his property, including said land, to his wife, Sarah A. Hodgdon, (mother of plaintiff;) that in said will plaintiff was neither provided for, nor in any manner mentioned; that said Hodgdon, deceased, never at any time, nor in any manner, provided for plaintiff by any settlement; and that it in no way appears that such omission to provide for plaintiff in said will or otherwise was intentional. It is then further averred that plaintiff is the owner in fee of the undivided one-half of said land because he succeeded to

<sup>1</sup> On the subject of collateral attack, see *McCarter v. Neil* (Ark.) 6 S. W. Rep. 731, and note; *Nicholson v. Nicholson*, (Ind.) 15 N. E. Rep. 223; *Decker v. Decker*, (N. Y.) Id. 307; *Comer v. Bray*, (Ala.) 3 South. Rep. 554; *In re Newman's Estate*, (Cal.) 16 Pac. Rep. 887; *Davis v. Robinson*, (Tex.) 7 S. W. Rep. 749.

the same as the sole child of said Hodgdon, deceased; that defendants claim an interest in said land adverse to plaintiff, and are in the actual and exclusive possession of the same; and that defendants have not any estate, right, or interest in or to plaintiff's undivided one-half interest therein. The prayer is that defendants be required to set forth the nature of their claims; that it be adjudged that they have no interest or estate in said undivided one-half; that plaintiff's title thereto is good and valid; and that he recover possession thereof. The court also found that administration of the estate of said James H. Hodgdon is still pending in the superior court of the city and county of San Francisco; no decree of distribution having yet been made therein, and, so far as it appears, no adjudication of the rightful heirship of plaintiff having yet been made in said superior court sitting as a probate court.

Counsel for defendants, by objections to evidence, by a motion for nonsuit, and by other appropriate objections and motions, made, and urge, here several points which, under our views of the case, it will not be necessary for us to determine. It may not be out of the way, however, to notice one of these points; because, if well taken, it may be of great importance in other cases. There is no doubt that, under our present law, a recognized and undoubted heir may, generally, maintain an action concerning real property, although the administration of the estate be still in progress. But it is contended that, in the case of a will and a pretermitted heir, it is the peculiar and sole province of the probate court to construe the will; to determine if there was an intentional omission of the contesting heir; if there was any provision for or advancement to the after-born child; whether the share to be assigned to the pretermitted heir shall be taken from that part of the estate (if any) not disposed of by the will; what are the debts of the estate, and what, if any, property must be sold to pay them and the expense of the administration; what amount, if any, must be taken from all of the devisees and legatees in order to make up the proportionate share of the omitted heir, etc.; and that all these matters can be ascertained only by the probate court administering the estate of the deceased. It will be noticed that the statutes in force at the death of plaintiff's decedent provided that, in the case of a pretermitted child, the necessary facts being shown, "the share of such child shall be *assigned* as provided by law." Hitt. Gen. Laws, 7341 *et seq.* Assigned by whom? Can another court, in an independent action of ejectment or to quiet title, try all these questions, and by its findings and judgment "assign" to the pretermitted child the particular part of the estate which he claims in his complaint, while these matters are still undetermined in the probate court, where the estate is being administered? Will such a judgment bind the probate court, when it comes to construe the will, to assign the share, and to distribute the estate? We allude to these questions because they are interesting and important; but, as before remarked, we do not deem it necessary here to definitely determine them.

The main defendant in this case is the Southern Pacific Railroad Company, a railroad corporation. Section 23 of the general railroad act of this state, approved May 20, 1861, and slightly amended April 27, 1863, (St. 1861, 607; St. 1863, 613,) is as follows: "Sec. 23. If it shall become necessary, for any of the purposes aforesaid, for such company to acquire any real estate, or any right, title, or interest therein, which is the property of any infant, idiot, or insane person, the guardian, executor, or administrator, as the case may be, may sell and convey the same to said company; but neither such sale nor conveyance shall be valid, for any purpose until the same shall have been approved by the judge of the proper probate court; and said judge is hereby authorized to examine such deeds and conveyances, and, if he shall deem the same just and proper, he shall approve the same, and thereupon such conveyances shall have the same force and effect, for the purposes in this section mentioned, as if the same had been executed by persons competent to convey

lands in their own names. Such company may acquire any real estate or any right, title, interest, estate, or claim therein or thereto, necessary for the purposes of said company, as hereinbefore provided, by means of the special proceedings prescribed in this act."

For the purpose of showing that, under this provision of the law, the said railroad company, defendant here, had acquired the title of plaintiff to the property in suit, the defendants, after plaintiff had closed his case in chief, and motion for nonsuit had been denied, proved by the proper record evidence that in January, 1872, Joseph S. Paxson was duly appointed guardian of the person and estate of Alexander Lewis Hodgdon, a minor, (plaintiff herein,) by the probate court of the city and county of San Francisco, Cal.; that letters of guardianship were issued to said Paxson from said court; and that he qualified and filed his bond, as required. The judgment of the court appointing said Paxson guardian was regular on its face, and the court had full jurisdiction to render it. Defendants then introduced a deed from said Alexander Lewis Hodgdon, (plaintiff herein,) by his said guardian, Joseph S. Paxson, executed immediately after his appointment as guardian, by which, for the consideration of \$10,200, the property sued for in this action was conveyed to the Southern Pacific Railroad Company, defendant herein, and proved that said \$10,200 was paid at the time by said defendant to said guardian, Paxson. The deed was accompanied by the following certificate of the judge of said probate court: "This is to certify that I, MILTON H. MYRICK, judge of the probate court in and for the city and county of San Francisco and state of California, have examined the within deed, and the sale therein made of the lands described, and I do find that the said land is necessary for the purposes of said railroad company; that the consideration paid is fair and equivalent for said land; and that said sale is just and proper; and, as such probate judge, I do hereby approve the said sale and deed, and confirm the same in as full and ample manner and form as I may or could do under the law of the said state of California in relation to the premises. M. H. MYRICK, Probate Judge of the City and County of San Francisco, Cal." The deed was duly acknowledged by Paxson as guardian, and was recorded January 27, 1872.

After close of defendant's evidence the court allowed the plaintiff, in rebuttal, against the objections and exceptions of defendants properly made and taken, to introduce evidence tending to prove that the said judgment of said probate court appointing said Paxson guardian as aforesaid was procured by fraud, collusion, etc.; and upon said evidence the court found certain facts which it held to be fraudulent, and to vitiate and render invalid the said proceedings in the said probate court. The evidence and findings on this point were, mainly, that Paxson's statements in the petition to be appointed guardian that he was a friend of and was befriending the minor, and that he made the application at the request of his mother and step-father, were not true; that he did not account to plaintiff for the money which he received for the deed; that he procured himself to be appointed at the request of agents of said railroad company; that the acts of the agents of the railroad company in inducing him to be appointed operated as a fraud on plaintiff; that the probate court did not have proof of the value of the land, or its necessity for railroad purposes; that there was collusion between Paxson and the agents of the railroad company, and that for these and other similar reasons "the said petition and application for guardianship, and the proceedings connected therewith, were fraudulent from their inception, and that, by reason of said fraud, the said probate court did not acquire jurisdiction to appoint a guardian of the estate of said minor;" and "that Joseph S. Paxson never was the legal guardian of said minor, and that the deed aforesaid was absolutely void."

(In respect to this matter it may be fair to parties to remark that there appears in the evidence a written agreement made in 1871, between the mother and step-father of plaintiff, and one Howard, an agent of the railroad com-



pany, defendant, in which, after a recitation that the mother had conveyed to said Howard all her title to certain land in San Francisco, and that it was claimed that the plaintiff herein, then a minor, was seized of the residue of the title to said land, it was agreed by the said mother and step-father that the value of the interest of said plaintiff should be determined by two persons therein named, and that their valuation should be final and conclusive, and that certain proceedings should then be taken to convey the said interest of said plaintiff to said Howard, upon his payment of the sum fixed by said two persons, and that said persons did fix said valuation at \$10,200, the sum afterwards paid by said defendant to said guardian of plaintiff.)

Whether or not the said evidence objected to, and the said findings of the court below, would constitute a sufficient ground for relief in an action brought directly for the purpose of setting aside the judgment of the probate court, with proper averments in the complaint and proper parties before the court, is a question not necessary to be here examined; for it is well settled that a judgment, regular on its face, and rendered by a court having full jurisdiction to render it, cannot be attacked collaterally on the ground of fraud, collusion, or other matter *aliunde*. The opposite rule would subject to the uncertain and insecure test of parol evidence those things to which the law attaches the utmost conclusiveness and stability,—judgments and judicial records. *Joyce v. McAvoy*, 31 Cal. 274; *Breeze v. Ayres*, 49 Cal. 208; *Carpentier v. City of Oakland*, 80 Cal. 439; *Robb v. Robb*, 6 Cal. 21; *Marshall v. Shafter*, 32 Cal. 177; *Chase v. Christianson*, 41 Cal. 253. And authorities other than those of this state to the point are numerous. And the appointment of a guardian by a probate court is a judgment to which the rule applies. *Warner v. Wilson*, 4 Cal. 313; *In re Guardianship of Fegan*, 45 Cal. 176; *Herron v. Dater*, 120 U. S. 464, 7 Sup. Ct. Rep. 620; *Fitts v. Fitts*, 21 Tex. 511. The rule applies to infants as well as to adults. *Joyce v. McAvoy*, *supra*. The admission of the evidence above-mentioned was therefore erroneous, and the said findings of what the court held to be fraud, and upon which the judgment was based, were immaterial, and insufficient to warrant the court in practically vacating the judgment of the probate court upon a collateral attack. Upon such a principle, any judgment could be disregarded upon a showing that the court which rendered it committed an error either of law or fact.

We think that the deed from Paxson to the said defendant, and its approval and confirmation by the probate judge, was a sufficient compliance with the statutory provision under which it was executed. That provision is distinct from the provision of another statute by which a guardian, in a certain prescribed way may sell property of his ward for his maintenance or education. The law under which this sale was made contemplated an entirely different purpose, namely, the furtherance of a public use. No particular form of conveyance or procedure was prescribed. The only limitation upon the sale is that it shall be approved and confirmed by the probate judge. The deed was in proper form to convey the estate, and the probate judge found that it was a case within the statute, and approved the sale. This we think was sufficient. *Exendine v. Morris*, 76 Mo. 416. And we have no doubt of the constitutionality of the statute.

For the reasons given, the judgment and order are reversed, and the cause remanded.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCKINSTRY, J.

(76 Cal. 8)

HEILBRON *et al.* v. CENTERVILLE & K. I. D. Co. (No. 12,093.)

(Supreme Court of California. April 28, 1888.)

**1. APPEAL—ASSIGNMENTS OF ERROR—FAILURE TO SPECIFY PARTICULARS.**

Code Civil Proc. Cal. § 659, subd. 3, provides that, when the notice of motion for new trial designates as the ground the insufficiency of evidence, the statement shall specify the particulars in which it is alleged to be insufficient; and, when errors in law are designated, the statement shall specify the particular errors; and, if no such specifications be made, the statement shall be disregarded. *Held*, that specifications that the court erred in finding that the diversion of water by defendant from K. river had not been made continuously, uninterruptedly or peaceably for five years prior to the filing of the complaint, and in not finding to the contrary thereof, and that the court erred in its findings of law that the cause of action was not barred by the statute of limitations, were insufficient, and must be disregarded.

**2. SAME—RULING ON DEMURRER—NOT REVIEWABLE, WHEN.**

A ruling on a demurrer will be reviewed only on an appeal from the judgment, and not on appeal from an order denying a new trial, especially when the statement in an appeal from such order does not specify the alleged error in such ruling, as required by Code Civil Proc. Cal. § 659, subd. 3.

**3. SAME—NOT TAKEN WITHIN A YEAR—DISMISSAL.**

An appeal from a judgment taken more than a year after entry thereof, will be dismissed.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by August Heilbron, Adolph Heilbron, Simon Clayburgh, and S. C. Lillis, against the Centerville & Kingsbury Irrigation Ditch Company, to restrain defendant from diverting the waters of Kings river, and to recover damages for past diversions. Plaintiffs had judgment, from which, and from an order denying a new trial, defendant appealed.

*W. D. Tupper*, for appellants. *Brown & Daggett*, for respondent.

BELCHER, C. C. The plaintiffs commenced this action to obtain an injunction restraining the defendant from diverting the waters of Kings river, and to recover damages for past diversions. The defendant demurred to the complaint, and its demurrer was overruled. It then answered, and, among other things, set up the statute of limitations. The case was tried by the court, without a jury, and the findings and judgment were in favor of the plaintiffs. The defendant moved for a new trial, and has appealed from the judgment and order denying its motion.

The judgment was entered on the 12th day of September, 1885, and the appeal was taken on the 1st day of March, 1887. As more than a year elapsed between the entry and the appeal, the appeal from the judgment cannot be considered, and must be dismissed.

It is claimed for the appellant that the demurrer to the complaint should have been sustained. The point is not well taken. The ruling on a demurrer is a matter to be reviewed on an appeal from the judgment, and not on an appeal from an order denying a new trial. Besides, on an appeal from an order refusing to grant a new trial, only such errors can be considered as are specified in the statement, and this alleged error is not specified or referred to in the statement presented here. Section 659, subd. 3, Code Civil Proc.

It is further claimed that the action was barred by the statute of limitations, and that the findings of the court to the contrary were not justified by the evidence. This point cannot be maintained. At the conclusion of the evidence and rulings set out in the statement on motion for a new trial, the statement proceeds as follows: "And the defendant assigns and specifies the following as errors occurring at the trial," and then follows a statement of 21 instances in which it is alleged the court erred; and among them are these: "The court erred in finding in its findings of facts that the diversion of water by the defendant from Kings river had not been made continuously, uninterruptedly, or peaceably for a period of five years prior to the filing of plaintiff's com-

plaint, and in not finding to the contrary thereof." "The court erred in its findings of law that the cause of action was not barred by the statute of limitations." The Code provides that "when the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion." Section 659, subd. 3, Code Civil Proc. It is evident that the specifications above noted are quite insufficient to meet the requirements of the Code, and they must therefore be disregarded. *Smith v. Christian*, 47 Cal. 18; *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. Rep. 711.

The other points in the case are fully met and answered by the decision, lately rendered, in *Heilbron v. Canal Co.*, ante, 535, opinion filed March 29, 1888. The appeal from the judgment should be dismissed, and, on the authority of the last-named case, the order denying a new trial should be affirmed.

I concur: FOOTE, C.

HAYNE, C., took no part in this decision.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

(76 Cal. 11)

HEILBRON *et al.* v. KINGS RIVER & F. C. Co. (No. 11,968.)

(*Supreme Court of California.* April 28, 1888.)

1. WATERS AND WATER-COURSES—DIVERSION—RIGHT TO MAINTAIN ACTION.

In an action for damages for diversion of the water of a stream, where the complaint alleges that plaintiffs are owners of the land from which the water has been diverted, and the findings are that they are not owners, but tenants in possession under a lease, the findings are not outside of the issue raised, as plaintiffs' possession gives to them the right to maintain the action.

2. SAME—EVIDENCE—DIVERSION BY THIRD PARTIES.

In an action for diverting water from a stream running through plaintiffs' land, evidence is properly excluded of diversions by others besides defendant; it not appearing whether such diversions were lawful or with plaintiffs' consent.

3. SAME—ISSUES AND FINDINGS.

Where the complaint alleges that defendant diverted water from a stream, and a branch thereof flowing through plaintiffs' ranch, thereby causing the loss of their stock; and the answer alleges that the stream is navigable; that the water diverted was furnished them by another company, which had appropriated the same for more than five years before this action; that such appropriation reclaimed plaintiffs' land, which had been waste: that others besides defendant diverted the water, so that, had defendant not, the plaintiffs would still have been deprived of it; that defendant's rights are vested, and its use of the water reclaims a large area that would be otherwise desert, the material issues are covered by findings that plaintiffs are tenants in possession using the range for stock purposes, that the river flows through their land, and the branch is a natural water-course, and that plaintiffs have been damaged by defendant's diversion of water, and that the cause of action is not barred by the statute of limitation.

4. SAME—ADVERSE USER—SUFFICIENCY OF EVIDENCE—REVIEW ON APPEAL.

Where there is a substantial conflict in the evidence upon the issues of adverse and continuous diversion and use by defendant of water in a stream, relied upon by him as giving prescriptive title and right to the same, a finding that there was not such adverse or continuous use and diversion will not be disturbed.

5. SAME—DAMAGES.

Evidence that from 250 to 300 cattle, worth \$30 per head, died by reason of diversion of water from a stream running through plaintiffs' land, supports a finding of the amount of damages at \$1,000.

6. **BOUNDARIES—CALL FOR RIVER.**

Under a description in a patent as follows: "Thence meandering down the right bank of Kings river,"—the river is properly considered one of the boundaries of the land.<sup>1</sup>

7. **PLEADING—CROSS-COMPLAINT.**

A so-called cross-complaint containing nothing which is not already set out in the answer is demurrable, especially in an action of tort, where no affirmative relief can be granted.

8. **SAME—AMENDMENT.**

A refusal to allow an amendment on the ground that the matters of amendment are sufficiently pleaded in the original answer, the affidavit in support of the motion stating that the matters in the amendment are substantially the same as those in the original answer, being discretionary with the court below, will not be disturbed.

9. **APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.**

The insufficiency of evidence to support a finding not being specified on the motion for a new trial, the facts stated therein cannot be controverted on appeal.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

This was an action begun on the 4th day of October, 1882, by plaintiffs, August Heilbron, Adolph Heilbron, S. Clayburg, and S. C. Lillis, riparian owners, for injunction and damages for diversion of water from Kings river, in Fresno county, by the defendant corporation, the Kings River & Fresno Canal Company. Judgment was rendered for the plaintiffs, and the defendant appeals.

The complaint in substance alleged that plaintiffs are, and their grantors for more than five years prior to the filing of the complaint had been, the owners and in possession of the Rancho Laguna de Tache, containing 48,000 acres of land, and that the plaintiffs are owners of a large amount of stock, and that said lands are used as a stock range, and are of great value for that purpose; that Kings river, from time immemorial, has flowed, and but for the wrongful acts of defendant would still continue to flow, through said lands; that there is a certain natural branch of said Kings river called "Cole Slough," which receives its supply of water from said Kings river; that the channel of Cole slough is located wholly within the boundaries of said lands, and from time immemorial has flowed through said lands; that defendant is a corporation, and that it constructed a ditch or canal leading out of the channel of Kings river at a point about 27 miles above the point at which said Cole slough receives its supply of water, and in September, 1881, without the consent of plaintiffs, constructed a large dam in the channel of said Kings river, and diverted and still diverts from the channel of said Kings river a large quantity of water, which, but for the wrongful acts of said defendant, would have flowed through plaintiffs' said lands and would have overflowed said lands, and increased their fertility, and furnished water for plaintiffs' stock; that the diversion has caused plaintiffs' lands to fail to produce their usual and accustomed crops of grass, and now deprives plaintiffs' cattle and live-stock of water to drink, and has caused plaintiffs loss and damage in the sum of \$25,000; that the defendant threatens to continue to divert the water, and, unless restrained by a decree of the court, defendant will continue to divert the same to such an extent as to completely drain said channel, and finally change the course of said stream, and that compensation therefor cannot be adequately obtained in an action at law for damages, etc. The prayer is for a permanent injunction.

The answer in substance alleged that Kings river was a navigable stream; that the Centreville channel, from which defendant diverted water, was not a channel of the river except at flood times; that certain persons, having incorporated as the Centreville Canal & Irrigation Company, in 1868, and before that date, diverted the water from said stream, and their successor, the

<sup>1</sup>See *Barre v. Flemings*, (W. Va.) 1 S. E. Rep. 731, and note.

Fresno Canal & Irrigation Company, continued so to do, and the latter company, by agreement, being granted full control and right of way in the said channel, in return furnished water to defendant through said channel; that all the water conducted into defendant's canals has been furnished by the said Fresno Canal & Irrigation Company; that in 1869 the incorporators of the defendant appropriated water, in 1870 posted notice of appropriation, and in 1871 incorporated, and continued to enlarge its ditch, and used and appropriated said water for more than five years before the commencement of this action under claim of title continuously and adversely. And the answer further alleged that said waters were unappropriated when so appropriated by defendant; that the water was devoted to useful purposes; that for 10 years prior to said appropriations, plaintiffs' lands were waste, and defendant and its grantors believed plaintiffs and their grantors claimed none of said waters. That divers persons and corporations besides defendant divert water from said river above plaintiffs' lands; that said Fresno Canal & Irrigation Company and defendant have so appropriated said waters, under the laws and customs of California and the United States, for irrigation, and, after supplying said canals, except at flood times, there is not enough to flow down to plaintiffs' lands; so, had defendant not diverted water, it would have flowed into said other canals; that plaintiffs' lands are swamp, and can be reclaimed by diverting said waters, and said diversions have prevented the overflow of parts of said lands. That the lands irrigated by said Fresno Canal & Irrigation Company and defendant are 24,000 acres, which without irrigation would be desert, but which, by irrigation, are worth \$2,000,000, and are populous; that the existence of the Fresno Canal & Irrigation Company and defendant, and of \$1,500,000 of property, depend on the use of said water; that the defendant's rights to said water are vested and accrued under the act of congress of the 24th of July, 1866, and the local customs, laws, and decisions of the courts of said state, and that plaintiffs ought not to maintain their action. That plaintiffs and their grantors well knew of said diversions and outlays by defendant and its grantors, and their ignoring of plaintiffs' claims, and that defendant and its grantors believed their claims valid, yet made no objection thereto, whereby they acquiesced therein and are estopped, and, having so failed, plaintiffs' conduct is a fraud on defendant. That plaintiffs' pretended cause of action did not accrue within five years next before this action, and is barred by statute; nor within three years, and is barred by statute; that divers persons and canals have, at all the times, etc., diverted large quantities of the waters of said river below defendant's ditch, and above plaintiffs', in which plaintiffs have been interested; and, if defendant only had diverted, there would have been no appreciable diminution of the water except at low stages. The defendant filed, further, a cross-complaint, a demurrer to which was sustained; and the defendant thereupon moved for leave to file an amended answer, to support which motion an affidavit of defendant was produced, to the effect "that said amendments in nowise alter the lines of defense herein, nor can they in any manner surprise plaintiffs or work disadvantage to them, being almost, if not wholly, merely, as believed, better pleading of the same defenses already pleaded in the original answer." The motion for leave to amend the answer was denied.

Regarding the amount of the damages sustained by plaintiffs there was evidence to the effect that, through defendant's diverting water from Kings river, the plaintiffs' cattle were deprived of water, and from 250 to 300 died because of such diversion, and it was testified that they were worth \$30 per head. The court found that plaintiffs sustained damages to the amount of \$1,000. Regarding the ownership of the land it was found that in 1866 a patent had been issued to Manuel Castro, which, in the course of its description of the land, uses the following language: "Thence according to the true meridian, the variation of the magnetic needle being fifteen degrees forty-five minutes

east, east at fifty links enters bottom land of the Kings river, twenty-six chains and thirty-eight links, to a post marked 'L. T.' and 'Sec. 36' station; thence meandering down the right bank of the Kings river, south, forty-five degrees, west, eighty-seven chains and sixty-eight links, to station." That the said Castro conveyed to one Jeremiah Clarke on the 10th day of August, 1866. That Clarke on the 1st day of May, 1889, leased the land to the plaintiffs, who have remained in possession ever since as tenants. The cause was tried by the court, a jury having been waived, and judgment was rendered for the plaintiffs. A new trial was denied, and defendant appeals, specifying a large number of errors.

*H. S. Dixon, (Flournoy, Mhoon & Flournoy, of counsel,) for appellant. Brown & Daggett, for respondents.*

**PER CURIAM.** Many of the questions involved in this appeal have recently been determined adversely to the contentions of appellant herein. It is therefore unnecessary to notice them further. *Heilbron v. Canal Co.*, ante, 535, (filed March 29, 1888;); *Heilbron v. Last Chance W. Ditch Co.*, ante, 68; *Heilbron v. Centreville & K. I. Ditch Co.*, ante, 932, (filed April 28, 1888.)

1. The defendant's motion for leave to file an amended answer was addressed to the sound discretion of the court, and it appears from the affidavit filed in support of the motion that the matters set out in the amended answer were not substantially different from those which had already been pleaded in the answer on file. The court denied the motion on the ground "that said matters of amendment are sufficiently pleaded in the original answer to the amended complaint." We think, therefore, that the court did not abuse its discretion in refusing to allow it to be filed. The defendant seems to have been given the benefit of all the matters alleged in his original answer and proposed amendments.

2. The demurrer to the cross-complaint, so called, was properly sustained. The cross-complaint contained nothing which had not already been set out in the answer filed. Furthermore, the action is one for tort, and no affirmative relief could be granted. *MacDougall v. Maguire*, 35 Cal. 274.

3. No specifications of the insufficiency of the evidence to support the first, second, third, fourth, fifth, or sixth finding of fact are made in the statement on motion for a new trial. The facts therein stated, therefore, cannot be controverted.

4. The findings of the court upon the question of adverse use are against the defendant on every element necessary to a title by prescription, and are, we think, supported by the evidence. The question is not whether this court would, upon the same evidence, find the facts as they are found by the court below. It is sufficient to say that there is a substantial conflict. There is nothing to show that Clark or his tenants had knowledge or notice of the diversion of water through defendant's ditch. The most that can be said is that the evidence, taking into consideration all presumptions, is conflicting upon that question. Diversion of water by the defendants took place at a point nearly 30 miles above the lands of plaintiff's ranch, on the land of a riparian proprietor. It was not incumbent upon Clarke or his tenants to take notice of what was going on at that distance above their property to ascertain whether any one was diverting water from the channel of the river. There is evidence in the record tending to show that the diversion of water from Kings river was a matter of notoriety in the vicinity of plaintiffs' ranch prior to August, 1877, but it is confined to diversions made by other ditches than that of the defendant. There was also evidence tending to show that the diversion of water by the defendant had not been continuous and uninterrupted for five years before the commencement of this action. The court found such to be the fact. Upon this topic there was also a substantial conflict in the evidence.

5. The findings of the court are not outside of the issue upon the question of ownership. The plaintiffs are tenants, and not owners in fee; but they have the right to the exclusive possession and use of the property and all its appurtenances, and have the right to maintain an action for any injury which interferes with their possession, or the use and enjoyment of the property. In *Luc v. Haggin*, 69 Cal. 436, 10 Pac. Rep. 674, it was said: "When water is diverted from land, an injury is done to the possession. Ordinarily, it is sufficient if the plaintiff shows that he has possession against a mere wrongdoer \* \* \* The plaintiff in such cases is not bound to prove the same title as he alleges, for the disturbance is the gist of the action."

6. We see no error in the construction given to the patent by the court below with respect to the boundary lines of the ranch. We think, under the description given in the patent, Kings river is one of the boundaries of the lands described in the complaint.

7. There was evidence to sustain the findings of the court with respect to the amount of damages sustained by plaintiffs. The court evidently believed, from the evidence before it, that the amount of water diverted by the defendant, if it had been permitted to flow in the channel of the river, would have furnished the plaintiffs' cattle with sufficient water to drink, and that plaintiffs' stock died by reason of the diversion of the water by defendant.

The court excluded evidence offered on behalf of defendant to show that other parties were diverting water at different points on the river above the ranch of the plaintiffs. In this we think the defendant was not prejudiced. It does not appear whether the diversions referred to were lawful or unlawful,—with or without the consent of the plaintiff. If the acts of the owners of other ditches were joined with the acts of the defendant, the defendant cannot shield itself with evidence of such other diversions.

8. We think that the findings cover all the material issues raised by the pleadings. The court found upon the questions of ownership of plaintiffs and their predecessors, their possession, and the use of the range for stock purposes; that Kings river flows through the lands; that Cole slough is a natural water-course, and a branch of Kings river; that plaintiffs have been damaged by the defendant's diversion of the waters therefrom; and that the cause of action is not barred by the statute of limitations. These are all the material matters in issue.

9. We see no errors in the rulings of the court in admitting or excluding evidence, which operate to the prejudice of defendant's substantial rights. Some of the rulings respecting the notoriety of the diversions, and the means of knowledge possessed by the plaintiffs, appear at first sight to have been erroneous; but an examination of all the testimony shows that they were made upon the ground that the evidence of notoriety and knowledge was incompetent because it did not relate to diversions made by the defendant, but to diversions of water from Kings river generally, and at a point many miles above the lands of the plaintiffs. The only purpose which could have been subserved by the evidence was to show that the defendant's diversion of water by means of its ditch was not clandestine. Judgment and order affirmed.

(76 Cal. 127)

LEEKE v. HANCOCK. (No. 11,086.)

(Supreme Court of California. April 30, 1888.)

1. NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSER—LIABILITY OF.

Where plaintiff, having received a note indorsed by defendant, indorsed it over, and subsequently paid it off, defendant is liable to him for the amount paid, though plaintiff had collateral security of the maker in his hands for money previously advanced, and knew, when he received the note, that defendant was an accommodation indorser for the maker.

**2. ASSUMPTIO—COMMON COUNTS—WHEN FINDING ON FIRST COUNT IS SUFFICIENT.**

In an action, under the Code, against an indorser of a note by a subsequent indorser, who has paid it off, he may declare against defendant in the common counts for money paid out and expended, etc., with a prayer indicating that they are in the alternative; and a finding and judgment for plaintiff upon the first count is a finding against him on the others, and must be affirmed.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by C. Leeke against C. H. Hancock for an amount paid by him upon two notes made by one Buckman, which had been previously indorsed by defendant. Buckman, who was a street contractor, had previously borrowed money of Leeke, for which he had assigned a street contract as collateral security. Judgment for plaintiff, and defendant appeals.

*O'Brien & Morrison*, for appellant. *Nagle & Nagle*, for respondent.

MCKINSTRY, J. If the moneys paid by the plaintiff on taking up the notes made by Buckman were paid out of funds of the maker in the hands of plaintiff, the payments were in effect payments by the maker of the note. But there is at least a substantial conflict in the evidence with respect to the issue as to whether the plaintiff did pay the notes out of funds of the maker in his hands, or whether he promised to pay them out of funds of the maker dedicated to that purpose. As between themselves, the defendant was an accommodation indorser for Buckman, the maker. But there is nothing on the face of the notes to indicate that relation, and there is evidence that, as to plaintiff, it was understood that the defendant should be bound in the character in which he assumed to act. Even if the plaintiff, indorsee and subsequent indorser, knew that, as between themselves, the defendant indorsed the note for the accommodation of Buckman, he could still hold him as indorser if he consented to receive them only in case the defendant should bind himself to plaintiff as indorser. One of the two joint makers of a note may be a surety only, as between himself and his co-promisor, and yet, as to the payee, his apparent and real character be that of principal. *Harlan v. Ely*, 55 Cal. 340; *Chase v. Evoy*, 58 Cal. 353; *People v. Marshall*, 59 Cal. 387. Section 2832 of the Civil Code does not prohibit the apparent maker in such case from agreeing that he shall be bound as maker, and there is no principle which will render nugatory the actual and apparent contract of an indorser.

The complaint was upon the "common counts" for money paid, laid out, and expended, for money lent, and for money had and received; each count being separately stated. The prayer was for the sum alleged in each count to be due upon the cause of action therein stated, to-wit, \$1,027.50. The court found that the plaintiff paid, laid out, and expended for the use and benefit of the defendant \$1,027.50. The court failed to find upon the issues made by the averments of the other counts of the complaint, and the denials thereof. The finding and judgment upon the first count must be held to be a finding and judgment against the plaintiff upon the other counts. Clearly, in ordinary cases, there must be a distinct finding upon each material issue. But in a case like the present the prayer may be referred to as illustrating the scope of the action, and here the prayer clearly indicates that the counts are in the alternative; the same cause of action being stated in different forms. If such practice seems not to accord with the methods prescribed by the Code of Civil Procedure, the apparent anomaly arises from the fact that the common counts have been allowed. But the right to rely upon them has been settled by the earlier decisions in this state, which, even if we were inclined to do so, we are not authorized to disregard. *Freeborn v. Glazer*, 10 Cal. 337; *De Witt v. Porter*, 13 Cal. 171; *Buckingham v. Waters*, 14 Cal. 146. Where a subsequent indorser has paid the whole note, or a part of it, he may recover from a prior indorser the amount paid as so much money paid, laid out, and



expended. *Builer v. Wright*, 20 Johns. 367; *Baker v. Martin*, 3 Barb. 634; Pom. Smith, Merc. Law, § 327, note 3. Judgment and order affirmed.

We concur: SEARLS, O. J.; PATERSON, J.

(May 14, 1888.)

PER CURIAM. The above-entitled cause having been inadvertently submitted and decided after the death of the defendant, C. H. Hancock, the appellant, and his death having been suggested to the court, and Caroline E. Hancock, his administratrix, having been substituted as a party defendant and appellant, now, upon reading and filing the stipulation of counsel for the respective parties, it is ordered and adjudged—*First*, that the judgment entered herein on the 30th day of April, 1888, affirming the judgment and order of the court below, be, and the same is hereby, set aside and annulled; *second*, that the cause be submitted upon the record and briefs on file; *third*, that the judgment and order appealed from be, and they are hereby, affirmed, for the reasons given in the opinion in said cause filed April 30, 1888; *fourth*, that the *remittitur* herein issue on the 30th day of May, 1888.

(76 Cal. 28)

BURNHAM v. SAN FRANCISCO FUSE MANUF'G CO. (No. 11,356.)

(Supreme Court of California. April 30, 1888.)

INJUNCTION—TO RESTRAIN SALE OF DELINQUENT STOCK—OFFER TO DO EQUITY.

An injunction will not be granted to restrain the sale of stock for delinquent assessments because notice has not been published 15 days before the day appointed for the sale, as required by Civil Code Cal. § 339, and is therefore irregular, unless the complaint contains an offer to pay the assessments.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Suit for an injunction. Charles F. Burnham, the plaintiff, was a stockholder in the San Francisco Fuse Manufacturing Company. On April 6, 1885, the company made an assessment on its capital stock, which assessment plaintiff failed to pay, and the company, on June 2d, ordered his stock to be sold on June 15th, and notice was first published on June 2d, 13 days prior to the day of sale. Civil Code Cal. § 339, requires the first publication of delinquent sales of stock to be at least 15 days prior to the day of sale. Section 346 reads: "No assessment is invalidated by a failure to make publication of the notice hereinbefore provided for, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings except the levying of the assessment are void, and publication must be begun anew." Plaintiff brought action against the company, praying an injunction to enjoin the sale because less than 15 days intervened between the first publication of notice and the day appointed for the sale; but the complaint contained no offer to pay the assessments. The court issued a restraining order, which was afterwards vacated and the action dismissed. Plaintiff appeals.

*J. C. Bates*, for appellant. *Jas. A. Waymire* and *W. T. Baggett*, for respondent.

MCKINSTRY, J. The order of the 2d of June, directing a sale of the delinquent stock of plaintiff, was irregular, and any sale upon 13 days' notice would have given to the purchaser no title which he could assert against the plaintiff, should the latter tender him the amount of the assessment, and bring his action to recover the stock within 6 months. Civil Code, § 347. But the assessment was valid, (*Id.* § 346,) and it was the duty of the plaintiff to pay it. A court of equity properly refused to entertain his application for an injunction to prohibit the sale in the absence of an allegation that he had done, or offered to do, equity. True, if he paid, there would be no sale, and he would not need the extraordinary writ; but the jurisdiction of equity does not depend upon the convenience of a party. The statutory remedy is plain, and it was intended by the legislature that this shall be the only remedy in case a

valid assessment is not paid. It may be said the rule thus laid down will encourage sales without the notice which the statute declares to be necessary, and proceedings of the character which are declared to be void by section 346. But the context shows the sense in which the word "void" is employed. It is intended thereby to declare that the irregular proceedings shall be inoperative to confer an indefeasible title to the stock as against the owner, who shall make tender of the assessment, and bring suit for its recovery within the time prescribed in section 347. As the complaint did not state a cause of action, the suit was properly dismissed. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

(76 Cal. 24)

BURNHAM v. SAN FRANCISCO FUSE MANUF'G CO. (No. 11,238.)

(*Supreme Court of California.* April 30, 1888.)

CORPORATIONS—MEMBERS AND STOCKHOLDERS—REMEDIES.

Where a stockholder of a company fails to pay an assessment lawfully made, and his stock is advertised for sale, a complaint setting forth that the company refused to show plaintiff its bills and vouchers, as required to do by Civil Code Cal. § 377, enacting that a corporation for profit shall keep a record of its transactions, which shall be open to inspection by stockholders, that it was a worthless concern, and desired to get plaintiff's stock for the assessment, shows no ground for the appointment of a receiver to wind up its affairs, or for the granting of an injunction to restrain the sale.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Charles F. Burnham, the plaintiff, was a stockholder of the San Francisco Fuse Manufacturing Company. An assessment on the capital stock of the company having been made, and plaintiff not having paid the assessment, his stock was advertised for sale, whereupon he brought suit for an injunction to restrain the sale, and for the appointment of a receiver. A demurrer to the complaint was sustained, and plaintiff appeals. Civil Code Cal. § 377, enacts that corporations for profit shall keep a record of all their transactions, which shall be open to the inspection of any director, member, stockholder, or creditor of the corporation.

J. C. Bates, for appellant. Jas. A. Waymire and W. T. Baggett, for respondent.

MCKINSTRY, J. The complaint avers that on the 6th day of April, 1885, the board of directors of the defendant passed an order whereby they levied an assessment, No. 10, of two dollars a share, on the capital stock of said corporation, payable, etc.; that the order contained a notice that "any stock upon which this (said) assessment shall remain unpaid on the 11th day of May, 1885, will be delinquent, and advertised for sale at public auction, (and,) unless payment be made before, will be sold on Friday, the 29th day of May, 1885, to pay said delinquent assessment, together with the cost of advertising and the expenses of sale;" that on the 12th day of May, 1885, a delinquent list or notice was published by defendant in the Daily Examiner, a daily newspaper, etc., a copy whereof is annexed to the complaint; that, unless restrained, the defendant will, at the time and place mentioned in notice, sell the 100 shares alleged to belong to the plaintiff. So far as appears from the complaint, the order levying the assessment and the publication comply with the provisions of the Civil Code. In addition, however, to the prayer for a decree enjoining the sale, the plaintiff prays "that a receiver be appointed to take charge of and wind up the affairs of the said corporation defendant." This last decree seems to be sought upon the averments that the defendant's secretary, on a certain day, refused to show plaintiff "the vouchers and bills paid or payable, so that he might learn and know the financial condition of defendant;" that the secretary, on a

certain day, testified in an action between these parties that the corporation had no reputation or good-will of any value, "but that it was a worthless concern as it stands;" and that, according to plaintiff's information and belief, the defendant is not making gain, but is running behindhand, and will continue to do so "the way it is now managed," owing to the low price of fuse, etc. The further allegation that the real object of the defendant and its directors is to get the plaintiff's stock for the assessment is hardly a cause of complaint, if the concern is worthless. If, in this state, a corporation may be dissolved at the suit of a stockholder, the court below was justified in refusing such decree upon the facts alleged in the present complaint. Civil Code, 377; Tayl. Priv. Corp. 610, 611.

The demurrer was properly sustained. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

(76 Cal. 57)

PEOPLE v. CURTIS. (No. 20,370.)

(Supreme Court of California. May 1, 1888.)

1. CRIMINAL LAW—FORMER ACQUITTAL—INDICTMENT FOR BURGLARY—CONVICTION FOR LARCENY.

Upon indictment for burglary a verdict of guilty of an attempt to commit petit larceny is a nullity, and does not operate as an acquittal of the charge of burglary, since larceny is not included in burglary.<sup>1</sup>

2. SAME—VERDICT NOT RESPONSIVE TO INDICTMENT—DISCHARGE OF JURY—FORMER JEOPARDY.

Upon rendering a verdict of guilty of a crime not included in the one charged in the indictment, the jury should not be discharged, but be sent back for further deliberation, but, if discharged with defendant's consent, he is not thereby put in jeopardy.

3. SAME—REVIEW ON APPEAL.

Where, upon an appeal in a criminal case, the discharge of the jury in a former trial upon the same indictment is relied upon in defense, and the minutes of the court regarding such former trial are not brought up, and the bill of exceptions is silent as to any consent to such discharge, it will be presumed that the jury was discharged with defendant's consent.

4. SAME—TRIAL—ORAL CHARGE.

Under Pen. Code Cal. § 1008, subd. 6, a charge to the jury, in a criminal case, may be given orally if taken down by the phonographic reporter.

In bank. Appeal from superior court, San Bernardino county; H. M. WILLIS, Judge.

*Baker & Blair*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

THORNTON, J. The defendant was accused by information of burglary, and convicted of an attempt to commit petit larceny. He then moved for a new trial, which was granted. On the second trial he was convicted of burglary in the second degree. The defendant asked on the new trial to be allowed to plead once in jeopardy and former acquittal. This was refused, and an exception was reserved. The defendant, on the new trial, asked the court to direct the jury as follows: "That the defendant having been previously tried on this same information for the crime of burglary, and found guilty by the jury on said trial of the offense of an attempt to commit petit larceny, he cannot now be convicted of the higher crime of burglary." This was refused, and defendant excepted. The defendant could not have been convicted on the information for burglary of an attempt to commit larceny. Larceny is not included in the crime of burglary. This was so held in *People v. Garnett*, 29 Cal. 628, and we think correctly. If larceny is not included in burg-

<sup>1</sup> Concerning what will support a plea of former conviction or jeopardy, see *State v. Blanck*, (Ark.) 2 S. W. Rep. 140; *Robinson v. State*, (Tex.) 4 S. W. Rep. 904, and note.

lary, we cannot see that the defendant could be convicted under the statute (Pen. Code, § 1159) of an attempt to commit it.

The verdict of the jury was then a nullity, but on returning it the jury was discharged. As the verdict was a nullity, and of no effect, the jury should have been sent out for further deliberation. The verdict constituted no legal reason for the discharge of the jury, and in our judgment, if they were discharged without consent of the defendant, (except in the cases specially provided for,) it operated as an acquittal of the defendant. *Bell v. State*, 48 Ala. 696, 697. Under our statute, in a case like this, the consent must appear on the minutes of the court. Pen. Code, § 1140. The minutes of the court as regards the former trial are not before us. The only information we have as to this trial is set forth in the bill of exceptions, and that is silent as to any consent by either party. The bill of exceptions not showing a discharge of the jury without the consent of the defendant, a case is presented where error of the court is not made to appear, and we must presume that the jury was discharged with defendant's consent. As the jury was discharged with the consent of the defendant, without rendering a verdict, it must be held that there was no jeopardy and no acquittal. *People v. Webb*, 38 Cal. 480. Therefore the court did not err in refusing to allow defendant to plead former jeopardy and former acquittal, nor did it err in refusing the instruction above set forth asked by the defendant. The charge of the court, though given orally, was taken down by the phonographic reporter. This is allowed by statute, (Pen. Code, § 1093, subd. 6,) and therefore there is no error in the court not charging the jury in writing. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; MCFARLAND, J.; SHARPSTEIN, J.

(76 Cal. 18)

**CITY AND COUNTY OF SAN FRANCISCO v. HOLLADAY et al.**

(*Supreme Court of California*. April 28, 1888.)

**1. MUNICIPAL CORPORATIONS—PUBLIC PARKS—DEDICATION—RES ADJUDICATA—TITLE AFTERWARDS ACQUIRED FROM UNITED STATES.**

In an action of ejectment brought to recover certain parcels of land in plaintiff city, claimed to have been dedicated as a public park, defendants set up in bar of the action a judgment rendered in an action commenced November 16, 1863, brought by the people against defendants, by which it was adjudged that the land in question never had been dedicated to public use. At the time issue was joined in that action, the legal title to the land was in the government of the United States, and did not pass from it until the passage of the act of congress of July 1, 1864, by which act the land was granted in trust for the uses and purposes specified in the ordinances of plaintiff city. *Held*, that the title which passed to plaintiff by the act of July 1, 1864, was unaffected by the judgment rendered in the action commenced November 16, 1863, being acquired after issue joined in such action, and because the attorney general of the state had no power to submit the title of the government of the United States for adjudication; and it was therefore error for the court to hold that the judgment in that action barred plaintiff from questioning defendant's title to the land in controversy. *People v. Holladay*, 9 Pac. Rep. 655, followed.

**2. SAME.**

But plaintiff was estopped from questioning defendant's title to such land by a judgment in favor of defendants in an action against plaintiff commenced December 17, 1864, several months after the passage of the said act of congress, in which action the same acts claimed as acts of dedication were relied upon by plaintiff.

**3. SAME—RIGHT TO BE SUED—QUIETING TITLE.**

Under the provisions of the consolidation act, (St. Cal. 1850, p. 223,) authorizing the city and county of San Francisco to "sue and be sued, plead and be impleaded, defend and be defended, in all courts of law, and in all actions of law, and in all actions whatsoever," an action to quiet title may be maintained against said city and county.

In bank. Appeal from superior court, city and county of San Francisco;  
T. H. REARDEN, Judge.

*Wm. Matthews*, for appellant. *S. W. & E. B. Holladay*, for respondents.

PATERSON, J. This is an action of ejectment brought by plaintiff to recover of the defendants two parcels of land in the city and county of San Francisco, forming a part of what is known as "Lafayette Park." The plaintiff claims that it is seized in fee of the lands in trust for the people of the state; that the lands were dedicated to the public; that the defendants are trespassers and intruders thereon. Plaintiff claims title under section 5 of the act of congress of July 1, 1864, (13 St. at Large, 393,) and an act of the legislature of California, passed March 11, 1858, (St. 1858, p. 52.) A digest of the provisions of the Van Ness ordinance and other ordinances of the city, mentioned in the act of the legislature referred to, is given in the report of *Hoadley v. San Francisco*, 50 Cal. 266, and shows the basis of plaintiff's claim to the lands in controversy in this case. In defense of the action the defendants made a general denial, and pleaded in bar three final judgments entered before the commencement of the present action. The court below found that all the matters and issues in this action, and all the questions of title and of dedication involved herein, had been, prior to the commencement of this action, heard, tried, and finally adjudicated and determined in favor of S. W. Holladay, one of the defendants herein, and against the plaintiff herein, in an action commenced November 16, 1863, in the Fourth district court, wherein the people of the state were plaintiffs and S. W. Holladay was defendant; that the same land was the subject-matter of controversy in that action as in this, and that the same title and the same question of dedication to public use and acceptance by the public were litigated and adjudicated in that action as in this action; that said former action was commenced at the instance of plaintiff herein, and the trial thereof was managed and conducted in the interests of the plaintiff by its attorneys and officers acting on its behalf. The court further found that all the matters in issue in this action, including the title and question of dedication, were finally adjudged and determined in favor of Holladay, one of the defendants herein, and against the plaintiff herein, in an action commenced December 17, 1864, in said Fourth district court, wherein Holladay was plaintiff, and the city and county of San Francisco was defendant; that the same land was the subject-matter of that action as in the present action. And upon these findings the court rendered judgment for the defendants.

The third action referred to was an action commenced by the people of the state, on the relation of Mayor Bryant, against the present defendants, wherein it was alleged by plaintiff that the land in controversy was a portion of a public square dedicated to public uses. In the lower court said action was decided in favor of these defendants. Plaintiff's motion for a new trial was denied, an appeal was taken to this court, and the appeal was pending at the time the case at bar was decided. The decision of this court in that case is reported in 68 Cal. 439, 9 Pac. Rep. 655, and it was there held that the title which passed to the city and county of San Francisco by the act of July 1, 1864, was unaffected by the judgment in the case of *People v. Holladay*, commenced November 16, 1863, because it was acquired long after issue was joined in the action in which the judgment pleaded in bar was rendered, and because the attorney general of the state had no power to submit the title of the government of the United States for adjudication. The court below therefore erred in holding that said judgment, the first judgment pleaded in bar of this action, estopped the plaintiff from questioning the defendant's title to the lands in controversy.

The third judgment pleaded as an estoppel by the defendants in this action was reversed by this court in *People v. Holladay*, *supra*, and, of course, is no defense to this action. In that case this court said: "If the particular piece of land in controversy had been, prior to the passage of the act of congress of July 1, 1864, dedicated by the city as a public square, congress, by granting and relinquishing the title of the United States to the city, \* \* \* ratified and confirmed the dedication, \* \* \* and this virtually perfected the

dedication." 68 Cal. 444, 9 Pac. Rep. 657. It was not decided in that case whether there had been a dedication. That question, we think, was determined in favor of the defendant herein by the judgment in the second action.

The objection to the validity of the judgment in the first case, which was made in *People v. Holladay*, *supra*, cannot be urged against the judgment in the case of *Holladay v. City and County of San Francisco*, the second judgment pleaded in bar in this case, because *Holladay v. City and County of San Francisco* was commenced December 17, 1864, several months after the passage of the act of congress referred to. If the land has ever been dedicated to the public use, such dedication must have been before the passage of that act,—at least before the commencement of the action, December 17, 1864. In the second action referred to, the same acts which are here claimed as acts of dedication were relied upon by the defendant therein, (plaintiff herein.) The court there necessarily held, in view of its judgment, that no dedication had ever been made. It would seem, therefore, that the matter is *res adjudicata*, and that the city is barred from further litigation of the question, and estopped from denying the fact. Issue therein was not joined until December 30, 1864, and final judgment was not rendered until December 25, 1867. It is claimed by appellant that the record in that case is not binding upon the city or the people, for the reason that, at the date of the institution of the suit, all the title that the city had was the bare right to the possession of this land in trust for the people of the state. But the particular matter litigated in that suit was whether the city held the fee in trust for the people or at all, and it was adjudged therein that the city had no right, title, or interest in the land. The judgment in that case was not appealed from, and is final, so far as the city is concerned. It quieted the title of the plaintiff as against any and all claims of the defendant therein. Upon the strength of that title, so quieted, it appears that some of these defendants have purchased portions of the property in good faith. "It is for the public good that there be an end to litigation. If it were otherwise, there would be no security for any other person, and great oppression might be done under color and pretense of law." *Miles v. Caldwell*, 2 Wall. 39; *Broom*, Leg. Max. 243.

2. The provisions of the consolidation act authorized the city and county of San Francisco to "sue and be sued, plead and be impleaded, defend and be defended, in all courts of law, and in all actions of law, and in all actions whatsoever." Act 1850, § 2; Stat. 1850, p. 223. Under this provision we think that the plaintiff in *Holladay v. City and County of San Francisco*, *supra*, could maintain an action against said city and county. Order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

END OF VOLUME 17.









